

2009 DEC 15 PM 2:15  
MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

IN THE  
MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

vs.

ANTOINE TERRY,

Appellant.

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No. WD 69672

90332

FILED

OCT 14 2009

Thomas F. Simon  
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APPEAL TO THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT  
FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI  
NINETEENTH JUDICIAL CIRCUIT  
THE HONORABLE PATRICIA S. JOYCE, JUDGE

BRIEF OF APPELLANT

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## JURISDICTIONAL STATEMENT

Antoine Terry appeals his conviction following a jury trial in the Circuit Court of Cole County, Missouri, for first degree statutory rape, § 566.032.<sup>1</sup> On May 6, 2008, the Honorable Patricia S. Joyce sentenced Mr. Terry to seven years imprisonment (L.F. 27),<sup>2</sup> and notice of appeal was timely filed on May 9, 2008 (L.F. 30). This appeal does not involve any issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, thus jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, Section 3, Mo. Const. (as amended 1982); § 477.070.

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<sup>1</sup> All statutory citations are to RSMo 2000, unless otherwise stated.

<sup>2</sup> The Record on Appeal consists of a legal file (L.F.) and a transcript (Tr.).

## STATEMENT OF FACTS

### Statement of the case.

The State charged seventeen-year-old Antoine Terry with first degree statutory rape for allegedly having sexual intercourse with twelve-year-old A.W. between May 1 and August 11, 2007 (L.F. 10; Tr. 86, 119). Antoine was found guilty by a jury on February 6, 2008 (L.F. 24; Tr. 2). A.W. was pregnant at the time of trial, and she gave birth to the child between the trial and sentencing on May 6 (Tr. 23, 95, 168). The court sentenced Antoine to seven years imprisonment, and notice of appeal was filed May 9, 2008 (Tr. 170-73; L.F. 27, 30). As stated in Antoine's motion to remand filed in this Court on October 15, 2008, DNA testing performed after sentencing revealed that Antoine was not the father of the baby (Exhibits A and B to the Motion to Remand; included in the Appendix at App. A-3 and A-4).

### Facts.

Antoine Terry, who was seventeen years old and lived in Chicago, spent time in the summer of 2007 visiting his sister in Jefferson City (Tr. 119-21). A.W. who was then twelve, lived in the same neighborhood (Tr. 86). She did not remember how they met, but they began to "hang out" and talk (Tr. 84, 86).

At some point that summer, according to A.W., their relationship became sexual (Tr. 85, 87). She said they had sexual intercourse more than six times over the course of the summer (Tr. 87-88). A.W. said it was all consensual and it only occurred at Antoine's sister's house (Tr. 88, 94). She later said that it was not at his

sister Shanika's where Antoine was staying; it was at a different sister's house (Tr. 94, 97, 120-21, 134). Then she said she did have sex with Antoine's at Shanika's, just not on August 10, though she told an officer that they had sex that day (Tr. 97-99). She admitted lying to the officer (Tr. 99-100).

Antoine testified that he was born March 18, 1990; he was still 17 at trial on February 6, 2008 (Tr. 22, 119). He denied having sex with A.W. at any time (Tr. 119). Antoine lived in Chicago and was in school there in May 2007; he did not go to Jefferson City until about June 20 (Tr. 120-21). He said he had seen A.W. —she lived nearby and she was at Antoine's niece's birthday party in late July (Tr. 121-22).

In August, A.W. ran away from home and the police were called (Tr. 90-92). At that point, she lied to the police about why she had been out all night because she did not want to get Antoine in trouble (Tr. 92-93). Later, she learned that she was pregnant (Tr. 93). She talked to the police again and told them she had had sex with Antoine that summer (Tr. 93). She believed Antoine was the father of her baby; he was the only one she had sex with that summer (Tr. 88, 95).

Jefferson City Police Detective Wolters questioned Antoine after A.W. went back to the police on August 10; A.W. told Wolters that they had had sex that morning (Tr. 103-06). Wolters told Antoine that he was investigating the claim of rape by a 12-year-old girl and Antoine asked if it was A.W. (Tr. 105). Wolters told Antoine that A.W. had claimed he penetrated her vagina with his fingers and attempted to have sexual intercourse with her (Tr. 105-06). He told Antoine that she

said it happened the previous night, when she stayed out all night or ran away (Tr. 106).

Antoine denied having penetrated A.W. with his fingers and Wolters asked him whether anything happened (Tr. 106). He said Antoine admitted having sex with A.W. , but it was not at the time she reported (Tr. 106). He said the most recent time they had sex was the Tuesday before, making it August 7 (Tr. 116-17). Detective Wolters said he asked Antoine whether A.W. was a willing participant and Antoine said she was (Tr. 107). Wolters also said that Antoine told him he did not use a condom (Tr. 107). When Wolters asked why he had done it, Antoine said he was only 17 and he thought that he would only get in trouble if he was 18 (Tr. 107).

Antoine testified that Wolters misunderstood him, that he denied having sex with A.W. at any time (Tr. 119, 123). He said he “almost” had sex with her one time, which was what he told Wolters—he said that he and A.W. were at his sister’s house and he took his shirt off, but his sister walked in on them and told them to go outside (Tr. 123).

At some point, Wolters talked to A.W. again (Tr. 107-08). She changed her story, saying that she had actually had an ongoing sexual relationship with Antoine, beginning in May, and that they also had sex in June and August 2007 (Tr. 108).

A.W. said they had sexual contact at 1015 Elizabeth—Antoine’s sister Shanika’s address (Tr. 108-09, 134). She did not say it happened anywhere else (Tr. 109). In their first conversation, Wolters asked A.W. whether Antoine had ejaculated and she said he had not (Tr. 109-10).

When A.W. underwent a SAFE exam on August 11, she had acute injuries to her hymen and the tissues surrounding it, meaning they were less than 72 hours old, which was consistent with her statement of sexual intercourse during that time frame (Tr. 113-15). The examiner also found that A.W. was pregnant (Tr. 114-15).

The prosecutor asked Antoine during cross-examination whether Wolters was lying when he testified that Antoine told him that he and A.W. did not have sex on August 10 but did three days earlier (Tr. 129). Defense counsel objected, saying it was speculation for Antoine to say what was in the officer's mind (Tr. 129). The court sustained the objection and directed the prosecutor to rephrase the question (Tr. 130). She then stated that Wolters testified that Antoine had told him that they had had sex three days before and asked Antoine whether that was a lie or the truth (Tr. 130). Antoine said it was a lie (Tr. 130).

Continuing, the prosecutor asked Antoine whether he had heard Wolters say that Antoine told him he did not use a condom (Tr. 130). When Antoine said he had heard it, she asked him whether that was a lie (Tr. 130). Antoine said that too was a lie, because he never said he had had sex with her (Tr. 131). Defense counsel then objected, saying that was "the same kind of question. It calls for whether or not he thinks that Detective Wolters is lying." (Tr. 131). The court said, "I'll sustain that objection." (Tr. 131).

Antoine admitted telling Wolters that he did not know he could get in trouble when he was under eighteen and the prosecutor asked, "So you didn't know you could get in trouble for having sex with a twelve-year-old when you were only seventeen?"

(Tr. 131). Antoine answered, “That’s not the point. The point is I didn’t know she was twelve. She lied to me about her age.” (Tr. 131). He remembered Wolters testifying that when he told Antoine that a twelve-year-old had accused him of having sex with her, but said he did not tell Wolters that—what happened was that Wolters said her name and Antoine repeated it (Tr. 131-32). The prosecutor then asked, “So pretty much the gist of everything Detective Wolters testified to was false?” (Tr. 132). Antoine confirmed it: “Pretty much[,]” and counsel then said, “Wait a minute. No. I have the same objection again. She’s trying --” The court interrupted, saying, “All right. I’ll sustain that objection.” (Tr. 132). Counsel said “I’ll ask --” and the court again broke in, saying, “That will be stricken from the record.” (Tr. 132).

When defense counsel attempted to address the issue in redirect, his question, “Antoine, is it possible that Detective Wolters simply misunderstood what you said?” drew an objection—“to speculation”—after Antoine answered, “Yes, sir.” (Tr. 132). The court sustained the objection (Tr. 132).

Antoine’s sister, Shanika Judkins,<sup>3</sup> testified that she lived at 1015 Elizabeth Street and that Antoine never lived with her (Tr. 134). He first came to stay with her there on either August 3 or 4, 2007 (Tr. 135). He stayed with her off and on, as did

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<sup>3</sup> Counsel referred to the witness as “Ms. Judkins,” and the court reporter noted her name as “Shanika Judkins,” but she was never announced, nor was she asked her name (Tr. 133-143). Counsel earlier mentioned Shanika Judkins in a request to let Ashley see her in the courtroom; he said then that she would be a witness (Tr. 95-96).

her two sisters (Tr. 134-35). He split time between Ms. Judkins's at her sister's; he stayed overnight at Ms. Judkins's apartment perhaps twice that summer (Tr. 137-38). He did not have a key to her apartment (Tr. 138). She was with him generally any time he was in her apartment, other than when she was putting her children to bed (Tr. 138-39, 142). Ms. Judkins did not see Antoine in Jefferson City in May of that year (Tr. 136).

Ms. Judkins saw A.W. in her home once, on August 7 (Tr. 135). Antoine had the TV too loud and when Ms. Judkins went downstairs to tell him to turn it down, she saw Antoine in the living room with company and without a shirt (Tr. 136, 139). He knew that she did not want him to have company—she did not allow her sisters' boyfriends in her apartment either, except during family get-togethers—and she told him that A.W. had to leave (Tr. 136, 142). A.W. was fully dressed and they were not touching—they were not even close together (Tr. 136).

In a hearing immediately before trial commenced (February 6, 2008), the court took up the State's motion in limine to exclude evidence under the "rape shield" law, § 491.015 (Tr. 22-23). The prosecutor said it would be obvious that A.W. was pregnant and had become so in the summer of 2007 (Tr. 23). She said she had no objection to evidence suggesting that someone other than Antoine was the father, but she believed that Antoine would be offering evidence that A.W. had sex with two other people in 2006, which was irrelevant and would violate the statute (Tr. 23).

Defense counsel stated as an offer of proof that A.W. told an investigating officer in August 2007 that she had had sex with two fifteen-year-old boys, "last fall."

(Tr. 24). The court observed that that would mean the fall of 2006, and defense counsel said that her admission to having sex in 2006 made it possible that she also “had sex with them during the time period that’s relevant.” (Tr. 24-25). Counsel also noted that A.W. had admitted lying to the officer, telling him at first that she had not had sex with anyone, then later saying she had “had sex with the these two boys[,]” but she had not wanted to say so in her mother’s presence (Tr. 25). Counsel argued that the lies went to A.W.’s credibility, which was always relevant (Tr. 25).

The court ruled it could not let the evidence in because the sexual activity would not have occurred during the time during which she became pregnant, but that her inconsistent statements could come in, though without mentioning that her lie was about having sex (Tr. 25-26). The court said that counsel could ask A.W. whether she told the officer one thing, then changed her story when her mother was there (Tr. 27).

Before concluding the matter, counsel pointed out that he was trying to preserve the record for a possible appeal, that he had made his offer of proof and it was denied, and that he obviously could not make the offer in front of the jury (Tr. 28). He said he wanted to make sure that there was nothing else he needed to do to accomplish his goal (Tr. 28-29). The court believed he had made an adequate record and had “done everything the statute requires.” (Tr. 29).

In closing argument, the prosecutor said that a lot of cases involved a “he-said-she-said” situation of “one person’s word versus the other person’s word,” and there is no corroborating evidence (Tr. 147). But she said that in this case, “We have the

fact that she's pregnant now. We have the fact that she told you he was the one she had sex with last summer when she got pregnant." (Tr. 147).

The jury found Antoine guilty as charged, taking a little less than two hours to reach a verdict (L.F. 24; Tr. 160-61). At sentencing on May 6, 2008, the State presented A.W. 's mother, who was questioned by the prosecutor and the court about the impact on A.W. of the conduct she alleged, including the resulting birth of a baby and what that meant to her (Tr. 167-70). At the conclusion of her testimony, as the court was apparently dismissing the witness, defense counsel asked whether he was allowed to ask her questions and the court responded, "Well, I mean usually victims [*sic*] impact, they just make their statement. I think that's the procedure." (Tr. 170). The court then asked the prosecutor for argument, following which, it sentenced Antoine to seven years imprisonment (Tr. 170-73; L.F. 27). Notice of appeal was filed May 9, 2008 (L.F. 30). On October 31, 2008, this Court ordered Antoine's motion to remand taken with the case.

## POINTS RELIED ON

### I.

**This Court must grant Antoine's motion for judgment of acquittal and order him discharged from his sentence for first degree statutory rape, because to affirm the sentence and judgment would violate Antoine's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt that he had sexual intercourse with A.W. , because the DNA tests performed after trial establish that Antoine is not, contrary to A.W. 's claim, the father of her child, thus her testimony is contradicted by known physical facts and reliance thereon is necessarily precluded. In the alternative, this Court must remand this cause to the trial court for action on the newly discovered evidence that establishes either: 1) Antoine did not have sex with A.W. —because she essentially testified that she had sex only with the father of her child, but that was not Antoine; or 2) that A.W. lied about not having sex with anyone other than Antoine, which is crucial evidence that Antoine's jury did not hear, but to prevent a manifest injustice a jury must hear before deciding whether to believe A.W. or Antoine.**

*State v. Silvey*, 894 S.W.2d 662 (Mo. banc 1995);

*State v. Mims*, 674 S.W.2d 536 (Mo. banc 1984);

*State v. Harris*, 428 S.W.2d 497 (Mo. 1968);

*Sanders v. Sullivan*, 863 F.2d 218 (2nd Cir 1988);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

§ 566.032; and

24 C.J.S., *Criminal Law*, § 1454 (1961).

## II.

The trial court erred and abused its discretion in refusing to permit Antoine to introduce evidence of the details of A.W. 's lie to the police, because this denied Mr. Antoine his rights to due process of law 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 Antoine sought to introduce evidence that A.W. lied about having had sexual experiences but the court sustained the State's objection under the "rape shield" law, § 491.015, allowing only the abstract evidence about lying but not the subject. The full details were admissible both to impeach A.W. 's credibility and to show the possible alternate explanation of her pregnancy, because even though her admission was to having sexual intercourse in the fall of 2006, not during the time when she became pregnant, the fact that she specifically lied about her sexual partners made it more likely that someone other than Antoine was the father of her baby—shown by subsequent events to be true—which was a central part of Antoine's defense.

*State v. Rauch*, 118 S.W.3d 263 (Mo.App. W.D. 2003);

*Washington v. Texas*, 388 U.S. 14 (1967);

*State v. Long*, 140 S.W.3d 27 (Mo. banc 2004);

*State v. Justus*, 205 S.W.3d 872 (Mo. banc 2006);

U.S. Const., Amends VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a); and  
§ 491.015.

### III.

**The trial court plainly erred in failing to *sua sponte* intervene when the prosecutor repeatedly inquired of Antoine in cross-examination whether Detective Wolters was lying, because this conduct violated Antoine's rights to due process of law and a fair trial, 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 it is improper to ask one witness to give an opinion as to the veracity of another witness because credibility is solely a matter for the jury to determine.**

*State v. Roper*, 136 S.W.3d 891 (Mo.App. W.D. 2004);

*State v. Savory*, 893 S.W.2d 408 (Mo.App. W.D. 1995);

*State v. Graves*, 668 N.W.2d 860 (Iowa 2003);

*State v. Hadley*, 815 S.W.2d 422 (Mo. banc 1991);

U.S. Const., Amends VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a); and

Rule 30.20.

## ARGUMENT

### I.

**This Court must grant Antoine's motion for judgment of acquittal and order him discharged from his sentence for first degree statutory rape, because to affirm the sentence and judgment would violate Antoine's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt that he had sexual intercourse with A.W. , because the DNA tests performed after trial establish that Antoine is not, contrary to A.W. 's claim, the father of her child, thus her testimony is contradicted by known physical facts and reliance thereon is necessarily precluded. In the alternative, this Court must remand this cause to the trial court for action on the newly discovered evidence that establishes either: 1) Antoine did not have sex with A.W. —because she essentially testified that she had sex only with the father of her child, but that was not Antoine; or 2) that A.W. lied about not having sex with anyone other than Antoine, which is crucial evidence that Antoine's jury did not hear, but to prevent a manifest injustice a jury must hear before deciding whether to believe A.W. or Antoine.**

### **I. Insufficient Evidence**

Antoine was the only one, A.W. swore. He was the only one she had sex with that summer when she got pregnant, and he was the father of her baby (Tr. 88,

95). The problem is that it wasn't true.

### *Standard of Review*

Before the State can deprive Antoine of his liberty, the Due Process Clause requires that it prove each element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *State v. O'Brien*, 857 S.W.2d 212, 215 (Mo. banc 1993). This impresses “upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused” and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id.*, at 318.

This Court considers “whether a reasonable juror could find each of the elements beyond a reasonable doubt.” *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). In reviewing the case on appeal, this Court takes the evidence and *reasonable* inferences therefrom in the light most favorable to the State. *Id.* It disregards inferences contrary to the verdict, “unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them.” *Id.* The Court must also ensure that the jury did not decide the facts “based on sheer speculation.” *Id.* at 414.

### *The Offense*

Under § 566.032.1, “[a] person commits the crime of statutory rape in the first degree if he has sexual intercourse with another person who is less than fourteen years

old.” Although A.W. testified that she had sex with Antoine (Tr. 85, 87-88), that does not end the inquiry under the circumstances of this case.

***The Corroboration Rule and the Doctrine of Destructive Contradictions***

A.W.’s testimony was not sufficient, under the doctrine of destructive contradictions, to support Antoine’s conviction.

Generally, corroboration of the victim’s testimony in criminal sexual offense trials is not mandated in order to make a submissible case. Our Supreme Court does, however, recognize an exception to the general rule under the “destructive contradictions” doctrine. The doctrine is properly invoked only when the testimony is so “inherently incredible, self-destructive or opposed to known physical facts” on a vital point or element that reliance on the testimony is necessarily precluded. The doctrine specifically does not apply to contradictions between the victim’s trial testimony and prior out-of-court statements, to contradictions as to collateral matters, or to inconsistencies not sufficient to make the testimony inherently self-destructive.

***State v. Wright***, 998 S.W.2d 78, 81 (Mo.App. W.D. 1999) (internal citations omitted).

In cases of sexual offenses, where the evidence is of such a nature that it is deprived of probative force, the testimony must be corroborated or the judgment cannot be sustained. ***State v. Silvey***, 894 S.W.2d 662, 673 (Mo. banc 1995).

“Corroboration is not mandated unless the victim’s testimony is so contradictory and

in conflict with physical facts, surrounding circumstances and common experience, that its validity is thereby rendered doubtful.” *Id.*; also see, *State v. Dudley*, 809 S.W.2d 40, 44 (Mo.App. W.D. 1991) (corroboration of the victim’s testimony is required when her testimony contradicts itself or conflicts with the physical facts, the surrounding circumstances and common experience to the extent that it becomes so unconvincing and improbable as to raise substantial doubts); *State v. Kuzma*, 751 S.W.2d 54, 58 (Mo.App. W.D. 1987) (citation omitted).

### *Discussion*

Here, the scientific tests absolutely demonstrated that A.W.’s testimony was false. At its most elemental, A.W.’s testimony was that she had sex that summer with one person—the father of her child. Since that person was not Antoine, he could not be guilty. At the very least, this triggers application of the corroboration rule.

#### *Ashley’s testimony was not corroborated.*

The corroboration evidence relied on by the State was that: 1) A.W. was pregnant; and 2) she had acute—less than 72 hours old—injuries to her hymen and the tissues surrounding it, which was consistent with her claim of having had sexual intercourse during that time (Tr. 113-15, 147).<sup>4</sup> But this evidence corroborates

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<sup>4</sup> The prosecutor also argued that the State had other evidence not usually present—that Antoine admitted to Detective Wolters that he had sex with A.W. (Tr. 147), but she, correctly, did not claim that as corroborating evidence (Tr. 147), because Antoine

nothing, as the DNA tests demonstrate. Yes, there was medical evidence that A.W. had sex less than 72 hours before her exam on August 11, and it is a fact that she became pregnant, but the rest of her claim—that Antoine was the source and cause of those physical conditions—was refuted by the facts.

Therefore, A.W. 's testimony was so “in conflict with physical facts, surrounding circumstances, and common experience as to be unconvincing.” *Silvey*. This Court must reverse Antoine’s conviction and discharge him from his sentence.

## II. Remand – Newly Discovered Evidence

In the alternative, this Court must at least remand—as Antoine requested in his motion filed October 15, 2008—to allow the trial court to determine whether the DNA testing reported after trial supports the conclusion that a manifest injustice or miscarriage of justice has occurred because Antoine was convicted on the completely discredited testimony that he was A.W. 's sole sexual partner and was the father of her child.

Missouri law does not provide a specific means for a criminal defendant to present claims of newly discovered evidence after the time to file a motion for new trial under Rule 29.11 has expired. *State v. Garner*, 976 S.W.2d 57, 60 (Mo.App. W.D. 1998). But this Court has “recognized that, in ‘extraordinary’ cases, it may remand the case as plain error pursuant to Rule 30.20 or to this court’s inherent

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denied saying that to the detective, therefore that was simply another issue on which the credibility of the witnesses had to be resolved by the jury.

powers so that the defendant can present his new evidence. Such extraordinary circumstances are where the newly discovered evidence would have completely exonerated the defendant.” *Id.* [citations omitted].

The DNA tests (App. A-3 – A-4), show that Antoine is not the father of A.W. s child, born in April 2008. So even if this Court does not agree with Antoine’s argument that this conclusively demonstrates his innocence, it is inescapable that he was convicted on the basis of A.W. ’s testimony that he was the only one—testimony that has now been proven to be perjury.

Further, *United States v. Bagley*, 473 U.S. 667, 676 (1985), establishes that impeaching evidence is exculpatory evidence and can establish one’s innocence—it is “evidence favorable to an accused,” quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It “may make the difference between conviction and acquittal.” *Bagley*, at 676. Due process requires material exculpatory evidence to be disclosed where there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense. *Id.*, at 682. Exculpatory evidence includes impeaching evidence of a critical witness. *Id.*, at 676.

This Court has said:

As a general rule “a conviction which results from the deliberate or conscious use by a prosecutor of perjured testimony violates due process and must be vacated.”

*State v. Albanese*, 9 S.W.3d 39, 49 (Mo.App. W.D. 1999), quoting, *State v. Mims*, 674 S.W.2d 536, 538 (Mo. banc 1984). To prevail on a claim of denial of due process

due to a conviction through the use of perjured testimony, the appellant must prove: “(1) the witness’ testimony was false; (2) the state knew it was false; and (3) the conviction was obtained as a result of the perjured testimony.” *State v. Cummings*, 838 S.W.2d 4, 7 (Mo.App. W.D. 1992).

Antoine recognizes that this language requires a showing of knowledge of the perjury on the part of the prosecutor, and there is no suggestion in the record in this case that the prosecutor *knew* that A.W. perjured herself. But he also points out that the prosecutor was at least on notice that this issue may arise: she knew that A.W. had admitted having sex before her alleged encounters with Antoine, after first denying it to the police, and that Antoine’s position was that that constituted evidence of an alternative source of her pregnancy—which evidence the prosecutor successfully excluded (Tr. 22-29; See Point II, *infra*).

Further, there is no Missouri Supreme Court case holding that such knowledge is an absolute requirement, and the better-reasoned rule is to the contrary. Indeed, in *Mims*, the Missouri Supreme Court recognized earlier Missouri authority for reversing a conviction without showing a knowing use by the State:

. . . it is not clearly defined what relief, if any, must be afforded a defendant whose conviction results from perjury which was not known to be false by the prosecutor at the time of trial. Authority exists for the proposition that the trial court has the duty to grant a motion for new trial where it is shown that movant’s conviction resulted from the use of perjured testimony. *State v. Harris*, 428 S.W.2d 497, 500 (Mo. 1968);

*State v. Moberly*, 121 Mo. 604, 26 S.W. 364, 366 (1894); *State v. Platt*, 496 S.W.2d 878, 882 (Mo.App.1973); *see also* 24 C.J.S., *Criminal Law*, § 1454 (1961).

*Mims*, 674 S.W.2d at 538-39. The Court also noted decisions by the Court of Appeals to the contrary, but it then went on, “[a]nyhow, in this case it is unnecessary to determine whether a defendant may successfully challenge his conviction on the basis of perjured testimony unknown to the prosecutor in either a motion for new trial or a collateral proceeding under Rule 27.26, since the perjury was known to movant at the time of his trial and not disclosed by him either to the court or to the prosecutor.” *Id.*, at 539 (emphasis added). Therefore, there is no decision of the Supreme Court that is binding on this Court and that holds that knowledge of the perjury on the part of the prosecutor is an absolute requirement of such a claim.

In fact, in *Harris*, the Court said:

It would be patently unjust for a trial judge to refuse to grant a new trial in any case in which an accused was found guilty of a crime on the basis of false testimony, and the court “if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned,” would be under a duty to grant a new trial. That is to say, “(w)here it appears from competent and satisfactory evidence that a witness for the prosecution has deliberately perjured himself and that

without his testimony accused would not have been convicted, a new trial will be granted.”

*Harris*, 428 S.W.2d at 500 (citations omitted). That language applies equally to the situation where the prosecutor does not know of the perjury. Antoine recognizes that the Court also said:

By this opinion we do not intend to relax or depart from the rule that in order to vacate a judgment claimed to have been procured by false testimony under Criminal Rule 27.26 it is a requirement that it be alleged and proved that the State knowingly used false testimony or knowingly failed to correct testimony which it knew to be false.

*Id.*, at 502-03. But the context of that statement concerns raising such claims in postconviction collateral attacks on the judgment—there, under former Rule 27.26. It does not apply to claims such as Antoine’s, raised on direct appeal.

The reasoning underlying the requirement of the knowing use of perjured testimony is that it is essentially a *Brady* claim—where the prosecutor knows or should know about the perjured testimony, he has an obligation to disclose it. *See, United States v. Agurs*, 427 U.S. 97, 103 (1976).

Like the Missouri Supreme Court, the United States Supreme Court has not addressed whether due process commands a reversal where the State is an innocent party when it presents perjured testimony. But other courts have. In *Sanders v. Sullivan*, 863 F.2d 218, 222 (2nd Cir 1988), a habeas review of a state conviction, the

Second Circuit reviewed the caselaw then existing and noted the reason that some courts require knowing use of perjured testimony before relief may be granted—that otherwise the “state-action” component of due process analysis is not satisfied. The Court said,

We note that to the extent these cases disapprove the principle that a due process violation occurs when, without more, perjured testimony is introduced at trial, we would concur.

In our view however, it is indeed another matter when a credible recantation of the testimony in question would most likely change the outcome of the trial and a state leaves the conviction in place.

*Id.* The Court was not persuaded by the rationale of cases to the contrary:

There is no logical reason to limit a due process violation to state action defined as prosecutorial knowledge of perjured testimony or even false testimony by witnesses with some affiliation with a government agency. Such a rule elevates form over substance. It has long been axiomatic that due process requires us “to observe that fundamental fairness essential to the very concept of justice.” [citation omitted]. It is simply intolerable in our view that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies.

*Sanders*, 863 F.2d at 224. The Court felt that, although a due process violation “must

of course have a state action component[.]” there is sufficient state action in a “state’s failure to act to cure a conviction founded on a credible recantation by an important and principal witness[.]” *Id.* The DNA tests that caught A.W. in her lie are no less persuasive than a witness’ credible recantation. Indeed; there could be no more credible “recantation” of A.W.’s testimony than to have it conclusively refuted by scientific evidence.

The Eighth Circuit took a similar approach in *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991). Lewis was convicted of a sexual assault on little more than the testimony of the victim, who originally identified Lewis and his codefendant as the perpetrators. *Id.*, at 1361-62. At the beginning of the codefendant’s trial, after Lewis had been convicted, the victim recanted, saying she was unable to identify the codefendant, and his case was dismissed. *Id.*, at 1362. After his state remedies were exhausted, Lewis sought federal habeas relief based on the newly discovered evidence—the recantation. *Id.* The Court said, “[w]e grant habeas relief based on newly discovered evidence if the evidence would probably produce an acquittal on retrial.” *Id.* (citations and internal quotations omitted). The Court did not require that the prosecutor have been aware of the victim’s likely perjury when she testified in Lewis’s trial that she had no doubt that he and the codefendant were her assailants; the sole issue was the likelihood of a conviction in view of the recantation. *Id.*

Applying that test here, if a jury were to hear that A.W. insisted that Antoine was “the only one” and that he was the father of her baby, all the while knowing it not to be true, “the evidence would probably produce an acquittal on retrial.” *Id.* It could

make no difference whether the prosecutor knew of her lie or not. Antoine would still be sitting in prison on the word of a proven liar. It is an overwhelmingly illogical position to hold that Antoine is not entitled to relief simply because the prosecutor was taken in by A.W.'s perjury.

In *Agurs*, an appeal of the denial of a motion for new trial based on newly-discovered evidence, where the defense to murder was self-defense, the United States Supreme Court considered the prosecutor's failure to disclose to the defense the victim's arrest record, showing two convictions for violence or carrying deadly weapons. 427 U.S. at 100-01. The issue was the materiality of the evidence, in view of the fact that the defense had not requested it, and there was other evidence showing the victim's violent character. *Id.* The Court rejected the holding of the Court of Appeals that granted a new trial because it believed that "the evidence was material, and that its nondisclosure required a new trial because the jury might have returned a different verdict if the evidence had been received." *Id.*, at 102.

Instead, according to the Supreme Court, the case, and the test for whether a due process violation has occurred, turns on what a defendant must establish with respect to the evidence—whether called "newly discovered" or undisclosed. If "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury . . . the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable

likelihood that the false testimony could have affected the judgment of the jury.” *Id.*, at 103 (footnotes omitted).

But where the evidence is obtained from a “neutral” source, rather than having been withheld by the prosecutor, this “test of materiality” does not apply; instead, the defendant must “satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.” *Id.*, at 104, 111. First of all, the evidence here meets that burden—whether the Court accepts that it shows Antoine’s absolute innocence, or that it so severely impeaches A.W.’s credibility that a conviction on retrial would be highly unlikely.

Secondly, the *Agurs* Court also said that, in cases in which “the undisclosed evidence demonstrates that the prosecution’s case includes perjured testimony and that the prosecution knew, or should have known, of the perjury . . . the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Id.*, at 103-04 (footnotes omitted). Notably, the Court also said that the “strict standard of materiality” applies to those cases, “not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.” *Id.*, at 104. The truth-seeking function was corrupted in Antoine’s trial as well; the question whether the prosecutor knew that ahead of time goes only to Antoine’s burden, not whether he has a remedy at all. Again, the evidence here satisfies the highest burden.

Significantly, the Court further said,

Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. [citation omitted]. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

*Id.*, at 110.

Those words can apply to Antoine's case, too. While the prosecutor here may have no culpability, the newly-discovered evidence is "highly probative of innocence[.]" In fact, that is the point of *Sanders* and *Lewis*: where the evidence demonstrates innocence, the prosecutor's good character should not prohibit relief. The issue is the reliability of the verdict, not who is to blame for its inaccuracy.

A.W.'s testimony was perjured, and it substantially affected the outcome of the trial and undermined confidence in that outcome. *Albanese*, 9 S.W.3d at 49-50. Antoine is entitled to a new trial, or at least a hearing on his claim of newly discovered evidence.

Finally, an alternative approach is suggested by *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003), a proceeding under Rule 91, in which Amrine raised an “actual innocence claim,” seeking to set aside his conviction and sentence to death. In setting the burden on the petitioner, the Missouri Supreme Court said:

A freestanding claim of actual innocence is evaluated on the assumption that the trial was constitutionally adequate. Accordingly, the evidence of actual innocence must be strong enough to undermine the basis for the conviction so as to make the petitioner’s continued incarceration and eventual execution manifestly unjust even though the conviction was otherwise the product of a fair trial. [citations omitted].

At the same time, because an actual innocence claim necessarily implies a breakdown in the adversarial process, the conviction is not entitled to the nearly irrebuttable presumption of validity afforded to a conviction on a direct appeal challenging the sufficiency of the evidence.

*Id.*, at 547-48. On the other hand, “it is appropriate that the burden of proof is heavier than the ‘more likely than not’ standard governing *Clay* [*v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000)] gateway claims of innocence because relief under *Clay* is premised upon a serious constitutional defect at trial and the conviction is worthy of less confidence by the habeas court.” *Id.*, at 548. The Court resolved the issue by “strik[ing] a balance” between those competing standards and held that a petitioner

must “make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.”

As he has stated again and again, Antoine has met this burden. The DNA results constitute “clear and convincing” evidence that undermines confidence in the verdict; it is “highly probative of innocence,” as in *Agurs*; it “would most likely change the outcome of the trial,” as in *Sanders*; and it “would be patently unjust for a trial judge to refuse to grant a new trial in any case in which an accused was found guilty of a crime on the basis of false testimony,” as in *Harris*.

It is unthinkable that Antoine can be left in this situation with no remedy. If this Court does not reverse his conviction and order him discharged as requested in Part I of this argument, then it must remand this cause to the circuit court with directions to hold a hearing on the DNA exclusion and find either that he has been exonerated by that evidence or that he is entitled to a new trial at which that and A.W.’s perjury may be presented to the jury.

## II.

**The trial court erred and abused its discretion in refusing to permit Antoine to introduce evidence of the details of A.W. 's lie to the police, because this denied Mr. Antoine his rights to due process of law 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 Antoine sought to introduce evidence that A.W. lied about having had sexual experiences but the court sustained the State's objection under the "rape shield" law, § 491.015, allowing only the abstract evidence about lying but not the subject. The full details were admissible both to impeach A.W. 's credibility and to show the possible alternate explanation of her pregnancy, because even though her admission was to having sexual intercourse in the fall of 2006, not during the time when she became pregnant, the fact that she specifically lied about her sexual partners made it more likely that someone other than Antoine was the father of her baby—shown by subsequent events to be true—which was a central part of Antoine's defense.**

In a hearing immediately before trial commenced, the court took up the State's motion in limine to exclude evidence under the "rape shield" law, § 491.015 (Tr. 22-23). The prosecutor said it would be obvious that A.W. was pregnant and had become so in the summer of 2007 (Tr. 23). She said she had no objection to evidence suggesting that someone other than Antoine was the father, but she believed that

Antoine would be offering evidence that A.W. had sex with two other people in 2006, which was irrelevant and would violate the statute (Tr. 23).

After hearing defense counsel's offer of proof— A.W. told an investigating officer in August 2007 that she had had sex with two fifteen-year-old boys, "last fall" (Tr. 24)—the court ruled it could not let the evidence in because the sexual activity did not occur during the time during which she became pregnant, but that the fact that she lied to the police then later changed her story could come in, though without mentioning that her lie was about having sex (Tr. 25-26). The court said that counsel could ask A.W. whether she told the officer one thing, then changed her story when her mother was there (Tr. 27).

Before concluding the matter, counsel pointed out that he was trying to preserve the record for a possible appeal, that he had made his offer of proof and it was denied, and that he obviously could not make the offer in front of the jury (Tr. 28). He said he wanted to make sure that there was nothing else he needed to do to accomplish his goal (Tr. 28-29). The court believed he had made an adequate record and had "done everything the statute requires." (Tr. 29).

### *Standard of Review*

The trial court is afforded broad discretion in assessing the admissibility of evidence, and its ruling on the admissibility of the evidence will not be interfered with on appeal absent a clear abuse of discretion. *State v. Mozee*, 112 S.W.3d 102, 105 (Mo.App. W.D. 2003). But that discretion is not unfettered. *State v. Williams*, 673

S.W.2d 32, 35 (Mo. banc 1985). It must “be exercised in careful consideration of [Antoine’s] rights as a criminal defendant.” *See, State v. Rauch*, 118 S.W.3d 263, 276 (Mo.App. W.D. 2003). This Court “will take issue with the trial court in cases where we conclude there has been an abuse of discretion.” *State v. Dudley*, 912 S.W.2d 525, 529 (Mo.App. W.D. 1995).

Further, “[c]ourts in this state frequently say that the admissibility of evidence is within the discretion of the trial court. [citation omitted]. That is true, in many instances, but is not accurate where an evidentiary principle or rule is violated, especially in criminal cases.” *State v. Walkup*, 220 S.W.3d 748, 756 (Mo. banc 2007). “On questions of relevance, the trial court certainly has discretion, but its discretion is bounded by the principle that the court’s rulings will be overturned if they are ‘clearly against the logic of the circumstances.’” *Id.*, at 757 (citation omitted). “Evidentiary decisions of the trial court as to relevance are reviewed, in the context of the whole trial, to ascertain whether the defendant received a fair trial.” *Id.*

### *Discussion*

The basis for the trial court’s ruling—the so-called “rape shield” statute—states in relevant part:

1. In prosecutions under chapter 566, RSMo, or prosecutions related to sexual conduct under chapter 568, RSMo, opinion and reputation evidence of the complaining witness’ prior sexual conduct is inadmissible; evidence 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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(2) Evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;

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2. Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

§ 491.015 (complete statute at App. A-5).

Defense counsel stated as an offer of proof that A.W. told an investigating officer in August 2007 that she had had sex with two fifteen-year-old boys, “last fall.” (Tr. 24). The court observed that that would mean the fall of 2006, and defense counsel argued that her admission to having sex in 2006 made it possible that she also “had sex with them during the time period that’s relevant.” (Tr. 24-25). Counsel also noted that A.W. had admitted lying to the officer, telling him at first that she had not had sex with anyone, then later saying she had “had sex with the these two boys[,]” but she had not wanted to say so in her mother’s presence (Tr. 25). Counsel argued that the lies went to A.W.’s credibility, which was always relevant (Tr. 25). As noted, the court excluded all but the bare fact that A.W. lied to the police (Tr. 25-26).

The evidence was relevant to provide an alternative explanation for A.W. 's pregnancy.

Evidence must be logically and legally relevant to be admissible. *State v. O'Neal*, 718 S.W.2d 498, 502 (Mo. banc 1986). "Evidence is 'logically relevant' if such evidence tends to make the existence of any material fact more or less probable than it would be without the evidence. This is a very low-level test that is easily met." *State v. Vorhees*, 248 S.W.3d 585, 591 (Mo. banc 2008) (citation omitted). Evidence is legally relevant if its probative value outweighs its prejudicial effect. *State v. Jackson*, 228 S.W.3d 603, 606 (Mo.App. W.D. 2007).

Two crucial factors the Court must not lose sight of in considering this issue are: 1) that Antoine had a due process right to present a defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967); and 2) ultimately, there was an alternative explanation for A.W. 's pregnancy; Antoine is not the father (See Point I, *supra*).

Antoine's defense was very simple: he denied having sex with A.W. , and he denied telling Detective Wolters that he had done so (Tr. 119, 123). The trial court prevented Antoine from supporting his defense with evidence that A.W. ' had admitted having sex before she met Antoine—in the fall of 2006. Had the jury been allowed to hear that evidence, it could have inferred that, since A.W. admitted having sex but was willing to lie to the police about when it occurred, one of the "two boys" was the actual father of A.W. 's baby, not Antoine.

And while that fact would not alone absolutely prove that Antoine did not have sex A.W. , it would have accomplished other goals of his defense: 1) it would have

removed the powerfully corroborating physical evidence that supported A.W. 's claim (which the prosecutor exploited in closing argument to take the case out of the "he-said-she-said" situation of "one person's word versus the other person's word" (Tr. 147)); 2) it would have more thoroughly impeached A.W. 's credibility, due to the subject matter of her lie, than the bare "I lied to the police" that was all the trial court allowed the jury to hear, because sex was the heart of the case, and the fact that A.W. admitted lying about sex would have shown her to be unreliable; and 3) it would have made it more likely that Antoine, rather than A.W., was telling the truth, because she would have been shown to be willing to lie, not just to avoid the embarrassment of her mother learning that she was sexually active, but to protect one or both of her sexual partners.

For these reasons, the evidence Antoine offered did not violate § 491.015.

In *State v. Long*, 140 S.W.3d 27, 30-31 (Mo. banc 2004), in which the Missouri Supreme Court considered the impact of the rule prohibiting the admission of extrinsic evidence of a witness' specific acts of misconduct—specifically prior false allegations of sexual assault<sup>5</sup>—the Court said that in some cases:

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<sup>5</sup> The Court noted that § 491.015 was not implicated, because the evidence the defendant sought to introduce was of *false* allegations of sexual assault, thus it was not evidence of sexual conduct for purposes of the statute; the Court added that if the evidence at issue implicated actual sexual conduct, the trial court would have to consider the applicability of § 491.015. *Id.* at 30, n.3.

the rule excluding extrinsic evidence of prior false allegations fails to serve [the general policy to avoid mini-trials on collateral issues and to focus the fact-finder on the most probative facts] by shielding the fact-finder not from collateral issues, but from a central issue in the case. An issue is not collateral if it is a “crucial issue directly in controversy.” [citation omitted]. Where, as in this case, a witness’ credibility is a key factor in determining guilt or acquittal, excluding extrinsic evidence of the witnesses’ prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of the witness.

In the end, the Court said, “[a]n evidentiary rule rendering non-collateral, highly relevant evidence inadmissible must yield to the defendant’s constitutional right to present a full defense.” *Id.*, at 31, *citing*, Mo. Const. Art. 1, § 18(a).

So, too, the trial court deprived Antoine’s jury of evidence that was highly relevant to A.W.’s credibility—the central issue in the case—and thereby denied Antoine’s state and federal constitutional right to present a defense. *Id.*; *Washington v. Texas*, *supra*; U.S. Const., Amend. XIV. To the extent that Antoine’s right appears to conflict with the statute, the statute must be interpreted in such a way as to avoid that conflict. *See, State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006) (where defendant did not challenge the constitutionality of § 491.075, the Supreme Court

“decline[d] to address the constitutionality of the statute *sua sponte*; it is sufficient to point out that application of the statute is subject to the Confrontation Clause.”).

Similarly, even if § 491.015 arguably bars the evidence Antoine sought to present, its application must be subject to Antoine’s constitutional due process right to present a defense. U.S. Const., Amend. XIV; Mo. Const., Art. I, §§ 10 and 18(a). The trial court’s ruling denying him that right by denying him crucial evidence impeaching A.W. ’s credibility, in a case in which credibility was the sole factor on which the jury found Antoine guilty, was not made “in careful consideration of [Antoine’s] rights as a criminal defendant.” *State v. Rauch, supra*. The ruling was therefore an abuse of the court’s discretion and denied Antoine a fair trial, and this Court must remand for a new trial at which the jury is allowed to hear all relevant evidence.

### III.

**The trial court plainly erred in failing to *sua sponte* intervene when the prosecutor repeatedly inquired of Antoine in cross-examination whether Detective Wolters was lying, because this conduct violated Antoine's rights to due process of law and a fair trial, 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 it is improper to ask one witness to give an opinion as to the veracity of another witness because credibility is solely a matter for the jury to determine.**

The prosecutor asked Antoine during cross-examination whether Wolters was lying when he testified that Antoine told him that he and A.W. did not have sex on August 10 but did three days earlier (Tr. 129). Defense counsel objected, saying it was speculation for Antoine to say what was in the officer's mind (Tr. 129). The court sustained the objection and directed the prosecutor to rephrase the question (Tr. 130). She then stated that Wolters testified that Antoine had told him that they had had sex three days before and asked Antoine whether that was a lie or the truth (Tr. 130). Antoine said it was a lie (Tr. 130).

Continuing, the prosecutor asked Antoine whether he had heard Wolters say that Antoine told him he did not use a condom (Tr. 130). When Antoine said he had heard it, she asked him whether that was a lie (Tr. 130). Antoine said that too was a lie, because he never said he had had sex with her (Tr. 131). Defense counsel then

objected, saying that was “the same kind of question. It calls for whether or not he thinks that Detective Wolters is lying.” (Tr. 131). The court said, “I’ll sustain that objection.” (Tr. 131).

Antoine admitted telling Wolters that he did not know he could get in trouble when he was under eighteen and the prosecutor asked, “So you didn’t know you could get in trouble for having sex with a twelve-year-old when you were only seventeen?” (Tr. 131). Antoine answered, “That’s not the point. The point is I didn’t know she was twelve. She lied to me about her age.” (Tr. 131). He remembered Wolters testifying that when he told Antoine that a twelve-year-old had accused him of having sex with her, but said he did not tell Wolters that—what happened was that Wolters said her name and Antoine repeated it (Tr. 131-32). The prosecutor then asked, “So pretty much the gist of everything Detective Wolters testified to was false?” (Tr. 132). Antoine confirmed it: “Pretty much[,]” and counsel then said, “Wait a minute. No. I have the same objection again. She’s trying --” The court interrupted, saying, “All right. I’ll sustain that objection.” (Tr. 132). Counsel said “I’ll ask --” and the court again broke in, saying, “That will be stricken from the record.” (Tr. 132).

When defense counsel attempted to address the issue in redirect, his question, “Antoine, is it possible that Detective Wolters simply misunderstood what you said?” drew an objection—“to speculation”—after Antoine answered, “Yes, sir.” (Tr. 132). The court sustained the objection (Tr. 132).

### *Standard of Review*

“The scope of cross-examination and the determination of matters that may bear on a witnesses’ credibility are largely within the discretion of the trial court. The trial court is vested with broad discretion over questions concerning the relevance and admissibility of evidence. Such discretion shall not be disturbed on appeal absent a clear abuse of discretion.” *State v. Davis*, 186 S.W.3d 367, 373 (Mo.App. W.D. 2005). (citation omitted). In matters involving the admission of evidence, this Court reviews for prejudice, not mere error and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* (citation omitted).

Because defense counsel did not pose timely objections, nor did he include this in the motion for new trial, this Court may review only for plain error. Rule 30.20. Under the plain error standard, this Court reviews the claim of error under a two-prong standard. *State v. Roper*, 136 S.W.3d 891, 900 (Mo.App. W.D. 2004) (citation omitted). In the first prong, the Court determines whether there is error that is “evident, obvious, and clear.” *Id.* If so, in the second prong of the analysis, the Court considers whether a manifest injustice or miscarriage of justice has occurred. *Id.* Antoine must show, based on the specific facts and circumstances of his case, that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice. *Id.*

### *Comment on Witnesses’ Credibility*

An attorney “may not directly ask one witness if another was lying.” *Roper*, 136 S.W.3d at 900, *citing*, *State v. Savory*, 893 S.W.2d 408, 411 (Mo.App. W.D.

1995). “Witnesses should not give their opinions upon 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, 570 (1869).

### *Discussion*

In *Roper*, this Court considered a similar situation. “In at least six instances during cross-examination of Roper, the prosecutor asked Roper to comment on the veracity of law enforcement officers’ testimony.” 136 S.W.3d at 899. Much the same occurred here. The Court said that Roper raised “a serious issue that posing such questions to a criminal defendant places him in an untenable position. By objecting to such questions, a defendant could look evasive, but answering could put him in an even worse light.” *Id.*, at 901.

But despite finding that the prosecutor’s questioning was improper, the Court did not find manifest injustice. *Id.*, at 903. Among the factors relied upon were the physical evidence in the case, the dramatic difference between Roper’s and the other witness’ testimony, and the fact that the prosecutor did not emphasize the subject in argument. *Id.* Here, the situation is very different.

Here, the case came down to one factor: the credibility of Antoine versus A.W. . The prosecutor’s line of questioning unfairly impugned Antoine’s credibility. Calling this “a serious issue [in] that posing such questions to a criminal defendant places him in an untenable position[,] this Court in *Roper* said:

By objecting to such questions, a defendant could look evasive, but answering could put him in an even worse light. Roper also heavily

relies upon a recent pronouncement by the Iowa Supreme Court that discusses how such questions violate the prosecutor's duty to conduct a fair trial:

[T]he use of this tactic-asking the defendant whether another witness is lying-is incompatible with the duties of a prosecutor. Unfairly questioning the defendant simply to make the defendant look bad in front of the jury regardless of the answer given is not consistent with the prosecutor's primary obligation to seek justice, not simply a conviction. Nor is such questioning consistent with the prosecutor's duty to the defendant to ensure a fair trial, including a verdict that rests on the evidence and not on passion or prejudice.

*Id.*, at 901, quoting, *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003).

As in *Roper*, the prosecutor repeatedly grilled Antoine on Wolters's veracity:

- The prosecutor asked Antoine whether Wolters was lying when he testified that Antoine told him that he and A.W. did not have sex on August 10 but did three days earlier (Tr. 129).
- After defense counsel's "speculation" objection was sustained, the prosecutor stated that Wolters had previously testified that Antoine had told him that they had had sex three days before; she then asked Antoine whether that was a lie or the truth (Tr. 129-30).

- After Antoine confirmed that he had heard Wolters testify that Antoine told him he did not use a condom the prosecutor asked him whether that was a lie (Tr. 130). The court again sustained counsel’s defense objection—this time because the question called for Antoine to state whether the detective was lying—which was raised after Antoine answered affirmatively (Tr. 131).
- Antoine also remembered Wolters testifying that, when he told Antoine that a twelve-year-old had accused him of having sex with her, the first thing he said was, “Oh, A.W.?” (Tr. 131-32). But said he did not tell Wolters that—that what happened was that Wolters said her name and Antoine repeated it, and the prosecutor then asked, “So pretty much the gist of everything Detective Wolters testified to was false?” (Tr. 131-32).

After Antoine confirmed it—answering “Pretty much”—counsel then said he had “the same objection again[,]” and the court again sustained the objection, also ordering this last stricken from the record (Tr. 132). But the damage was done. Antoine was put in the “worse light” of having answered, *and* counsel’s untimely objections made it look as though the defense was trying to be evasive. *Roper*. Although when counsel made the correct objection the court sustained it, the jury heard the prosecutor ask Antoine four times to try to place his own credibility—as a seventeen-year-old from Chicago accused of having sex with a pre-teen girl—against a twelve-year veteran of the Jefferson City police force (Tr. 103). This tactic put Antoine in a no-win situation.

This Court further said in *Roper*:

The discomfort many courts feel about this type of question arises from a number of grounds. First is the fact that, in most circumstances, this type of question has no probative purpose and “is not intended to seek information at all but instead to score rhetorical points.” *Allen v. United States*, 837 A.2d 917, 920 (D.C. 2003). The Iowa Supreme Court opined,

We think the predominate, if not sole, purpose of such questioning is simply to make the defendant look bad. . . . The accused’s answer is unimportant because the accused is in a no-win situation. If the defendant says the other witness *is* lying, then the defendant is put in the position of calling someone a liar, a particularly unenviable state when the other witness is a law enforcement officer. If the defendant says a contradictory witness is *not* lying, then a fair inference is that the *defendant* is lying.

*Graves*, 668 N.W.2d at 872 (citations omitted).

*Roper*, 136 S.W.3d at 901-02. The Court went on, “[s]uch questions create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied, a risk that is especially acute when the witness is a government agent in a criminal case.” *Id.*, at 902 (citations and internal quotations omitted). The jury

holding Antoine's fate was shown that it had to find that, not only A.W. , but Wolters lied as well.

As noted, unlike *Roper*, the evidence against Antoine was not overwhelming; it consisted only of A.W. 's disputed allegations—untested by her admitted lies to the police about not having had sex before (See Point II, *supra*)—and the disputed testimony of Wolters that Antoine admitted everything to him. Also unlike *Roper*, when the prosecutor argued this case to the jury, she bolstered Wolters's credibility:

We have Detective Wolters who has absolutely no reason to lie. And that's something you're allowed to look at when you discuss, you know, the credibility of the witnesses who testified before you. Ask yourself what reason does Detective Wolters have to make up this story? None.

(Tr. 147-48). She later returned to the point:

You would have to believe that Detective Wolters for who knows what reason decided to make up this story. And ask yourself if that makes sense. And if it doesn't, who was the more credible witness? And I submit to you that that was Detective Wolters, not the defendant.

(Tr. 149-50).

While not directly referring to her questioning of Antoine about Wolters's honesty, it nonetheless reminded the jury of how Antoine had to accuse him, in effect, of "making it up." This was especially problematic where the prosecutor objected—which the court sustained—when defense counsel tried to remove some of the taint from the prosecutor's misconduct by asking Antoine on redirect whether the detective

might simply have misunderstood him (Tr. 132). So the prosecutor here, again unlike *Roper*, “emphasi[zed]” and “exacerbate[d]” the prejudice resulting from the questioning *Id.*, at 903.

The Court concluded in *Roper*:

While we ultimately conclude that a manifest injustice or miscarriage of justice did not occur in the proceedings below, we do not want to minimize the fact that the prosecutor’s questioning of Roper clearly violated our holding in *State v. Savory*, and constituted misconduct. Such questioning lacks any probative purpose and will not be condoned, as it invites reversible error.

*Id.*, at 903-04.

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. Sadly, the prosecutor here did not learn from history and repeated it, though the Missouri courts have yet to find such conduct reversible: *Verb. sap.*, a “word to the wise,” has not been enough; appellate opinions condemning such conduct without reversing a conviction seem to do little to cure the problem. There is one way to ensure that the conduct stops and that is for this Court to take that step and reverse a conviction, thus sending the proverbial message that the conduct crossed the line.

The trial court had an obligation to keep the prosecutor behind that line, not to allow her to ask unwarranted questions, especially where the court understood the issue and was willing to sustain defense counsel's objections—when they were made. The court therefore recognized the impropriety yet did not stop it.

The jury could have believed that Antoine was telling the truth, but placing him in the position of calling a veteran detective a liar made that much more difficult. Making Antoine call Wolters a liar deprived him of a great deal of any credibility the jury may have been willing to grant him. In a case where credibility was crucial, unfairly taking away Antoine's credibility will inexorably result in a manifest injustice if this conviction is allowed to stand.

This Court must grant Antoine a new trial to remove the injustice caused by the prosecutor's use of this improper and unfair technique.

## CONCLUSION

For the reasons set forth in Point I, appellant Antoine Terry respectfully requests that this Court reverse his conviction and sentence and discharge him therefrom, or in the alternative, remand for a hearing on newly-discovered evidence. For the reasons set forth in Points II and III, Antoine respectfully requests that this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Kent Denzel, 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 12,035 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 December, 2008. According to that program, these disks are virus-free.

On the 12<sup>th</sup> day of December, 2008, 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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Kent Denzel