IN THE
SUPREME COURT OF MISSOURI

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No. SC87069

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STATE OF MISSOURI,

Respondent,

vs.

RONNIE REEDER,

Appellant.

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APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE ROBERT H. DIERKER, JR., JUDGE

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RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of the City of St. Louis for three counts of statutory rape in the first degree, § 566.032 RSMo Supp. 1995 and 2000, and one count of attempted child molestation in the first degree, § 564.011 RSMo 2000, for incidents occurring between November 1, 1999, and February 3, 2002, and for which Appellant was sentenced to fifteen years imprisonment. This case was transferred to this Court, after opinion, by order of the Missouri Court of Appeals, Eastern District. Therefore, jurisdiction lies in this Court pursuant to Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

On June 11, 2002, Appellant was indicted on four counts of statutory rape in the first degree, § 566.032, RSMo Supp. 1995 and 2000; three counts of statutory sodomy in the first degree, § 566.062, RSMo 2000; one count of the class B felony of child molestation in the first degree, § 566.067, RSMo 2000; and one count of the class C misdemeanor of assault in the third degree, § 565.070 RSMo 2000.[1] (L.F. 9-11). Appellant was tried by a jury on March 1-4, 2004, before Judge Robert H. Dierker, Jr.. (L.F. 4-6). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

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[1] The state filed an order of *nolle prosequi* on the charge of assault in the third degree. (L.F. 4). The trial court issued a directed verdict dismissing one count of statutory rape and two counts of statutory sodomy. (L.F. 4). The child molestation charge was amended and submitted to the jury as attempted child molestation. (L.F. 5). The remaining counts were submitted to the jury as charged in the indictment. (L.F. 5).

T.W. was thirteen years old in November of 1999 and was living at 2017 Agnes in the City of St. Louis. (Tr. 136-37). Appellant is T.W.'s uncle and was sporadically living at that address. (Tr. 130, 136). T.W. slept in the basement of the house. (Tr. 137). The basement had a doorway from which people could enter or exit without going through the upstairs portion of the house. (Tr. 147-48). Sometime prior to Thanksgiving, T.W. was sleeping in her bed when Appellant woke her up. (Tr. 137-38). Appellant picked T.W. up underneath her arms and put her on a dresser. (Tr. 139). T.W. was seated with her back towards the mirror and Appellant was standing in front of her. (Tr. 141).

Appellant pulled T.W.'s legs apart and tried to force his penis inside her vagina. (Tr. 141-42). T.W. tried to push Appellant off of her, and he told her that it was just going to hurt a little bit, that it always hurts the first time, but that it doesn't hurt all the way through. (Tr. 142-43). Appellant forced himself inside of T.W. and stayed inside of her between one and two minutes. (Tr. 143). T.W. tried to get Appellant to stop by threatening to go upstairs and tell somebody. (Tr. 146). Appellant told her that no one else was home. (Tr. 146). After Appellant finished, T.W. went upstairs and laid down on a couch. (Tr. 147). The next morning, she told her grandmother that Appellant had sex with her. (Tr. 148, 150).

M.O. was a friend of L.W., another of Appellant's nieces. (Tr. 193, 253, 256). M.O. was thirteen years old on December 31, 2001. (Tr. 196-97). M.O. was spending the night with L.W. at L.W.'s house. (Tr. 196). M.O., L.W., and L.W.'s younger sister, A.W., were alone at the house. (Tr. 256-57). M.O. and A.W. started drinking some wine from a bar in the house and one of the girls vomited in L.W.'s hair. (Tr. 258). L.W. sent M.O. next door

to her grandmother's house to get some conditioner. (Tr. 259). M.O. was gone about fifteen to twenty minutes. (Tr. 260). When she returned, her demeanor was more quiet and she wanted to go to bed. (Tr. 260). M.O. told L.W. that she and Appellant had sex on the couch. (Tr. 261). M.O. was crying and appeared to L.W. to be scared. (Tr. 262).

M.O. again stayed with L.W. the weekend of February 2-3, 2002. (Tr. 262). The two girls were sitting on a couch, watching television, when Appellant arrived. (Tr. 264). He asked for some cigarettes, and L.W. left the room to get some. (Tr. 264). Appellant was sitting next to M.O. on the couch, and he put his fingers in her vagina and kept them in there for a couple of minutes. (Tr. 228-31, 265-66). M.O. tried unsuccessfully to push his hand away. (Tr. 232).

Later that night, M.O. was asleep in bed when she awoke to find Appellant on top of her. (Tr. 209-10). Appellant pulled down M.O.'s shorts and began having sexual intercourse with her. (Tr. 210-11). Appellant also kissed M.O. and fondled her breasts over her clothing. (Tr. 215). L.W. was sleeping in a separate bed in the same room, and woke up to find Appellant having intercourse with M.O. (Tr. 214, 266-67). L.W. turned on the light and threw something at Appellant. (Tr. 214, 267). He left the room. (Tr. 214, 268).

Following the presentation of evidence at trial, the jury found Appellant guilty of statutory rape in the first degree for having sexual intercourse with M.O. on December 31, 2001; statutory rape in the first degree for having sexual intercourse with M.O. on the weekend of February 2-3, 2002; attempted child molestation in the first degree for

attempting to subject M.O. to sexual contact on February 2-3, 2002;[2] and statutory rape in the first degree for having intercourse with T.W. in November, 1999. (L.F. 5, 9-10). The jury acquitted Appellant on a charge of statutory sodomy in the first degree for engaging in deviate sexual intercourse with M.O. on February 2-3, 2002. (L.F. 5, 9).

The jury assessed punishment at ten years imprisonment on the two counts of statutory rape involving M.O., three years imprisonment for the count of attempted child molestation, and fifteen years imprisonment on the statutory rape count involving T.W. (L.F. 5-6). The trial court held a sentencing hearing on April 22, 2004, where it ordered that the sentences assessed by the jury on the three counts involving M.O. be served concurrently, and that the fifteen-year sentence for the statutory rape of T.W. be served consecutively with the other sentences. (L.F. 6, 85-88).

Appellant filed an appeal with the Missouri Court of Appeals for the Eastern District. (L.F. 7, 91). That court issued an opinion affirming Appellant's convictions and sentences on June 28, 2005. *State v. Reeder*, 2005 WL 1513104 (Mo. App. E.D., June 28, 2005). Appellant filed a "Motion for Transfer to the Supreme Court," in the Court of

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[2] That count was tied to Appellant attempting to fondle M.O.'s breasts while having intercourse with her. (Tr. 381).

Appeals on July 13, 2005. The Court of Appeals granted the Motion on August 19, 2005, and transferred the case to this Court on August 22, 2005.

ARGUMENT

Appellant's constitutional right to present a full defense was not infringed because he was able to present extrinsic evidence that some of the state's witnesses had made prior false allegations against others, including false allegations of rape, in that Appellant was permitted to cross-examine the witnesses on whether they had made any prior false allegations of rape and whether they had made false accusations involving non-sexual conduct, and once the witnesses denied making those claims Appellant presented testimony from the mother of one of the witnesses, who alleged that those false charges had been made.

Appellant argues that he was denied his constitutional right to present a full defense when the trial court restricted his use of prior false allegations by the complaining witnesses to attack their credibility. This claim of constitutional error was raised for the first time in Appellant's brief filed in the Court of Appeals for the Eastern District. No claim of error, constitutional or otherwise, relating to this issue was included in Appellant's motion for new trial. (L.F. 80-83).

A. Standard of Review.

A claim that a defendant's constitutional rights were violated must be included in his motion for new trial to be properly preserved for review. *State v. Middleton*, 998 S.W.2d 520, 525 (Mo. banc 1999). Appellant contends that he could not raise the issue in his new trial motion because the constitutional right he seeks to vindicate was not recognized as such prior to this Court's decision in *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004), which

was issued while this case was pending on appeal before the Court of Appeals for the Eastern District. (L.F. 7, 91). *Long* does not, as Appellant contends, set forth a new constitutional principle. The case was presented to this Court on an abuse of discretion claim. *Id.* at 30. The only constitutional reference in the opinion was the statement that: "[a]n evidentiary rule rendering non-collateral, highly relevant evidence inadmissible must yield to the defendant's right to present a full defense." *Id.* at 31. Where *Long* differs from previous cases is the declaration that extrinsic evidence of prior false allegations is a central issue, rather than a collateral issue, in cases where a witness's credibility is a key factor in determining guilt or acquittal. *Id.* at 30-31, *compare*, *State v. Wolfe*, 13 S.W.3d 248, 258 (Mo. banc 2000) (specific acts of misconduct are collateral except where there is proof of bias or relevance, in which cases extrinsic evidence may be admissible). Even in cases where witness credibility is a central issue, the trial court retains wide discretion in determining the legal relevance of prior false allegations, and their admissibility at trial. *Id.* at 32.

Long thus did not proclaim a new constitutional principle, but instead revised the previous evidentiary rule that generally barred extrinsic evidence of prior false allegations. *Long*, 141 S.W.3d at 31. As for the constitutional right that Appellant says he seeks to vindicate, that right has existed in the Missouri Constitution since its adoption in 1945, and derives from a similar article in the Constitution of 1875. Article I, § 18(a), Missouri Constitution (1945). Even without *Long*, the constitutional claim was available for Appellant to have raised before the trial court.

Since Appellant did not preserve his constitutional claim, it is only reviewable for plain error. *Middleton*, 998 S.W.2d at 525; Supreme Court Rule 30.20. The plain error rule is to be used sparingly and does not justify a review of every point that has not been properly preserved. *State v. Johnson*, 150 S.W.3d 132, 136 (Mo. App. E.D. 2004). Plain errors are evident, obvious, and clear, and must be determined based on the facts and circumstances of each case. *Id.* An appellate court will decline to review a defendant's claim of plain error where the claim fails to establish on its face substantial grounds to believe a manifest injustice or a miscarriage of justice occurred. *Id.* Because even properly preserved constitutional error can be harmless error, it follows that unpreserved constitutional error does not mandate invocation of the plain error rule in every case. *State v. McKinley*, 689 S.W.2d 628, 632 n.3 (Mo. App. E.D. 1984). Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome-determinative. *Deck v. State*, 68 S.W.3d 418, 428 (Mo. banc 2002).

B. Appellant did present extrinsic evidence of prior false allegations of rape.

Appellant argues that *Long* is on all fours with the present case. (Appellant's Sub. Brf., p. 16). In fact, there are substantial and significant differences between this case and *Long*. The defendant in *Long* wanted to present testimony from three witnesses that the victim in his rape and sodomy case had made previous false allegations of sexual or physical assault. *Long*, 140 S.W.3d at 29-30. The trial court excluded the testimony after an offer of proof, and the defendant's attorney did not cross-examine the victim about the prior allegations. *Id.* at 30. Unlike the defendant in *Long*, Appellant did present extrinsic

evidence of prior false allegations made by two of the state's witnesses. Also unlike *Long*, Appellant's attorney did not object to the trial court's rulings on extrinsic evidence and did not make any offers of proof. Appellant also has not identified in his brief any extrinsic evidence that he was prevented from offering.

Appellant presented testimony from T.M.P., the mother of victim T.W. (Tr. 327-344). T.W.'s mother testified that T.W. had made false accusations against her to the police, and that investigators from Children's and Family Services had investigated allegations made by her daughter. (Tr. 327-28, 330). She also testified that T.W. had accused several men of rape: T.M.P.'s former husband; two of T.M.P's former boyfriends; her former brother-in-law; and her sister's former boyfriend. (Tr. 331, 339, 342-43). She said that T.W. later admitted to her that the allegations against three of the men were false. (Tr. 340, 342-43). T.W.'s mother also testified that L.W., who testified as a witness for the state, had also accused one of T.M.P.'s former boyfriends of rape. (Tr. 339).

T.M.P. said all those men lived in the same house with her and T.W., and that they were strict with the girls, causing T.W. and L.W. to make accusations that would precipitate the men leaving the house. (Tr. 344). T.M.P. also testified that she enlisted Appellant's help in running-off young men who were hanging around her house to visit with T.W., L.W. and with the other victim, M.O. (Tr. 332-35). She said that this made the girls mad, and that they would tell lies about the Appellant all the time. (Tr. 336).

Unlike the defendant in *Long*, Appellant was also allowed to cross-examine T.W. and L.W. about whether they had made previous accusations against other men of rape or other

inappropriate sexual contact . (Tr. 159-160, 173, 295-96). Appellant was also permitted to question T.W. about whether she had accused her mother of dealing drugs, and whether she had ever called the police or the Division of Family Services on her mother. (Tr. 160-61). The trial judge also indicated that if T.W. denied making any such reports, that he would consider allowing Appellant to introduce any independent evidence that such reports were, in fact, made. (Tr. 171-72). T.W. did deny making those reports, but Appellant never attempted to offer any evidence other than T.M.P.'s testimony to prove that T.W. did make those reports. (Tr. 161). Appellant's attorney, in fact, indicated to the trial court that his plan was to impeach T.W. with inconsistent statements and then bring in her mother to testify that the false reports did happen. (Tr. 163). He never identified any other witnesses or any other piece of extrinsic evidence that he wished to offer.

Appellant has not, in fact, identified any specific piece of extrinsic evidence that he was prevented from offering. The fact that he did not include any claim of error in his new trial motion underscores that Appellant was able to present all the extrinsic evidence he wished to offer. Appellant can not show any error, plain or otherwise, from any trial court ruling relating to the use of extrinsic evidence.

C. Trial court did not abuse its discretion in limiting the scope of Appellant's cross-examination of the state's witnesses.

Appellant also complains that the trial court improperly restricted the scope of his cross-examination of the state's witnesses about any prior false accusations that they may have made. The trial court allowed Appellant to cross-examine one of the victims, T.W., as

to whether she had made past accusations against family members involving matters other than rape or sexual misconduct, but limited that questioning to incidents that occurred prior to September of 2000. (Tr. 169). That was the date when T.W. actually disclosed to authorities that Appellant had raped her. (Tr. 167-68). The record does not indicate that either M.O. or L.W. had made any false accusations involving non-sexual matters, and Appellant's counsel did not attempt to question them about any such accusations. (Tr. 251-53, 271-99, 302-04, 305-06).

The scope of cross-examination concerning matters that may bear on a witness's credibility rests within the discretion of the trial court. *State v. Jackson*, 925 S.W.2d 856, 866 (Mo. App. W.D. 1996). *Long* does not remove that discretion:

> A prior false allegation could be so remote in time or made under circumstances so dissimilar to the charged offense that the prejudice outweighs the probative value. As with any other relevancy ruling, trial courts retain wide discretion in determining the legal relevance of prior false allegations.

Long, 140 S.W.3d at 31-32.

Under the circumstances of this case, the trial court did not abuse its discretion in limiting the time frame for cross-examination of non-sexual accusations made by the witnesses. Appellant's counsel did not object to the time restriction when it was imposed by the trial court, he did not indicate to the trial court that he desired to cross-examine the witness on any events occurring after September of 2000, and Appellant has not identified

in his brief any specific incident about which he was unable to inquire. (Tr. 167-69). Even if such incidents did exist, they would have had little, if any, additional probative value in light of the matters on which Appellant was able to cross-examine T.W.

Appellant was allowed to cross-examine T.W., without limit, about prior false accusations of sexual misconduct, and to present extrinsic evidence about those accusations, as well as false accusations involving matters unrelated to sexual misconduct. (Tr. 159-160, 173-74, 327-43). If there was additional evidence of false accusations involving non-sexual conduct after September 2000, that evidence was cumulative to what was presented. A trial court does not abuse its discretion in limiting the admission of cumulative evidence. *State v. Nicklasson* 967 S.W.2d 596, 619 (Mo. banc 1998).

Appellant has not shown that the trial court committed any error, plain or otherwise. He also has not shown how the trial court's rulings changed the outcome of the trial, since he was able to present to the jury evidence that T.W. and L.W. had made false allegations of rape against other men, and that T.W. had made false accusations against her mother on matters unrelated to sexual misconduct.

D. *Long* should be applied prospectively.

In its opinion affirming Appellant's conviction and sentence, the Court of Appeals for the Eastern District determined that *Long*, which was decided while this case was pending on appeal, announced a new procedural rule which should be applied prospectively. *Reeder*, 2005 WL1513104 at *5. (App., A14-15). The Eastern District found the trial court did not err in properly applying the rule of evidence existing at the time of trial. *Id.*

(App., A15). Appellant's Substitute Brief raises the issue of whether *Long* should be applied prospectively or retrospectively. (Appellant's Sub. Brf., pp. 17-20). That issue, however, is not ripe for this Court's determination because the trial court actually complied with *Long* by allowing Appellant to present extrinsic evidence of prior false allegations by the complaining witnesses, including prior false allegations involving non-sexual matters. If this Court does determine to address the prospective/retrospective issue, the trial court should be affirmed because, as the Court of Appeals correctly held, *Long* is entitled to prospective application only.

This Court has the authority to determine whether a decision changing a rule of law is to be applied retrospectively or prospectively. *State v. Walker*, 616 S.W.2d 48, 48 (Mo. banc 1981). Where this Court fails to indicate whether the new rule is to be applied retrospectively or prospectively, that determination hinges on whether the new rule is procedural or substantive. *Id.* at 49. Procedural rules are given prospective application only, while substantive rules are given both prospective and retrospective application. *Id.*

Appellant argues that *Long* should be applied retrospectively because it involved vindication of a constitutional right. As more fully argued above in the discussion of the standard of review, *Long* did not announce a new constitutional principle, but held that in *some* cases, extrinsic evidence of prior false accusations is not a collateral issue and thus not subject to the general rule that extrinsic evidence of prior misconduct is collateral and inadmissible in most circumstances. *Long*, 140 S.W.3d at 30-31; *Wolfe*, 13 S.W.3d at 258.

The Eastern District correctly noted that *Long* created a new evidentiary rule. *Reeder*, 2005 WL 1513104 at *5. (App., A14-15). This Court has long held that, "evidentiary rules . . . are part of the legal machinery employed in the trial of a case and regarded as procedural." *State v. Shafer*, 609 S.W.2d 153, 157 (Mo. banc 1980); *Walker*, 616 S.W.2d at 49. There has also been a suggestion that retrospective application of changes to the law should be limited to those cases where the issue has been preserved. *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994). As noted above, any constitutional claim Appellant may have was not properly preserved.

Appellant nonetheless argues that changes in evidentiary law can be applied retrospectively when the change corrects a serious flaw in the fact-finding process. His argument for retrospective application of *Long* is based on the supposition that excluding extrinsic evidence of prior false allegations represents such a serious flaw. But decisions dealing with the admissibility of certain types of evidence have been found to be procedural and entitled only to prospective application. *Shafer*, 609 S.W.2d at 157; *Walker*, 616 S.W.2d at 49. The *Ussery* case on which Appellant relies did not involve an admissibility issue, but dealt with whether a jury should be allowed to determine the voluntariness of a confession without an independent determination by the court. *State v. Ussery*, 452 S.W.2d 146, 148-49 (Mo. 1970). The United States Supreme Court had, subsequent to the trial in *Ussery*, held that allowing a jury to determine the voluntariness of a confession violated the Fourteenth Amendment. *Id.* at 149, *citing*, *Jackson v. Denno*, 378 U.S. 368, 377 (1964). In holding that the rule in *Jackson* should be applied retrospectively, this

Court noted that the opinion itself stood for that proposition, and that the United States Supreme Court applied the new rule retroactively to a number of cases on the same day that *Jackson* was decided. *Ussery*, 452 S.W.2d at 149.

Ussery is thus distinguishable in two ways. It involved a new decision that was specifically given retrospective application by the issuing court, and that new decision was one that found a particular practice to always be violative of the Constitution. *Long*, by contrast, is silent on whether it should be applied prospectively or retrospectively. It also did not set out a hardfast rule that all evidence of prior false allegations is constitutionally required to be admitted in every case. It instead expanded the circumstances under which such evidence may be admissible, and it still made admissibility subject to the trial court's determination of relevancy. *Long*, 140 S.W.3d at 31. *Long* thus falls in line with the other cases given prospective-only application by this Court. *Shafer* involved application of a decision that changed the rules on application of the privilege as to testimony of a witness-spouse in criminal trials. *Shafer*, 609 S.W.2d at 157, *citing*, *State v. Euell*, 583 S.W.2d 173, 177 (Mo. banc 1979). *Walker* dealt with application of a previous opinion finding that a stipulation cannot make evidence admissible that would otherwise be inadmissible. *Walker*, 616 S.W.2d at 49, *citing*, *State v. Biddle*, 599 S.W.2d 182, 188 (Mo. banc 1980).

Because *Long* declares a new rule regarding the admission of evidence, and not a new constitutional principle, it is entitled to prospective application only, and the trial court did not err in applying the evidentiary rules in force at the time of trial.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) The attached brief complies with the limitations set forth in Supreme Court Rule 84.06, in that it contains 4,314 words as calculated pursuant to the requirements of Supreme Court Rule 84.06; and

(2) A copy of the brief has been supplied to the Court in diskette form on a diskette that has been scanned and found to be virus free; and

(3) A true and correct copy of the attached brief and a diskette containing a copy of this brief were mailed on September 19, 2005, to:

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Respectfully submitted,

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