



***In the Missouri Court of Appeals***  
**WESTERN DISTRICT**

STATE OF MISSOURI, )  
 )  
 ) RESPONDENT, )  
 )  
 ) v. ) WD69672  
 ) FILED: MAY 26, 2009  
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 ANTOINE TERRY, )  
 )  
 ) APPELLANT. )

**APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY**  
**THE HONORABLE PATRICIA S. JOYCE, JUDGE**

**Before DIVISION THREE: HAROLD L. LOWENSTEIN, Presiding Judge,**  
**JOSEPH M. ELLIS and LISA WHITE HARDWICK, Judges**

Antoine Terry appeals from his conviction for first-degree statutory rape. He contends: (1) the evidence is insufficient to establish that he had sexual intercourse with the victim; (2) the circuit court erred in refusing to allow specific evidence that the victim lied about her past sexual activity; and (3) the court erred in failing to intervene, *sua sponte*, when the State asked him on cross-examination whether a detective was lying. He also asks that we remand the case for a new trial due to newly-discovered evidence. For reasons explained herein, we affirm his conviction and deny his motion to remand.

## FACTUAL AND PROCEDURAL HISTORY

In May 2007, A.W., who was then twelve years old, met Terry, then seventeen years old. Terry lived in Chicago but was visiting his sister, who lived near A.W. in Jefferson City. A.W. and Terry started spending time together and, eventually, their relationship became sexual. Over the course of the summer, A.W. and Terry had sex more than six times.

A.W.'s mother did not approve of her spending time with Terry. On Friday, August 10, 2007, A.W. told her mother she was going to a friend's house. Instead of going to her friend's house, she went to Terry's sister's house, where she stayed with Terry. When A.W. did not return home, her mother called the police. Because A.W. was afraid that Terry would be in trouble, she was not truthful when she talked to the police about her relationship with Terry. She did tell the police, however, that Terry had penetrated her vagina with his fingers and had attempted to have sexual intercourse with her that night.

Barret Wolters, a detective with the Jefferson City Police Department, interviewed Terry the next day. When Wolters told Terry he was investigating a rape complaint made by a twelve-year-old girl, Terry responded, "Oh, [A.W.]?" Wolters then asked Terry if A.W.'s allegations were true. Terry said that he did not penetrate her vagina with his fingers that night. When Wolters asked Terry if anything had happened with A.W., Terry said they did not have sex on August 10 but indicated that he and A.W. had previously had sex, as recently as Tuesday of that week. Wolters asked him if A.W. was a willing participant when they had

sex, and Terry said that she was. Wolters asked Terry if he had used a condom, and he said that he had not. Terry also told Wolters that he was only seventeen years old and he thought he would get in trouble for “messaging with” A.W. only if he were eighteen.

A.W. underwent a SAFE exam. The SAFE exam revealed that A.W. had injuries to her hymen and the tissue surrounding the hymen. These injuries were less than seventy-two hours old, indicating that she had had sex less than three days before the exam. The exam also revealed that A.W. was pregnant. After A.W. discovered she was pregnant, she talked to the police again. She told the police that she had an ongoing sexual relationship with Terry, she was embarrassed, and she did not want her mother to know about it. She disclosed that she and Terry had sex numerous times in May, June, and August 2007.

Terry was indicted for first-degree statutory rape, in violation of Section 566.032, RSMo Cum. Supp. 2007.<sup>1</sup> A jury trial was held. A.W., Wolters, and the doctor who performed the SAFE exam testified for the State. A.W. was pregnant during the trial. She testified that she did not have sex with anyone else in the summer of 2007 and she believed Terry was the father of her unborn child.

Terry and his sister testified for the defense. In his testimony, Terry denied ever having sexual intercourse with A.W. Terry testified that he was in Chicago, not Jefferson City, in May 2007, and the first time he met A.W. was during his niece’s birthday party on July 29, 2007. Terry denied telling Wolters that he had

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<sup>1</sup> All statutory references are to the Revised Statutes of Missouri 2000 and Cumulative Supplement 2007.

sex with A.W. He testified that he told Wolters that he “almost had sex with her” on August 7, 2007. According to Terry, August 7 was the only time he was alone with A.W. that summer. On that day, he and A.W. went into a room in his sister’s house. Terry testified he could tell by the way A.W. was looking at him that she wanted to have sex with him, so he took off his shirt. At that moment, his sister walked in on them and said, “No, you all ain’t about to do that. Go outside.” When asked on cross-examination why his sister thought he was about to have sex with A.W. when she walked in on them, Terry testified, “Because my sister knows me.” Terry admitted that he told Wolters he “thought it was okay to mess with [A.W.]” until he turned eighteen and that he did not realize he could get in trouble while he was only seventeen.

The jury convicted Terry of first-degree statutory rape. Terry waived jury sentencing, and the court sentenced him to a term of seven years imprisonment. Terry appeals.

#### **MOTION TO REMAND DUE TO NEWLY-DISCOVERED EVIDENCE**

During briefing of this appeal, Terry filed a motion for remand due to newly-discovered evidence. The newly-discovered evidence is a DNA test that excludes him as the biological father of A.W.’s baby. Terry notes that the DNA test evidence was not available during the February 2008 trial because the child was not born until April 2008 and the DNA test was not completed until September 2008. He alleges this evidence directly contradicts A.W.’s testimony that (1) they had sexual intercourse during the summer of 2007; (2) she did not have sex with

anyone else that summer; and (3) he was the father of her baby. Terry argues that, had the DNA test evidence been available at the time of trial, he could not have been found guilty of statutory rape beyond a reasonable doubt.

Terry asks us to remand the case to the circuit court for either a new trial or a hearing on the newly-discovered DNA test evidence. Terry's motion is well beyond the time limits for filing a motion for new trial pursuant to Rule 29.11(b). Missouri's statutes and rules do not provide a mechanism for a criminal defendant to present a claim of newly-discovered evidence after the time to file a motion for new trial has expired. ***State v. Gray*, 24 S.W.3d 204, 208 (Mo. App. 2000)**. Because it is untimely, Terry's claim of newly-discovered evidence "preserves nothing for review, and, procedurally, is a nullity." *Id.* "The only formally authorized means by which a criminal defendant with a late claim of newly discovered evidence can seek relief is by application to the governor for executive clemency or pardon." ***State v. Garner*, 976 S.W.2d 57, 60 (Mo. App. 1998)**.

Nevertheless, we have recognized that, "in extraordinary cases," we "may remand the case as plain error pursuant to Rule 30.20 or pursuant to this court's inherent power so the defendant can present his new evidence." ***State v. Young*, 943 S.W.2d 794, 799 (Mo. App. 1997)** (quoting ***State v. Ramsey*, 874 S.W.2d 414, 417 (Mo. App. 1994)**). There appear to be only two such "extraordinary" cases in Missouri in which a remand was permitted for an untimely claim of newly-

discovered evidence. See *Gray*, 24 S.W.3d at 209.<sup>2</sup> In *State v. Mooney*, 670 S.W.2d 510, 511 (Mo. App. 1984), the defendant was convicted of molesting a minor. The only evidence to support the conviction was the victim’s testimony. *Id.* More than six months after the defendant’s original motion for new trial was filed and denied, the victim admitted in a tape-recorded conversation that he had lied under oath and “made up” his testimony. *Id.* at 512.

While the appeal was pending, the defendant filed a motion to supplement the record on appeal with the newly-discovered evidence of the victim’s recantation. *Id.* The Eastern District declined to consider the new evidence because it was not part of the record on appeal. *Id.* at 516. Nevertheless, in light of the absence of any rule or statute relating to the particular circumstances of the case, the court determined that it had “the inherent power to prevent miscarriages of justice in a proper case by remanding the case to the trial court with instructions that the appellant be permitted to file a motion for new trial upon the grounds of newly discovered evidence.” *Id.* at 515-16. The court then set forth its reasons why this particular case warranted exercise of its inherent power:

We believe this is a “proper case” because the recantation, if such it is, came too late for the defendant to file a timely motion for new trial on the grounds of newly discovered evidence. Although the judgment of the trial court is final for purposes of appellate review, and the trial court is without jurisdiction to entertain appellant’s motion because the case is on appeal, we believe upon remand a motion for new trial should be permitted to be filed where the appellate process has not been completed, there is no evidence

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<sup>2</sup> In *Gray*, we noted that in a third case, *State v. Post*, 804 S.W.2d 862, 863 (Mo. App. 1991), the Eastern District permitted a remand after an untimely motion for new trial was filed. *Gray*, 24 S.W.3d at 209. The remand in *Post* was based on juror misconduct, however, and not on “newly-discovered evidence.” *Id.*

connecting the appellant with the crime other than the testimony of the victim who has allegedly recanted, and whose testimony is uncorr[o]borated by any other evidence, where said newly discovered evidence did not become available during trial, and the recanting occurred under circumstances reasonably free from suspicion of undue influence or pressure from any source.

***Id.* at 516.**

The other case that permitted a remand based upon an untimely claim of newly-discovered evidence is ***State v. Williams, 673 S.W.2d 847 (Mo. App. 1984)***. While the direct appeal in ***Williams*** was pending, the defendant asked the court to remand the case for a hearing on his motion for new trial based on newly-discovered evidence. ***Id.* at 847**. The court did not provide details about the new evidence but noted that, “if believed, the newly discovered evidence would completely exonerate defendant of any complicity in the crime of which he was convicted.” ***Id.*** The prosecuting attorney filed an affidavit stating that the information contained in the defendant’s motion was true, and the State agreed that the defendant’s motion should be granted. ***Id.* at 847-48**. The Eastern District held that, under the “unique circumstances” of the case, including the State’s concession that the newly-discovered evidence existed and the State’s joining in the defendant’s request, it was “willing to overlook the time constraints of Rule 29.11” and remand the case to the circuit court. ***Id.* at 848**.

The Eastern District has recognized that its holdings in ***Mooney*** and ***Williams*** are limited by the “exceptional circumstances” of the cases. In ***State v. Davis, 698 S.W.2d 600, 603 (Mo. App. 1985)***, the court said of ***Mooney*** and ***Williams***:

A careful reading of those cases reveals that they involved exceptional circumstances and are thus limited. Furthermore, it is clear that remand is not mandated in cases involving allegations of newly discovered evidence after appeal. A case will only be remanded on the basis of newly discovered evidence after appeal where the court, *in its discretion*, determines that its inherent power must be exercised in order to prevent a miscarriage of justice.

The “exceptional circumstances” to which the court in *Davis* was referring included the fact that the newly-discovered evidence in *Mooney* and *Williams* was substantive and would have completely exonerated the defendants. *State v. Menteer*, 845 S.W.2d 581, 587 (Mo. App. 1992). Also, in *Williams*, the State agreed to the remand. *Id.*

After *Mooney*, *Williams*, and *Davis*, it may fairly be said that the “exceptional circumstances” doctrine is currently limited to cases “where the newly discovered evidence would have completely exonerated the defendant,” *State v. Parker*, 208 S.W.3d 331, 334 (Mo. App. 2006)), or where the newly-discovered evidence would impeach the testimony of another witness and the remaining evidence in the record is insufficient to establish the defendant’s guilt. *See, e.g., State v. Dorsey*, 156 S.W.3d 791, 798 (Mo. App. 2005); *State v. Clark*, 112 S.W.3d 95, 99 (Mo. App. 2003); *Gray*, 24 S.W.3d at 209-10; *Garner*, 976 S.W.2d at 60; *Young*, 943 S.W.2d at 799; *State v. Hill*, 884 S.W.2d 69, 76 (Mo. App. 1994).

In this case, the newly-discovered evidence would not completely exonerate Terry of the crime of statutory rape. At most, the DNA test evidence damages A.W.’s credibility, as it shows that A.W. lied when she said she did not have sex with anyone other than Terry during the summer of 2007, and it shows that she

either lied or was mistaken in her belief that Terry was the father of her baby. Moreover, even if we were to discount her testimony entirely, as Terry urges us to do, the evidence that is left is sufficient to convict Terry of first-degree statutory rape.

The most substantial remaining evidence of Terry's guilt is his confession to Detective Wolters. Terry's confession to Wolters was more than just a bare admission that he had sexual intercourse with A.W. When Wolters began his interview with Terry, he told Terry he was investigating a complaint of rape by a twelve-year-old girl. Terry's response was, "Oh, [A.W.]?" Upon further questioning, Terry told Wolters that he and A.W. had sexual intercourse as recently as Tuesday of that week, A.W. was a willing participant, and he did not use a condom. Terry also told Wolters that he was seventeen years old and that he thought "he would only get in trouble if he was eighteen."

In his trial testimony, Terry admitted that he told Wolters he "thought it was okay to mess with [A.W.]" until he turned eighteen. Other parts of Terry's trial testimony are also incriminating. Terry testified that he did not spend time with A.W. in the summer of 2007 and, in fact, met her for the first time at his niece's birthday party on July 29, 2007. Nevertheless, according to Terry, he and A.W. "almost had sex" at his sister's house approximately nine days later. Terry testified that on August 7, 2007, he and A.W. "almost had sex" because, without saying anything, A.W. gave him a "look" from which he could tell she wanted to have sex with him. Terry testified that he did not have sex with A.W. on that

occasion because his sister walked in on them and made them stop. When asked on cross-examination why his sister thought he and A.W. were about to have sex, Terry testified, "Because my sister knows me."

To establish that Terry was guilty of first-degree statutory rape, the State had to prove that Terry had sexual intercourse with A.W., who was then less than fourteen years old. Section 566.032.1. The DNA test showing Terry is not the father of A.W.'s baby does not refute Terry's detailed confession to Wolters that he had sexual intercourse with twelve-year-old A.W., the veracity of which is bolstered by Terry's incriminating trial testimony. The evidence in the record is sufficient to convict Terry of first-degree statutory rape. Because the newly-discovered evidence does not completely exonerate Terry, and the other evidence in the record is sufficient to establish Terry's guilt even if the newly discovered evidence was presented, he is not entitled to a new trial. Terry's motion to remand is denied.

#### SUFFICIENCY OF THE EVIDENCE

In Point I, Terry contends the evidence is insufficient to support his conviction for first-degree statutory rape. In reviewing this claim, we are limited to determining whether there is sufficient evidence from which a reasonable juror could have found Terry guilty beyond a reasonable doubt. ***State v. Burrell*, 160 S.W.3d 798, 801 (Mo. banc 2005)**. We accept as true all evidence and inferences favorable to the verdict and disregard all contrary evidence and inferences. ***State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993)**. We defer to the jury's superior

position to assess the witnesses' credibility and the weight and value of the testimony. ***State v. Johnson*, 244 S.W.3d 144, 152 (Mo. banc 2008)**.

Terry's claim of insufficiency rests exclusively upon the newly-discovered DNA test evidence showing that he is not the father of A.W.'s baby. We cannot consider the DNA test evidence in evaluating Terry's claims of error, as it is not part of the record on appeal. ***State v. Strong*, 142 S.W.3d 702, 729 (Mo. banc 2004)**. As we have noted, however, even if we could consider the evidence, it would not render the State's evidence insufficient to support Terry's conviction for first-degree statutory rape. Terry's detailed confession to Wolters and his incriminating trial testimony constitute sufficient evidence from which the jury could find beyond a reasonable doubt that Terry had sexual intercourse with A.W. Point I is denied.<sup>3</sup>

#### **ADMISSIBILITY OF PRIOR SEXUAL ACTIVITY EVIDENCE**

In Point II, Terry contends that the circuit court erred in refusing to admit evidence that A.W. had sex with two other people in 2006 and, therefore, she lied to the police when she told them that she had not had sex before she met Terry. Before trial, the State filed a motion *in limine* seeking to exclude specific instances of A.W.'s sexual activity in 2006 on the basis that such evidence would constitute inadmissible evidence of the victim's prior sexual conduct in violation of the rape shield statute, Section 491.015. The rape shield statute creates a presumption

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<sup>3</sup> Terry included the DNA test evidence in the appendix of his brief. The State has moved to strike those pages and Terry's first point because it relies upon the DNA test evidence. Given our disposition of Terry's first point, the State's motion to strike is denied as moot.

that evidence of a victim's prior sexual conduct is irrelevant to prosecutions for sex crimes. ***State v. Smith*, 996 S.W.2d 518, 522 (Mo. App. 1999)**. The statute renders evidence of prior sexual conduct inadmissible unless it falls within one of four specific exceptions, and the circuit court finds the conduct relevant to a material fact or issue. ***State v. Sloan*, 912 S.W.2d 592, 598 (Mo. App. 1995)**.

These exceptions include:

(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; or

(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 proved by the prosecution.

#### **Section 491.015.1.**

In his offer of proof, Terry asserted that evidence that A.W. had sex multiple times with two fifteen-year-old boys in the fall of 2006 fell under the second exception. He claimed that it constituted evidence showing an alternate source of her pregnancy. Specifically, he argued that the fact that she had had sex with two other boys, "even though she said it was at a prior time," was relevant to show that she could have had sex with them during the time she alleged that she had sex with Terry, which was the summer of 2007. Terry also claimed the fact that A.W. initially told the police she had not had sex with anyone besides Terry but

later disclosed she had had sex with these two other boys was relevant to impeach her credibility.

The circuit court granted the State's motion to exclude the evidence, finding that the time of the alleged sexual activity had no relevance to A.W.'s pregnancy. Hence, the evidence did not fall under any of the exceptions in the rape shield statute. As for using the evidence to impeach A.W.'s credibility, the court ruled that Terry could examine her about making inconsistent statements to the police but could not question her about the subject of those statements.

The circuit court has broad discretion in determining the admissibility of evidence, and we will not disturb the court's ruling unless we find a clear abuse of discretion. **Smith, 996 S.W.2d at 521.** An abuse of discretion occurs when the court's ruling is clearly against the logic of the circumstances and is so unreasonable and arbitrary as to shock the sense of justice and indicate a lack of careful consideration. **Id.**

Terry contends evidence that A.W. admitted to having sex before she met Terry and lied about it would have shown an alternative source of her pregnancy and would have thoroughly impeached A.W.'s credibility by showing that she lied about sex. To support his contention, he relies on **State v. Long, 140 S.W.3d 27 (Mo. banc 2004).** In **Long**, the circuit court precluded the defendant from introducing evidence of the victim's prior false allegations of sexual assault. **Id. at 30-31.** The Supreme Court reversed, finding that "[w]here, 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." *Id.* In such cases, "[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.

Terry's reliance on *Long* is misplaced because *Long* concerned using the victim's prior *false* allegations of sexual abuse to impeach her credibility. The Court in *Long* held that "the rape shield statute[ ] does not bar inquiry into prior false allegations of rape or sexual assault." *Id.* at 30 n.3. The Court explicitly stated, however, that if the prior false allegations of sexual assault implicate prior sexual conduct, "the trial court would have to consider the applicability of section 491.015." *Id.*

Both the Supreme Court and this court have rejected arguments similar to Terry's. In *State v. Madsen*, 772 S.W.2d 656, 661 (Mo. banc 1989), a rape victim told the police that she had not had sex with any person other than the defendant within twenty-four hours of the assault. In her first deposition, she extended the time to forty-eight hours, but in her second deposition she admitted that those statements were untrue. *Id.* The defendant contended that he should have been permitted to cross-examine her about the inconsistencies. *Id.* The Supreme Court rejected his argument, finding that the evidence did not fall under any of the exceptions in the rape shield statute and, therefore, was neither relevant nor admissible. *Id.* The Court held that "[t]here is no right to impeach by showing

inconsistent statements unless those statements are relevant and admissible.” *Id.* (footnote omitted).

Likewise, in *Smith*, 996 S.W.2d at 521-22, this court rejected the defendant’s claim that he should have been allowed to cross-examine the victim as to whether she lied in her deposition about sexual contact she had with other boys. We recognized that “the credibility of witnesses is always a relevant issue in a lawsuit,” but noted that “attacks on a witness’ credibility in criminal proceedings are subject to limitations, and not every attack will be allowed.” *Id.* at 521. Relying on *Madsen*, we found that the evidence the defendant wanted to elicit constituted specific instances of the victim’s prior sexual conduct and did not fall within any of the four exceptions in the rape shield statute. *Id.* at 522. Thus, the evidence was inadmissible. *Id.*

Contrary to Terry’s claim, evidence of A.W’s sexual activity with two boys in the fall of 2006 does not show an alternative source of her pregnancy, as conception occurred in the summer of 2007. Thus, because the evidence did not fall within any of the exceptions in the rape shield statute, it was inadmissible. The circuit court did not clearly abuse its discretion in excluding it. Point II is denied.

#### STATE’S CROSS-EXAMINATION OF TERRY

In Point III, Terry contends the circuit court plainly erred in failing to intervene, *sua sponte*, when the State repeatedly asked him whether Wolters was lying when he testified about what Terry said during the August 11, 2007

interview. During cross-examination, the prosecutor asked Terry if Wolters was lying when he testified that Terry had told him that he did not have sex with A.W. on August 10 but had had sex with her three days earlier. Defense counsel objected on the basis that the question called for speculation, and the court sustained the objection. The court asked the prosecutor to rephrase the question. The prosecutor then asked Terry if, when Wolters testified that Terry told him he had sex with A.W. on Tuesday of that week, it was a lie or the truth. Terry said it was a lie. The prosecutor next asked Terry if Wolters' testimony that Terry said he did not use a condom was a lie or the truth. Terry said it was a lie. After Terry answered, defense counsel objected on the basis that the question called for Terry's opinion as to whether he thought Wolters was lying. The court sustained the objection. When the prosecutor later asked Terry if "pretty much the gist of everything Detective Wolters testified to was false," Terry replied, "Pretty much." Defense counsel objected. The court sustained the objection and ordered the question and answer stricken from the record.

Although defense counsel objected and the objections were sustained, all but one of his objections were untimely because they were made after the questions were answered. ***State v. Norton*, 949 S.W.2d 672, 676 (Mo. App. 1997)**. Terry contends that the circuit court should have intervened, *sua sponte*, and stopped the prosecutor from asking Terry to comment on Wolters' credibility. Terry argues that the prosecutor's questions put him in the "no-win" situation of putting "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.” Terry did not raise this issue in his motion for new trial. He seeks plain error review.

Pursuant to Rule 30.20, we have discretion to review for “plain errors affecting substantial rights.” This review involves a two-step process. We first determine whether the claimed error facially establishes substantial grounds for believing that manifest injustice or a miscarriage of justice has resulted. ***State v. Hagan*, 113 S.W.3d 260, 267 (Mo. App. 2003)**. Plain error is evident, obvious, and clear. ***State v. DeWeese*, 79 S.W.3d 456, 457 (Mo. App. 2002)**. Absent a finding of facial error, an appellate court should decline its discretion to review the claim. ***Hagan*, 113 S.W.3d at 267**. If plain error is found, we proceed to the second step to consider whether the error actually resulted in manifest injustice or a miscarriage of justice. ***Id.***

“[W]hen seeking to expose contradiction between the testimony of several witnesses, an attorney may not directly ask one witness if another one was lying.” ***State v. Savory*, 893 S.W.2d 408, 411 (Mo. App. 1995)**. Posing such questions places a criminal defendant in an “untenable position.” ***State v. Roper*, 136 S.W.3d 891, 901 (Mo. App. 2004)**. “By objecting to such questions, a defendant could look evasive, but answering could put him in an even worse light.” ***Id.*** These types of questions are argumentative and lack any probative value. ***Savory*, 893 S.W.2d at 411; *Roper*, 136 S.W.3d at 904**. The prosecutor’s questions asking Terry whether Wolters was lying were improper.

Plain error relief is not required, however, unless we find that the court's failure to intervene, *sua sponte*, to stop the prosecutor from asking the questions resulted in manifest injustice or a miscarriage of justice. In **Savory** and **Roper**, we noted that the prejudicial effect of the improper questions is lessened where there is a drastic difference between the testimony presented by the State and the defendant's testimony, and credibility is a key issue in the case. **Savory, 893 S.W.2d at 411; Roper, 136 S.W.3d at 903.** "Where there is a dramatic difference between the testimony presented on behalf of the State and the defendant, the prejudicial effect of such questions, albeit improper, may be lessened or more difficult to establish." **Roper, 136 S.W.3d at 903.** This is because, in such cases, the jury necessarily has to determine the credibility of the witnesses in order to render its verdict. **Savory, 893 S.W.2d at 411.**

In this case, Wolters testified Terry said that he and A.W. had had sex as recently as Tuesday of that week, she was a willing participant, and he did not use a condom. Terry, on the other hand, testified that he never told Wolters he had sex with A.W. and never said anything about not using a condom, but told Wolters only that that he "almost had sex with her" on one occasion. Wolters' testimony was dramatically different from Terry's. The jury had to determine the credibility of Wolters and Terry in order to render its verdict. Any prejudice arising from the improper questions was minimal because it was obvious, given the conflicting testimony, that either Wolters or Terry was not telling the truth.

Moreover, we note that, despite the fact that defense counsel's objections were untimely, the court sustained the objections. The court also struck, *sua sponte*, from the record one of the State's questions and Terry's answer. The court had previously instructed the jury, pursuant to MAI-CR3d 302.02, to disregard any question to which the court sustained an objection and to disregard anything which the court ordered stricken from the record. Absent evidence to the contrary, the jury is presumed to have followed the court's instructions. ***State v. Newson*, 898 S.W.2d 710, 714 (Mo. App. 1995).**

Terry has not demonstrated that he suffered a manifest injustice or miscarriage of justice when the court failed to intervene, *sua sponte*. Therefore, he is not entitled to plain error relief. Point III is denied.

#### CONCLUSION

The judgment of conviction is affirmed.

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LISA WHITE HARDWICK, JUDGE

All Concur.