No. SC88922

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

PHILIP RAY COUCH,

Appellant.

Appeal from Audrain County Circuit Court
Twelfth Judicial Circuit
The Honorable Keith M. Sutherland, Judge

SUBSTITUTE RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of child molestation in the first degree, § 566.067, RSMo 2000, and two counts of endangering the welfare of a child in the first degree, § 568.045, RSMo 2003, obtained in the Circuit court of Audrain County, Missouri, the Honorable Keith M. Sutherland presiding, for which appellant was sentenced to fifteen years of imprisonment for child molestation and five years of imprisonment for each count of endangering the welfare of a child, the sentences to run consecutively (L.F. 45-47). After an opinion by the Court of Appeals, Eastern District, this Court took transfer of this case. Therefore, jurisdiction lies in the Supreme Court of Missouri. Mo.Const. art. V, § 10, Supreme Court Rule 83.04.

STATEMENT OF FACTS

Appellant, Philip Ray Couch, was charged by amended information with child molestation in the first degree, § 566.067, RSMo 2000, statutory sodomy in the first degree, § 566.062, RSMo 2000, two counts of endangering the welfare of a child in the first degree, § 568.045, RSMo 2003, attempted victim tampering, § 575.270, RSMo 2000, and violation of a full order of protection, § 455.538, RSMo 2000 (L.F. 29-31). On September 12-13, 2006, the cause was tried before a jury in the Circuit Court of Audrain County, the Honorable Keith M. Sutherland presiding (Tr. 7, 225).

Appellant does not dispute the sufficiency of the evidence to support his convictions (App.Br. 21, 35). Viewed in the light most favorable to the verdicts, the following evidence was adduced.

Appellant and his wife had several children, among whom were V.C., born July 28, 1989 (Tr. 110), S.C., born March 9, 1991 (Tr. 129), and J.C., born September 12, 1992 (Tr. 87). They lived in a rural area outside of Laddonia, Missouri (Tr. 130).

From the end of March 2003 to 2005 appellant and his wife did not have sexual relations (Tr. 204-205).

In March 2003, just after S.C.'s twelfth birthday (Tr. 135-36), she and her siblings were sleeping outside the house in an RV with appellant (Tr. 135). Appellant told her she should share his bed because it was larger (Tr. 135). While S.C. slept, appellant reached under her pajamas and put his finger in her vagina, which woke her up (Tr. 136, 138-39).

At other times over the next two years appellant would come into S.C.'s room and rub her breasts and vaginal area over her clothes (Tr. 139-42). The last time it happened

was near the end of April 2005 (Tr. 142). When appellant touched her that time she told him to stop (Tr. 142). Appellant did stop, and then he got up and went into V.C.'s room (Tr. 142).

In early March of 2005, when V.C. was 15 years old, appellant took her with him when he drove to Joplin to pick up a part for his car (Tr. 122, 124, 160, 196). On the way there appellant made comments to V.C., such as, "[You're] gonna have a good time tonight" (Tr. 121). The comments made V.C. uncomfortable, and she told appellant she wanted to go back home (Tr. 121-22). Appellant became angry because he would then have to pay to ship the car part (Tr. 121-22). V.C. relented and continued on with him (Tr. 122).

She and appellant spent that night in a hotel in Springfield (Tr. 122, 160, 196). While they were there appellant pushed V.C. down, grabbed her legs, spread them open, and said if he wanted to do something she was not big enough to stop him (Tr. 122-23).

About six weeks later, around April 25, 2005 (Tr. 113-15), V.C. fell asleep on a couch in the living room (Tr. 115). When appellant came home from work he found her asleep, and started rubbing her vaginal area with his hand over her pajamas (Tr. 116-17). V.C. woke up, jumped up, and pushed him away (Tr. 118). Appellant did not say anything, but just went to his room (Tr. 118).

The next night, appellant went to where V.C. was sleeping, put his hand under her clothes and started rubbing her vagina (Tr. 118-19). She pushed him away and got up (Tr. 119). Appellant asked her, "Where you going?" (Tr. 119). She said she was going to her room, and she left (Tr. 119).

About nine days later, on May 5, 2005, J.C., who was twelve years old (Tr. 87-88), was having trouble sleeping (Tr. 88). She went into her parents' bedroom and started to wake up her mother (Tr. 88). Appellant woke up and called her over to him, and she got in bed and lay down next to him (Tr. 88-90).

After a few minutes, appellant reached under her bra and rubbed her breasts and reached under her panties and touched her vaginal area (Tr. 90-92). J.C. got out of the bed, and appellant grabbed her arm and tugged her back into the bed with him (Tr. 92). He then put his hand under her underwear and rubbed her breasts and vagina again (Tr. 92).

Appellant asked her what she was "gonna do?" and she said she would probably just go upstairs and watch a movie and go to sleep (Tr. 93). Then she left the room and went upstairs (Tr. 93).

J.C. went to S.C.'s room and told her what happened (Tr. 93). S.C. put J.C. between herself and the wall, and J.C. fell asleep (Tr. 93). When J.C. woke up, S.C. and V.C. were in the room, and the three of them talked about what had happened (Tr. 94). Their older brother, Ronald, came in the room and found J.C. crying (Tr. 94, 149). V.C. told Ronald what appellant had done to J.C., and V.C. and S.C. told him that appellant had molested them, too (Tr. 149). Ronald left the house and went to DFS (Tr. 149). Although none of his sisters had asked him to report the abuse, he reported the abuse (Tr. 149-50).

On the day the report was made, Officer John Pehle briefly talked to J.C. about the abuse (Tr. 154-55). Less than a week later, Jan Stock, a licensed professional counselor employed by the Rainbow House, interviewed J.C. about the abuse (Tr. 279).

After the report was made, appellant moved in with his oldest daughter, Ceri Garrison, who lived a half-mile away on the same road (Tr. 286, 292-93). An order of protection prohibiting appellant from having any contact with S.C., V.C., or J.C. was served on him on May 7, 2005 (Tr. 187).

The last week in May, appellant called the house while J.C. was on the phone, and when he heard her voice he told her, "don't hang up" (Tr. 97). He asked her if she loved him and missed him (Tr. 97-98). Then he told her if she wanted him to come back home, she would have to lie and say "it didn't happen" (Tr. 97-98). Appellant asked her what she said at the Rainbow House, and whether she said anything about appellant being asleep when it happened (Tr. 183). When J.C. said yes, appellant replied, "good. That will help me out a lot." (Tr. 183-84). Appellant told her "it was all on her and if she could lie then he would be back home" (Tr. 183-84).

Then appellant asked J.C. to meet him on Monday at their barn at 10:00 p.m. (Tr. 98-99). J.C. mentioned the phone call to her mother's friend, who then called police (Tr. 176). The police came to the barn at the wrong time on Monday night and did not find appellant there (Tr. 176).

On June 14, 2005, Lisa Clervi, a licensed psychologist, met with J.C., and later met with S.C. and V.C. (Tr. 228-30). During cross-examination, appellant accused the therapist of making J.C. believe she had been molested, and asked whether S.C. and V.C.

fit “to a T” the profile of those who fabricate allegations (Tr. 239-42). During re-direct examination, Ms. Clervi explained that S.C. and V.C. wanted nothing more than to be in loving homes, and would have done nothing to sabotage the family (Tr. 245).

In June 2005, appellant’s wife found, in the glove box of their RV, letters from appellant addressed to herself and their children (Tr. 207-208). In his letter to J.C. appellant told her, “I do not really know what happened that night. I think you know I would never have done anything to hurt you or scare you intentionally” (Tr. 209). The letter also told her that he loved her (Tr. 209). In his letter to S.C. appellant told her that “I am aware that in the past at some point I must have made you feel uncomfortable” and that he was “sorry for anything I have done that made you feel that way” (Tr. 210). In his letter to V.C., appellant said, “I do believe the time we spent together was special” and that because she was the oldest child at home it was up to her to “keep the family going and together” (Tr. 210).

At the close of the State’s case, appellant called his grown daughter with whom he lived, Ms. Garrison, who testified that appellant could not have used his cell phone to call J.C. at the end of May because he had lent his cell phone to her (Tr. 287-89). Ms. Garrison also said that in June 2005 she talked to J.C., and J.C. said she wished she had never told about the abuse (Tr. 290).

Appellant took the stand, denied all the charges, said he only wrote the apology letters because he was depressed, and said he may have molested J.C., but if he did it was only in his sleep (Tr. 295-97, 299-302).

Appellant also called Tiffany Tice, who said that V.C. told her that appellant had removed her pants when they were in the hotel room and he told her he could rape her because she was too small to do anything about it (Tr. 315).

Appellant also called Martin Leverett, who said he had been friends with appellant for "a couple two or three years," and that appellant had a good reputation in the community (Tr. 319-20).

At the close of the evidence, instructions, and arguments of counsel, the jury found appellant not guilty of statutory sodomy, tampering, and violation of an order of protection, but found him guilty of child molestation in the first degree and both counts of endangering the welfare of a child in the first degree (L.F. 37-42). Appellant waived jury sentencing (L.F. 6). At the sentencing hearing the trial court sentenced appellant to fifteen years of imprisonment for child molestation in the first degree and five years of imprisonment for each count of endangering the welfare of a child in the first degree, with the sentences to run consecutively (Tr. 370-71, L.F. 45-47).

After an opinion by the Court of Appeals, Eastern District, this Court took transfer of the case.

ARGUMENT

POINT I

The trial court did not abuse its discretion in granting the prosecutor's motion to exclude testimony from Randy Zumwalt and Ronald Couch about alleged prior false allegations of one of the victims, V.C., because appellant failed to lay a foundation for this testimony in that he never questioned V.C. about the allegations. The ruling was also not an abuse of discretion because appellant did not prove, by a preponderance of the evidence, that the allegations were false and that the victim knew they were false. In any event, appellant was not prejudiced.

Appellant claims that the trial court abused its discretion in granting the prosecutor's motion to exclude testimony from Randy Zumwalt and Ronald Couch (App.Br. 21). Appellant claims that testimony from these men showed that V.C. had made prior false allegations of sexual and physical abuse (App.Br. 21). Appellant argues that he was entitled to present this evidence to show that V.C. had lied in the past, and was therefore lying at trial when she said appellant sexually assaulted her (App.Br. 21).

But appellant never asked V.C. about these allegations, and, in fact, chose not to call her as a witness at the pre-trial hearing on this issue (Tr. 65-67). Therefore, he did not lay any foundation for the admission of this testimony. Further, the trial court was well within its wide discretion when it found that the testimony of the two men did not meet the requirements for admission under *State v. Long*, 143 S.W.3d 27 (Mo.banc 2004) (Tr. 68-69). Finally, the admission of this testimony did not prejudice appellant as to the charges for any of the three victims.

1. Facts

Just before voir dire there was a discussion in chambers about appellant's desire to adduce evidence concerning allegedly false allegations made by one of the victims, V.C. (Tr. 14). Appellant's attorney said he intended to call Randy Zumwalt, V.C.'s uncle, to testify that V.C. accused him of raping her, but that he did not (Tr. 14). He said he intended to call Ronald Couch, V.C.'s brother, to testify that V.C. falsely accused Rocky Zumwalt, who at the time was her adopted father, of physically abusing her (Tr. 15). Appellant's attorney then said, "if push comes to shove I may call the child, [V.C.], to inquire of her about false accusations she made against Rocky Zumwalt" (Tr. 15).

The prosecutor stated that "late yesterday evening" was the first he knew that Ronald Couch and V.C. would be needed at a pretrial hearing, and that he had been trying to contact them since that time to have them come earlier to the courthouse (Tr. 17). The prosecutor said he had "filed a motion to exclude that evidence" (Tr. 17). The prosecutor argued that the evidence was irrelevant, and the trial court said, "I think Mr. Hamlett's still entitled to make his offer of proof" (Tr. 21).

Appellant then called Randy Zumwalt (Tr. 22). Appellant's attorney asked Mr. Zumwalt if "at a point approximately five years ago [V.C.] accused you of raping her" (Tr. 23). He said he did not rape her and never had any sexual contact with her (Tr. 23). Appellant's counsel then asked how long ago the allegations were made, and he answered, "I was guessing about six or seven years ago" (Tr. 23).

On cross-examination Mr. Zumwalt admitted he had a conviction for burglary in the second degree and that he refused to talk to the prosecutor's investigator unless he

had an attorney (Tr. 24-25). He admitted that V.C. had spent the night at his house (Tr. 25). He agreed that the allegation might not have involved rape, but actually involved touching her on her vagina (Tr. 25-26).

On re-direct examination, appellant's attorney asked if Mr. Zumwalt understood that V.C. accused him of touching her on her vagina, and Mr. Zumwalt said yes (Tr. 26). Appellant's attorney asked him if he understood that she also accused him "of actually raping her," and Mr. Zumwalt said, "No, I didn't. You know, I didn't know that much, you know." (Tr. 26-27). Appellant's attorney asked,
"But you've never had any sexual contact with her?" and Mr. Zumwalt said, "None whatsoever." (Tr. 27).

When Mr. Zumwalt was finished testifying, the trial court asked appellant's attorney if he had another witness at that time (Tr. 28). Appellant's attorney said, "I think we're going to have to wait because I don't believe that either [V.C.] or [Ronald] Couch are here" (Tr. 28).

During the lunch break appellant's attorney called Ronald Couch (Tr. 58). He asked Ronald Couch whether "in the year 2000 . . . [V.C.] made allegations of physical abuse against Rocky Zumwalt . . . to various state authorities, social workers, case workers, etc.?" (Tr. 59). Ronald Couch said V.C. did (Tr. 59). Ronald Couch said V.C. originally told some neighbors about the physical abuse, and that this started the investigation (Tr. 60). Ronald Couch said that later V.C. told him that Rocky Zumwalt had not physically abused her (Tr. 60). Ronald Couch said that he was removed from Rocky Zumwalt's home in part because of V.C.'s allegations (Tr. 60, 62).

On cross-examination, Ronald Couch said that he thought that V.C. said that Rocky Zumwalt "had whipped her with a switch," and that the reason she made that accusation "was that she wanted to be with her grandma" (Tr. 62). He said he did not know whether V.C. had any evidence of being hit with a switch (Tr. 63). He said he did not know whether V.C. "really made it up or not . . . [he only knew] she told [him] that" (Tr. 63).

On redirect examination, Ronald Couch said that he did not know whether V.C. had told other people that Rocky Zumwalt had hit her, but that he knew that when the Division of Family Services talked to her she told them she had been abused (Tr. 64).

On re-cross examination, Ronald Couch said that V.C. did not like being in foster care and wanted to get out of it (Tr. 65).

The trial court asked appellant's attorney if he wanted to call any other witnesses, and he said he would "rest at this time" (Tr. 65-66). The prosecutor said he did not have any witnesses (Tr. 66). Appellant's attorney then argued that because the prosecutor did not call V.C., the testimony of Randy Zumwalt and Ronald Couch was unrebutted (Tr. 66). The prosecutor told the trial court that he chose not to call V.C., but that if the trial court required "additional evidence" he would "ask leave to open the evidence" (Tr. 67).

Appellant's attorney claimed there was a "Division of Family Services record where they investigated [V.C.'s] allegation of physical abuse . . . and they removed her from his custody and care and found that he had physically abused the child" (Tr. 67).

The prosecutor argued that Ronald Couch said V.C. "told him something" but that he did not know "what really happened" (Tr. 68). The prosecutor again offered to call V.C. if necessary (Tr. 68).

The trial court then made the following findings on the admissibility of the testimony of Randy Zumwalt:

> First of all, as to the allegations against Randy Zumwalt I don't think his testimony that oh, I didn't do anything seven years ago or six years ago if his testimony was that it was either six or seven years ago is enough to prove that any allegation was false. I don't think that's been made by a preponderance of the evidence in any respect.
>
> We're talking about what circumstances evidence would be admissible that would otherwise violate what amounts to the rape shield statute is what it amounts to I suppose. So I don't think Rocky, uh, Randy, excuse me, Randy Zumwalt's testimony as to those allegations is admissible.

(Tr. 68).

The trial court made the following findings on the admissibility of the testimony of Ronald Couch:

> As to the—Assuming that what Ronald Couch testified to that there were allegations that Rocky Zumwalt had hit [V.C.] with a switch that meets part of the requirements to have this testimony admissible in that there were in fact prior allegations. There's a possibility they're false. I'm not sure they've been shown by a preponderance of the evidence to be false or that the victim knew they were

> false; and in addition they are not the same sort of allegations that are involved in this case. And that may be the most important thing. It's not prior allegations of child molestation or sexual misconduct of some kind. So I don't think it's appropriate to allow that testimony, either.

(Tr. 69). The trial court then said: "The sum total is I'm not going to allow the testimony or cross-examination of the victim as to any purported alleged false accusations in years past" (Tr. 69).

Appellant's attorney said, "I'd like to make a record that I'm objecting to the Court's ruling. . . . and I would ask that the Court deem the record thus far serve as my offer of proof at trial" (Tr. 69-70). The trial court said, "We consider the evidence we've heard already on the motion as an offer of prove[sic] is what you're talking about" (Tr. 70). Appellant's attorney said, "I'm just trying to preserve the record" (Tr. 70). The trial court answered, "I will consider that an offer of proof. I don't see any reason to have that same testimony just repeated almost verbatim again. . . . So I will consider the testimony we've heard from Randy Zumwalt and Ronald Anthony Couch on your motion also to be an offer of proof at trial. . . . without having to repeat the same testimony (Tr. 70-71).

Appellant's attorney did not ask for a continuing objection to the trial court's pre-trial ruling that he could not cross-examine V.C. about these issues (*see* Tr. 69-71). When V.C. testified, appellant's attorney did not ask her any questions on this issue, nor did he ask to approach the bench and ask the trial court to reconsider its ruling, nor did he make any offer of proof whatsoever as to what V.C. would answer if questioned regarding the alleged prior false allegations. (*see* Tr. 124-27).

2. Standard of review

> The determination of whether to admit evidence is within the sound discretion of the trial court. A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. This Court's direct appeal review is for prejudice, not mere error, and the trial court's decision will be reversed only if the error was so prejudicial that it deprived the defendant of a fair trial. Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial.

Murrell v. State, 215 S.W.3d 96, 109-10 (Mo.banc 2007), citations omitted.

3. Law on admission of extrinsic evidence of prior bad acts of the victim

"[E]xtrinsic evidence of prior, specific acts of misconduct [of a witness] is generally inadmissible" in Missouri. *Williams v. State*, 168 S.W.3d 433, 441 (Mo.banc 2005). In *State v. Long*, 140 S.W.3d at 31-32, this Court carved out a narrow exception to this rule. Under *Long*, even if the victim does not put her character in issue, a defendant can still impeach her with extrinsic evidence prior false allegations, but only in limited circumstances. *Id.*

There are several requirements for this exception to apply. The threshold requirement is that the witness sought to be impeached must be the victim or prosecuting

witness. *Williams v. State*, 168 S.W.3d at 441. The next requirement is that the defendant must lay a foundation for the impeachment evidence by asking the victim whether he or she made the allegations and whether they were false. *State v. Long*, 140 S.W.3d at 32, n. 7.

Next, the defendant must prove, by a preponderance of the evidence, that the victim made a false allegation and that the victim knew that the allegation was false. *Id*. at 31. In deciding whether to admit the evidence, the trial court must consider other factors including the remoteness of the prior false allegations, the circumstances under which the prior allegations were made, and the similarity of the prior allegations to the ones in the case at bar. *State v. Long*, 140 S.W.3d at 32-33.

In making these determinations, the trial court can believe or disbelieve all, part, or none of the testimony of any witness, whether uncontradicted or not. *See State v. Johnson*, 207 S.W.3d 24, 44 (Mo.banc 2006) (on review of a motion to suppress, deference is given to trial court's superior ability to judge the credibility of witnesses) *State v. Crawford*, 68 S.W.3d 406, 408 (Mo.banc 2002) (when the trial court is the finder of fact, it determines credibility and weight to give testimony, and may believe all, some, or none of the testimony of any witness); *State v. Nunnery*, 129 S.W.3d 13, 18 (Mo.App. S.D. 2004) (in determining whether evidence should be suppressed, conflicts in the evidence and credibility of witnesses are matters for the trial court to resolve); *Anderson v. State*, 84 S.W.3d 501, 505 (Mo.App. S.D. 2002) (at postconviction hearing trial court may believe or disbelieve any evidence, whether contradicted or undisputed).

The trial court should also consider whether the evidence would otherwise be barred by the rape shield statute. *See State v. Alberts*, 722 N.W.2d 402, 410, note 3 (Iowa 2006) (stating that a defendant seeking to impeach a victim with prior false allegations of sexual misconduct was required to comply with Iowa's rape shield statute). Missouri's rape shield statute, § 491.015, RSMo 2000, requires a written motion accompanied by offer of proof.

This Court has not set out any precise formula to which the trial court's findings on this issue must conform. *See State v. Taylor*, 929 S.W.2d 209, 223 (Mo.banc 1996) (in postconviction proceedings, motion court's findings and conclusions need not conform to a "precise formula," but should be sufficient to provide meaningful review).

Even if all these factors are established, the trial court may still exercise its wide discretion and decide to exclude the evidence. "The sole fact that evidence is logically relevant does not require its admission." *State v. Rousan*, 968 S.W.2d 831, 848 (Mo.banc 1998). "If evidence pertaining to collateral matters brings into a case new controversial matters which would result in confusion of issues . . . or cause prejudice wholly disproportionate to the value and usefulness of the offered evidence, it should be excluded." *State v. Rousan*, 961 S.W.2d at 848.

4. Appellant failed to lay a foundation for this evidence when he chose not to make an offer of proof regarding V.C.'s testimony about the allegations

The rule is that a defendant must "first cross-examine the witness prior to introducing extrinsic evidence of prior false allegations." *State v. Long*, 140 S.W.3d at 32, n. 7; *Strahl v. Turner*, 310 S.W.2d 833, 844 (Mo. 1958). If the victim admits that she

made the allegations and that they were false, a defendant may not call any other witnesses on the issue. *Hoover v. Denton*, 335 S.W.2d 46, 48 (Mo. 1960); *State v. Wilson*, 105 S.W.3d 576, 585 (Mo.App. S.D. 2003); *Litton v. Kornbrust*, 85 S.W.3d 110, 114 (Mo.App. W.D. 2002).

Appellant did not question V.C. about the alleged prior false allegations. Thus, he did not lay any foundation for the admission of the testimony from Randy Zumwalt and Ronald Couch. Without the foundation, he cannot prove that their testimony would have been admissible, or that the trial court's exclusion of it was an abuse of discretion.

Appellant argues that the trial court's ruling was based on the relevancy of the evidence, and therefore, any attempt to lay a foundation for the testimony by questioning the victim would have been "futile" (App.Br. 25-26). Appellant's argument proves too much—a foundation is not automatically futile any time a trial court rules against the admission of the evidence. The evidence from other witnesses may be so poor that there could never be an abuse of discretion in excluding it. But where a defendant is challenging a trial court's ruling, he must show that the evidence would have been admissible. He cannot prove this if he did not establish that there was an adequate foundation to support the evidence.

For example, if a victim is questioned about prior false allegations, she may testify that she made the allegations and that they were true, and may explain the circumstances to the satisfaction of the trial court, cementing the trial court's finding that the evidence was not a prior false allegation under *Long*. A defendant cannot decline to call the

victim, then ask the appellate court to assume that all her testimony would have been favorable to him, and seek to overturn the trial court's ruling on that assumption.

The majority in *Long* did not require the foundation to be laid because it would have been "futile." *State v. Long*, 140 S.W.3d at 32, n. 7. But, of course, the trial court in *Long* did not have the benefit of the opinion in *Long*. The trial court's ruling was that the evidence was irrelevant and not proper character evidence. *State v. Long*, 140 S.W.3d at 30. Essentially, this ruling was that the evidence was categorically inadmissible as a matter of law—a law which *Long* changed. In *Long*, the most favorable testimony possible from the victim would not have changed the trial court's ruling, leading the majority in *Long* to find that laying the foundation would have been futile.

In contrast, in appellant's case, the trial court applied the factors in *Long* to the evidence of the prior false allegations, and found that evidence to be deficient. It was not "futile" for appellant to lay a proper foundation, it was absolutely essential to prove that the trial court erred in applying *Long*. Therefore, appellant's reliance on the language in *Long* is misplaced and cannot excuse his lack of foundation.

Appellant argues that the trial court ordered him not to cross-examine the victim about the allegations, so he was foreclosed from laying the foundation (App.Br. 24-25). However, appellant was given the opportunity to call V.C. before trial, and never did. Appellant never asked for the opportunity to question V.C. about these issues in order to make a record. The trial court's ruling regarding cross-examination was not that appellant was not allowed to make a record, but only that appellant could not raise this

issue in front of the jury. Therefore, the trial court's ruling cannot save appellant's failure to lay a foundation for the admission of his testimony.

Without the proper foundation from V.C., appellant cannot show that the testimony from Randy Zumwalt and Ronald Couch was admissible and that the trial court abused its discretion in excluding it. Therefore, appellant's point must fail.

5. The trial court did not abuse its discretion in excluding the testimony from Randy Zumwalt and Ronald Couch

Even if appellant had not utterly failed to lay a foundation for the testimony, the testimony was still inadmissible.

A. Randy Zumwalt's testimony was inadmissible

The trial court properly excluded testimony from Randy Zumwalt. Randy Zumwalt's testimony was insufficient to even establish what allegations were made—he said he "didn't know that much" about what V.C.'s allegations actually were (Tr. 26). He said on direct examination that she had alleged that he raped her (Tr. 23), but on cross-examination he said that the allegations were only that he touched her on her vagina (Tr. 26). He was the only witness, and he admitted he did not know what the allegations actually were. The trial court could properly consider his equivocation in determining whether the nature of the prior allegations was established.

He also said that the allegations happened six or seven years earlier (Tr. 23), when V.C. was ten or eleven years old (Tr. 110). The trial court could properly find that this allegation was too remote, and was made when the victim was too young, for the allegation to have much probative value, even if false. In fact, even in *State v.*

Montgomery, 901 S.W.2d 255, 257 (Mo.App. E.D. 1995), a case upon which appellant relies (App.Br. 30-31), the appellate court affirmed the trial court's determination that prior false allegations of the victim occurring seven years prior was too remote to be probative.

Also, Randy Zumwalt had a motive to lie—to avoid prison. He refused to speak to the prosecutor's office without an attorney (Tr. 25), showing that he was aware he might incriminate himself. He also had a prior felony conviction for burglary (Tr. 24), which also affected his credibility. The trial court thought that his mere denial was insufficient to establish, by a preponderance of the evidence, that the allegations were false (Tr. 68). This determination of credibility was within the province of the trial court—in deciding whether appellant met his burden, the trial court was not required to believe everything Randy Zumwalt said. *See State v. Nunnery*, 129 S.W.3d 13, 18 (Mo.App. S.D. 2004) (in determining whether evidence should be suppressed, conflicts in the evidence and credibility of witnesses are matters for the trial court to resolve); *Anderson v. State*, 84 S.W.3d 501, 505 (Mo.App. S.D. 2002) (at postconviction hearing trial court may believe or disbelieve any evidence, whether contradicted or undisputed).

Because Randy Zumwalt was not even sure what the allegations were, because the allegations were too remote and made when the victim was too young, and because Randy Zumwalt had every motive to lie and was utterly lacking in credibility, the trial court did not abuse its discretion in finding that his testimony failed to meet the requirements of *Long*.

B. Ronald Couch's testimony was inadmissible

As shown above, Ronald Couch testified that his "understanding" was that V.C. had told their neighbors that Rocky Zumwalt had "whipped her with a switch" (Tr. 62). Ronald Couch said that V.C. later told him that Rocky Zumwalt had not physically abused her (Tr. 60). Ronald Couch admitted that he had no knowledge of whether Rocky Zumwalt had actually hit her with a switch (Tr. 63). The prosecutor's examination suggested that V.C. only recanted because she wanted to leave foster care (Tr. 65).

The trial court assumed that Ronald Couch's testimony was sufficient to establish that there were prior allegations (Tr. 68-69). The trial court then stated, "There's a possibility they're false. I'm not sure they've been shown by a preponderance of the evidence to be false or that the victim knew they were false" (Tr. 69). The trial court's finding may be somewhat inartful, but it still shows that the trial court did not think that appellant had proven, by a preponderance of the evidence, that the allegations were, in fact, false, and that the victim knew they were false. *See State v. Taylor*, 929 S.W.2d 209, 223 (motion court's findings need not follow a precise formula). Because appellant did not put on any witness who knew whether or not the abuse had occurred, and because the trial court could reasonably believe V.C. told the truth about the allegations and then recanted, the trial court did not abuse its discretion in finding that appellant had not shown that there was a prior false allegation.

The trial court also considered the similarity factors set out in *Long* and found that the allegations of physical abuse were, "not the same sort of allegations that are involved in this case" (Tr. 69). The trial court thought that the dissimilarity "may be the most important thing" (Tr. 69).

This finding was not an abuse of discretion. The similarity of the allegations to the charges is one of the factors specifically set out in *Long* for the trial court to consider. *State v. Long*, 140 S.W.3d at 32-33. In fact, the similarity of the allegations to the charges is, perhaps, the most important factor to consider in all cases involving prior false allegations. *See State v. Long*, 140 S.W.3d at 33, *dissenting opinion* (every state that has allowed extrinsic evidence of false allegations has required the allegations to be the same as or similar to the charges). If the allegations are not similar to the charges, the probative value of those false allegations is vastly diminished, and the *Long* exception begins to swallow the rule.

Evidence of prior false allegations is, after all, propensity evidence—prior bad acts used to show action in conformity therewith. *Compare State v. Ellison*, 239 S.W.3d 603, 606 (Mo.banc 2007) ("Evidence of prior criminal acts is never admissible for the purpose of demonstrating the defendant's propensity to commit the crime with which he is presently charged"). It would be difficult to find a victim who had not told an untruth at some point in the past. To keep the defendant's trial from turning into a smear-the-victim event, the *Long* court instructed the trial court to consider the similarity of the allegations in determining whether to exclude the evidence of prior false allegations. Therefore, the trial court was well within its discretion to give greater weight to the fact that the allegedly false allegations regarded physical abuse, not sexual abuse, and so were not probative enough to warrant admission.

6. In any event, appellant did not suffer prejudice

Appellant claims that if the evidence should have been admitted, all three of his convictions must be reversed (App.Br. 34). However, whether or not V.C. had made any prior false allegations was completely irrelevant to whether S.C.'s and J.C.'s testimony was true. Accordingly, he could not have suffered prejudice as to his two convictions pertaining to these victims, Counts I and III.

Appellant argues that he was prejudiced as to them and must be retried on all charges, because the jury might only have believed S.C. and J.C. because V.C. also accused appellant (App.Br. 34). However, the jury was presumably[1] instructed to consider the evidence for each count separately, MAI-CR 304.12, and appellant's speculation falls far short of evidence that the jury violated its instructions. *State v. Forrest*, 183 S.W.3d 218, 229 (Mo.banc 2006) (jurors are presumed to follow the trial court's instructions).

Appellant also claims that the prosecutor "sought to bolster" each victim's testimony "with the testimony of the others" by "arguing the counts as a package" (App.Br. 33-34). However, an examination of the transcript pages appellant cites reveals that the prosecutor did not say that any victim should be believed just because there were other victims. The prosecutor stated that appellant violated "the trust he had with his daughters" (Tr. 325), set out the time when each charge occurred (Tr. 332), and he argued

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[1] Appellant has not provided this Court with a copy of the instructions. *State v. Loveall*, 105 S.W.3d 569, 574 (Mo.App. S.D. 2003) ("An appellant has the duty to file the transcript and prepare a legal file sufficient to permit determination of the issues raised.").

that the jury should consider all the evidence in determining whether appellant was guilty (Tr. 333). There was no argument that if the jury believed one victim the jury must also believe the others. Therefore, appellant has not shown prejudice as to the counts involving S.C. and J.C.

Further, appellant did not suffer prejudice as to the count involving V.C. There was no motive for V.C. to lie about these charges. The most appellant could suggest is that V.C. was angry at him because he did not let her go to town by herself, but V.C. testified that she did not mind the limit because she did not go to town anyway (Tr. 125). After appellant suggested that V.C.'s disclosure fit the pattern of a false allegation (Tr. 241), the state's expert explained that V.C. would not have made a false allegation to split up the family, because she wanted nothing more than to be in a loving family (Tr. 245).

Also, Randy Zumwalt was utterly lacking in credibility—no reasonable juror would have acquitted appellant just because they had heard his bare assertion that he did not molest V.C., even though she said he did, and even though she spent the night at his house. And Ronald Couch's testimony was extremely weak—he did not even know whether the physical abuse had occurred, his testimony demonstrated that V.C. had a motive for recanting, and the state could have easily called an expert to explain why child victims recant (Tr. 21). Therefore, considering the strength of the state's case and the little probative value of the testimony regarding the alleged prior false accusations, there is no reasonable appellant would have been acquitted had this testimony been admitted. Accordingly, appellant did not suffer prejudice, and his point must fail.

Point II

The trial court did not abuse its discretion in allowing Lisa Clervi to testify, in response to appellant's cross-examination, that S.C.'s and V.C.'s allegations did not fit the pattern of a false allegation because the question and answer were not narrative in that they called for and related specific facts, and the testimony did not invade the province of the jury because it did not ask whether the girls' disclosures were true, but only asked for specific facts tending to show they did not fit the pattern of false allegations. In any event, appellant was not prejudiced.

Appellant claims that the trial court abused its discretion in allowing Lisa Clervi to testify as to specific reasons the disclosures of S.C. and V.C. did not meet the pattern of someone who makes a false allegation (App.Br. 35). Appellant argues two issues: that the prosecutor's question and Ms. Clervi's answer were narrative, and that her answer invaded the province of the jury (App.Br. 35-40). However, the question and answer were not narrative—the prosecutor's question called for specific information, and Ms. Clervi's answer was specific and brief. Also, her answer did not invade the province of the jury, and even if it had, appellant's improper cross-examination opened the door to it.

1. Facts

At trial the prosecutor called Lisa Clervi, a licensed psychologist with a master's degree in counseling psychology (Tr. 228). Ms. Clervi testified that she had counseled J.C., S.C., and V.C., since they disclosed appellant's sexual abuse (Tr. 229-30). On direct examination the prosecutor did not question Ms. Clervi about whether the disclosures of V.C. or S.C. were consistent with sexual abuse (Tr. 234).

On cross-examination, appellant's attorney questioned Ms. Clervi as follows:

Q. (By Mr. Hamlett) Well, since you've been trained in this area what characteristics do children who are making false allegations exhibit?

A. They usually have no—they usually have no emotional reactions at all. They change their stories repeatedly. They usually have a hidden or ulterior motive. They have a lack of detail in their disclosures. They verbalize frequently to peers or other people around them that they have disclosed falsely. The allegations can be baseless. It depends really on the child.

Q. Well, haven't you just with the exception of having admitted to their friends that they disclosed falsely haven't you described [S.C.] and [V.C.] to a T?

A. I don't believe so.

(Tr. 241).

On redirect examination, the prosecutor questioned Ms. Clervi about appellant's assertion as follows:

Q. Miss Clervi, Mr. Hamlett asked you if you felt that things that he said to you fit [V.C.] and [S.C.] to a T and you said you didn't believe so. Is that right?

A. That's correct.

Q. Okay. Specifically what—what about [V.C.]? Can you explain what specific characteristics about [V.C.] that you disagree with Mr. Hamlett's suggestion?

A. There is nothing more that [V.C.] wanted than to stay—

[appellant's objections were overruled]

A. When children have an ulterior motive of disrupting their family it's because they want to be out of that family, which is something that she never wanted and something that [S.C.] never wanted. They wanted to be in an adoptive family where they would be loved and cared about for the rest of their lives and would [have] done nothing to sabotage that.

(Tr. 244-45).

2. Standard of review

The determination of whether to admit evidence is within the sound discretion of the trial court. A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. This Court's direct appeal review is for prejudice, not mere error, and the trial court's decision will be reversed only if the error was so prejudicial that it deprived the defendant of a fair trial. Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial.

Murrell v. State, 215 S.W.3d 96, 109-10 (Mo.banc 2007), *citations omitted*.

"The trial court has broad discretion in determining the . . . extent and scope of cross-examination[.]" *Black v. State*, 151 S.W.3d 49, 55 (Mo.banc 2004). The trial court cannot use this discretion to foreclose a party's right to cross-examination, or to prevent a party from eliciting relevant and material facts. *Id*.

3. The question and answer were not narrative

"There is no ironclad rule mandating that testimony be taken in an interrogatory manner. The form of examination is a matter committed to the discretion of the court." *State v. Clark*, 693 S.W.2d 137, 142 (Mo.App. E.D. 1985); *State v. Sours*, 946 S.W.2d 747, 751 (Mo.App. S.D. 1997).

The prosecutor's question asked for specific information about [S.C.] that did not fit a false disclosure (Tr. 244). This question did not call for a narrative response, but called for specific information. Even if it had called for a narrative, it would have been within the trial court's discretion to allow the question. *State v. Clark*, 693 S.W.2d at 142; *State v. Sours*, 946 S.W.2d at 751.

Miss Clervi's response was that when children have an ulterior motive of disrupting the family, it is because they want to be out of that family, and [S.C.] and [V.C.] did not want to sabotage their family (Tr. 245). This answer was brief—it only seemed longer due to appellant's three interruptions claiming that it was narrative or not responsive (Tr. 244-45). Therefore appellant's claim that the question and answer were inappropriately narrative has no merit.

4. Ms. Clervi's testimony did not invade the province of the jury, and even if it had, appellant's improper cross-examination opened the door to this evidence.

"[T]he general rule is that expert testimony is inadmissible if it relates to the credibility of witnesses because it invades the province of the jury." *State v. Link*, 25 S.W.3d 126, 143 (Mo.banc 2000).

In criminal cases charging sexual abuse of children, there are two types of expert testimony that typically give rise to a challenge: general and particularized.

> General profile testimony describes a generalization of behaviors and other characteristics commonly found in victims of sexual abuse which is usually admissible. "Particularized testimony is that testimony concerning a specific victim's credibility as to whether they have been abused." In most instances, this type of testimony, i.e., that which explicitly or implicitly vouches for a victim's credibility, is inadmissible.

State v. Price, 165 S.W.3d 568, 572-73 (Mo.App. S.D. 2005) (citations omitted). "[I]t is proper for a witness to testify to specific facts that discredit the testimony of another witness, as long as the witness does not comment directly on the truthfulness of another witness." *State v. Link*, 25 S.W.3d at 143.

Thus, in appellant's case, it was not improper for appellant to ask Ms. Clervi to explain the general characteristics of false allegations. *Id*. And appellant could have asked Ms. Clervi about specific facts that tended to show that the disclosures of S.C. and V.C. were false allegations. *Id*. But it was improper for him to go one step further and ask Ms. Clervi if the general characteristics of false allegations fit S.C. and V.C. "to a T" (Tr. 241). *State v. Link*, 25 S.W.3d at 143.

The prosecutor's question, on the other hand, did not ask Ms. Clervi whether she felt that the disclosures of S.C. and V.C. were true or false. Instead, it only called for specific facts that tended to show that their disclosures did not fit the pattern of false allegations. Accordingly, the question and answer did not invade the province of the jury.

Appellant argues that Ms. Clervi's testimony "is categorically stating that the child would not fabricate" (App.Br. 40). But the testimony did not directly state that the victims would not lie (Tr. 245). The testimony stated that the victims did not fit the model of those who fabricate because they wanted to stay in their families (Tr. 245). The prosecutor's question elicited a specific fact to show that the victims did not fit the model of those who make false allegations (Tr. 244-45). The jury could use this evidence in deciding whether or not the victims were lying, but Ms. Clervi did not invade the province of the jury in relating the specific fact which explained why the victims did not fit the profile of those who fabricate allegations. *State v. Link*, 25 S.W.3d at 143.

Even if the question and answer had invaded the province of the jury, Ms. Clervi's testimony was still permissible because appellant's improper cross-examination opened the door to it. When a defendant injects improper issues into a case, he may open the door to evidence which is otherwise inadmissible. *State v. Neff*, 978 S.W.2d 341, 347 (Mo.banc 1998). Here, the prosecutor's brief questioning on redirect examination was designed solely to counter appellant's improper questioning on cross-examination (Tr. 241, 244). The prosecutor's examination was extremely brief and exactly tailored to respond to appellant's questioning, and therefore did not exceed what was proper. Accordingly, the trial court did not abuse its discretion in allowing the admission of the evidence.

Appellant relies on *State v. Churchill*, 98 S.W.3d 536 (Mo.banc 2003) (App. Br. 39-40), but that case is distinguishable. In that case, the doctor who examined the victim of sexual abuse testified that the abuse "was real" and "had occurred to her." *Id*. at 538.

In contrast, Ms. Clervi never testified that the sexual abuse had occurred. She testified only to specific facts that tended to show that the disclosures of S.C. and V.C. did not fit the pattern of false disclosures.

Appellant also relies on *State v. Williams*, 858 S.W.2d 796, 798-800 (Mo.App. E.D. 1993) (App.Br. 38). But in that case the state's expert made repeated statements that "very rarely" do sexual abuse victims lie, "less than three percent" of sexual abuse victims lie, and that properly interviewed children "essentially don't lie." *Id*. In contrast, in appellant's case, Ms. Clervi never stated that S.C. and V.C. were telling the truth. She only responded to appellant's questioning to give a specific fact to show that their disclosures did not fit the pattern of false disclosures.

Accordingly, appellant's reliance on *Churchill* and *Williams* is misplaced.

5. In any event, appellant was not prejudiced

As shown above, the prosecutor's question, and Ms. Clervi's answer, were brief and isolated. The prosecutor never referred to the testimony in closing argument (see Tr. 325-334, 347-350). Appellant asserts that the prosecutor did highlight the testimony in closing argument (App.Br. 39), but an examination of the transcript to which appellant cites demonstrates that the prosecutor never referred to Ms. Clervi's testimony that S.C. and V.C.'s testimony did not fit the pattern of false allegations (Tr. 349). Rather, the prosecutor's argument only referred to her testimony regarding the general characteristics of abuse and disclosure (Tr. 349). There is no reasonable probability that this testimony changed the jury's verdict, especially when contrasted with appellant's improper

questioning on the issue (Tr. 241, 244). Therefore, appellant has not shown prejudice, and his point must fail.

CONCLUSION

In view of the foregoing, respondent submits that appellant's convictions and sentence must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,984 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of February, 2008, to:

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