IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC85620**
	)	
JEFFREY D. LONG,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEVENTH JUDICIAL CIRCUIT
THE HONORABLE MICHAEL J. MALONEY, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant incorporates by reference the jurisdictional statement from his opening brief.

STATEMENT OF FACTS

Appellant incorporates by reference the Statement of Facts from his opening brief.

POINTS RELIED ON

I.

The trial court abused its discretion in precluding Mr. Long from presenting crucial evidence of his innocence, namely evidence, through the proffered testimonies of Timothy Wilson, Sharrie Clark, and Officer Cummings, that Ms. Flower had falsely accused Mr. Wilson of sexually assaulting her, of physically assaulting her, and of threatening her, on three different occasions, and later recanted her accusations regarding all three events, in violation of Mr. Long's rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6th and 14th Amendments to the U.S. Constitution, in that this excluded evidence was relevant to challenge Ms. Flower's veracity and was relevant because it would have supported appellant's defense that Ms. Flower had a history or tendency to make false reports, including sexual allegations, either because of mental abnormality or alcohol impairment, and later recant them.

Morgan v. State, 54 P.3d 332 (Alaska App. 2002);

In the Matter of C.B.N., 499 A.2d 1215 (1985);

State v. Pierson, 85 S.W.2d 48 (Mo. 1935);

State v. Robinson, 835 S.W.2d 303 (Mo.banc 1992);

O'BRIEN, MISSOURI LAW OF EVIDENCE (3d ed.1996)

E. CLEARY, MCCORMICK ON EVIDENCE section 40 (1984); and

3A Wigmore at section 948.

II.

The trial court erred in overruling Mr. Long's motion for judgment of acquittal at the close of all of the evidence and in sentencing him upon his conviction for forcible rape, Section 566.030, because the State did not prove beyond a reasonable doubt that either Mr. Long or his codefendant (Manning) had sexual intercourse with Ms. Flower, in violation of Mr. Long's right to due process of law as guaranteed by the 14th Amendment to the United States Constitution and Art. I, Section 10 of the Missouri Constitution, in that there was insufficient evidence that any alleged penetration of Ms. Flower's sex organ was by either Mr. Long's or Mr. Manning's sex organ; Ms. Flower said that she did not think that either suspect had sexual intercourse with her, though she was not sure; no semen or sperm was found; and the examining nurse only testified that Flower's physical examination of her sex organ revealed abrasions of her labia and inflammation of the vagina, indicative of some sort of non-consensual sex act or forced penetration, but did not testify that such injuries were the result of penetration by the male sex organ as opposed to some other source.

Strawderman v. Com., 108 S.E.2d 376 (Va. 1959)

State v. Wright, 834 So.2d 974 (La. 2002)

Commonwealth v. Brown, 711 A.2d 444 (Pa. 1998)

State v. Robinson, 313 S.E.2d 571 (N.C. 1984); and

Section 566.010(4) and 566.030.

IV.

The trial court abused its discretion in not disclosing to the defense the psychological, psychiatric, and medical records of Deborah Flower (Exhibits Nos. 47, 49, 50), because such ruling violated Mr. Long's rights to confront the witnesses against him, to due process and a fair trial, to compulsory process, and to present a defense, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this precluded Mr. Long from fully exploring Flower's credibility, bias, and her ability to discern reality on the day of the charged offense and during her testimony. Mr. Long was precluded from discovering possible evidence of false reports, of a history of psychiatric disorders manifesting themselves in manipulative and destructive conduct, of mental disorders having a high probative value on the issue of credibility, and of mental defects that materially affected the accuracy of Ms. Flower's testimony or tended to produce bias in her testimony. Further, there was a waiver of the privilege since the jury was informed by the state, including through Ms. Flower's testimony, that she was "mentally handicapped," had "a caseworker through Tri-County," received "disability income," and was taking several medications for her disability.

United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988);

State v. Parker, 886 S.W.2d 908 (Mo.banc 1994);

State v. Newton, 963 S.W.2d 295 (Mo.App.E.D. 1997); and

State v. Robinson, 835 S.W.2d 303 (Mo.banc 1992).

ARGUMENT

I.

The trial court abused its discretion in precluding Mr. Long from presenting crucial evidence of his innocence, namely evidence, through the proffered testimonies of Timothy Wilson, Sharrie Clark, and Officer Cummings, that Ms. Flower had falsely accused Mr. Wilson of sexually assaulting her, of physically assaulting her, and of threatening her, on three different occasions, and later recanted her accusations regarding all three events, in violation of Mr. Long's rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6th and 14th Amendments to the U.S. Constitution, in that this excluded evidence was relevant to challenge Ms. Flower's veracity and was relevant because it would have supported appellant's defense that Ms. Flower had a history or tendency to make false reports, including sexual allegations, either because of mental abnormality or alcohol impairment, and later recant them.

Respondent asserts that "Even if appellant had the right ***to cross-examine the victim*** about the prior allegations, he was not permitted ***introduce extrinsic evidence*** to prove that the victim had a propensity to make false claims of crimes against her" (Resp. Br. at 16; emphasis in original).[1]

It is true that a general rule of evidence in Missouri is that while witnesses may be impeached by specific acts of misconduct if they relate to the truth and veracity of the witness, the acts may not be proved by extrinsic evidence. ***Rousan v. State***, 48 S.W.3d 576, 590 (Mo.banc 2001); **O'BRIEN, MISSOURI LAW OF EVIDENCE section 5-7 (3d ed.1996)**. Oddly, this results in the jury hearing about the prior false allegation if the witness admits it while testifying, whereas the jury does not hear about it if the witness testifies falsely about it. As a result, the witness's prior untruthfulness is shielded by the second lie. So, the general

[1] The majority of the United States allows the defendant, in differing forms and under differing circumstances, to cross-examine the complainant about other false allegations of sexual assault, some holding that evidentiary rules preventing evidence of specific acts of untruthfulness must yield to the defendant's right of confrontation and right to present a full defense. *See generally* Annotation, *Impeachment or Cross-Examination of Prosecuting Witness in Sexual Offense Trial by Showing that Similar Charges Were Made Against Other Persons*, 71 A.L.R.4th 469 (1989). As noted below, some of these states also allow a defendant to introduce extrinsic evidence of a complaining witness's prior false accusations.

rule rewards the witness for lying twice and denies to the jury valuable information in its determination of the witness's credibility. The witness's second lie allows that witness to appear more credible since the opposing party is unable to produce extrinsic evidence to expose the second lie to the jury. See, ***Morgan v. State***, 54 P.3d 332, 338 (Alaska App. 2002) (discussing whether the witness had to concede the prior allegations' falsity to be admissible – "[this] leaves a defendant at the mercy of the complaining witness's conscience. Even when there is overwhelming evidence that a prior accusation was false, there will be times when the complaining witness will not concede this point.").

Still, there are exceptions to the general rule prohibiting extrinsic evidence to impeach the witness by specific acts of misconduct. For instance, even Respondent admits (Resp. Br. at 17) that extrinsic evidence can be adduced to show the bias of the witness for making false accusations. ***Kuehne v. State***, 107 S.W.3d 285, 295 (Mo.App.W.D. 2003); ***State v. Hedrick***, 797 S.W.2d 823, 826 (Mo.App.W.D. 1990); **3A Wigmore** at section 948. *Also see*, ***State v. Wolfe***, 13 S.W.3d 248, 258 (Mo.banc 2000) (where there is proof of bias or relevance, specific acts of misconduct are not collateral).

The term "bias" refers to all forms of partiality that may be proven by extrinsic evidence. See e.g., **E. CLEARY, MCCORMICK ON EVIDENCE section 40 (1984)**. "Bias" includes favor, hostility, self-interest, and *corruption*. ***Id***. McCormick notes that self-interest in an extreme form may be manifested in "*corrupt*" activity by the witness such as the "making of other similar charges on

other occasions without foundation." **MCCORMICK section 40 at 87** (emphases added). The case law and the rationale of the corruption doctrine extend beyond incentives to fabricate that are associated personally with the defendant. ***In the Matter of C.B.N.***, 499 A.2d 1215, 1219 (1985). "The willingness to testify falsely goes to the core of the witness' credibility, regardless of his personal or pecuniary relationship with the defendant." ***Id***. *In accord*, ***Johnson v. Brewer***, 521 F.2d 556, 560-61 (8th Cir. 1975) (error to restrict extrinsic evidence concerning witness' alleged previous "frame-up" of innocent person).

In ***Morgan***, *supra*, the court noted that a number of jurisdictions have held that the complaining witness's prior false complaints of sexual assault constitute a special kind of prior falsehood that has particular relevance above and beyond the fact that it may indicate the witness's general character for dishonesty, and therefore allow extrinsic evidence.[2] 54 P.3d at 335. The ***Morgan*** court noted this result was consistent with the common-law doctrine that a party could present evidence of a witness's "corruption," a term that included evidence of the witness's pattern of presenting false legal claims. ***Id***.

[2] *Citing*, ***Smith v. State***, 377 S.E. 2d 158, 160 (Ga. 1989); ***People v. McClure***, 356 N.E.2d 899, 901 (Ill.App. 1976); ***Little v. State***, 413 N.E.2d 639, 643 (Ind. 1980); ***Miller v. State***, 779 P.2d 87, 89-90 (Nev. 1989); ***Beck v. State***, 824 P.2d 385, 388-89 (Okla.Crim.App.1991); ***State v. Izzi***, 348 A.2d 371, 372-73 (R.I. 1975).

Here, the false allegation evidence tendered by Mr. Long, and rejected by the trial court, involved the "making of other similar charges on other occasions without foundation," **MCCORMICK section 40 at 87**, and thus can be considered as going to the witness's bias (i.e., "corruption"). As a result, Mr. Long should have been allowed to adduce evidence, including extrinsic evidence, concerning the false allegations.

Extrinsic evidence is also admissible to contradict a witness's testimony by showing a lack of capacity. **O'BRIEN, MISSOURI LAW OF EVIDENCE section 5-9 (3d ed.1996)**. Defects in the mental capacity of the witness are provable too impeach the credibility of the witness and may be shown by extrinsic evidence. ***Id***; ***Turnbo by Capra v. City of St. Charles***, 932 S.W.2d 851, 855 (Mo.App.E.D. 1996); ***State v. Pierson***, 85 S.W.2d 48, 54-55 (Mo. 1935) (trial court erred in excluding evidence that witness was so mentally impaired that he could not give a trustworthy account of matters about which he undertook to speak).

Here, the evidence proffered by Mr. Long was designed, in part, to show that Ms. Flower's mental deficiencies caused her to either hallucinate, or be mistaken, or make false allegations. This evidence went to the heart of the defense and to contradict Flower's testimony by showing her lack of capacity to testify

truthfully. Mr. Long should have been able to show this to the jury through extrinsic evidence. ***Pierson***, 85 S.W.2d at 54-55.[3]

Further, even if this Court does not agree that the evidence went to Ms. Flower's "bias" or "lack of capacity," a number of jurisdictions allow a defendant to introduce extrinsic evidence of a complaining witness's prior false accusations. E.g., Alaska,[4] California,[5] Georgia,[6] Illinois,[7] Indiana,[8] Kansas,[9] Michigan,[10]

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[3] This Court in ***Pierson*** also held it was not necessary for the introduction of such impeaching evidence that a foundation therefore should have first been laid by questions propounded to the witness on cross-examination. 85 S.W.2d at 55.

[4] ***Morgan v. State***, 54 P.3d 332 (Alaska App. 2002).

[5] ***People v. Hurlburt***, 333 P.2d 82 (Cal.App. 1958) ("The courts have been quite liberal . . . in allowing the admission of evidence of the prior acts of the *defendant* toward the *prosecutrix*.... Equally relevant, and for the same reasons, is evidence that the prosecutrix has in the past lied about the type of acts charged to defendant." ***Id***., 333 P.2d at 87-88 (emphasis in original)).

[6] ***Smith v. State***, 377 S.E. 2d 158 (Ga. 1989) (evidence of prior false accusations is admissible to attack the credibility of the prosecutrix and as substantive evidence tending to prove that the instant offense did not occur; ***Strickland v. State,*** 422 S.E.2d 312 (Ga.App. 1992).

[7] ***People v. McClure***, 356 N.E.2d 899 (Ill.App. 1976).

Montana,[11] Nevada,[12] Oklahoma,[13] Rhode Island,[14] South Dakota,[15] and Virginia.[16]

This Court should follow those jurisdictions. As noted in ***People v. Hurlburt***, 166 Cal.App.2d 334, 333 P.2d 82 (1958), showings of possible motive and bias of the witness have been held admissible, but "None of these is of as great probative value or relevancy as evidence of prior false accusations of the

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[8] ***State v. Walton***, 715 N.E.2d 824 (Ind. 1999) (evidentiary rule preventing evidence of specific acts of untruthfulness must yield to defendant's Sixth Amendment right of confrontation and right to present full defense); ***Little v. State***, 413 N.E.2d 639 (Ind. 1980).

[9] ***State v. Barber***, 766 P.2d 1288, 1289-90 (Kan.App. 1989) (the confrontation clause of the Constitution requires this kind of impeachment).

[10] ***People v. Evans***, 40 N.W. 473 (Mich. 1888); ***People v. Mikula***, 269 N.W.2d 195 (Mich.App. 1978).

[11] ***State ex rel. Mazurek v. District Court of Montana***, 922 P.2d 474 (Mont. 1996).

[12] ***Efrain M. v. State***, 823 P.2d 264 (Nev. 1991).

[13] ***Beck v. State***, 824 P.2d 385 (Okla.Crim.App. 1991).

[14] ***State v. Izzi***, 348 A.2d 371 (R.I. 1975).

[15] ***State v. Chamley***, 568 N.W.2d 607 (S.D. 1997).

[16] ***Clinebell v. Commonwealth***, 368 S.E.2d 263 (Va. 1988).

same charge involved in the main case. Such evidence is not offered for the purpose of impeaching or discrediting the general character or reputation of the witness, but is offered to disprove the very charge before the court. It is relevant as to the state of mind of the prosecutrix."

In ***State v. Robinson***, 835 S.W.2d 303 (Mo.banc 1992), this Court implicitly approved of the allowance of extrinsic evidence of false accusations. In that case, the defendant attempted to have the trial court order the complainant to submit to psychiatric examination. ***Id***. at 305-307. This Court ruled that the trial court was without authority to order such an examination. ***Id***. In so ruling, however, this Court held that the general rules governing disclosure, competency, and the defendant's right to necessary expert assistance sufficiently protected the defendant's right to a fair trial. ***Id***. at 307. Regarding the disclosure component of the defendant's right to a fair trial, this Court noted that the defendant was entitled to discovery of the complainant's psychiatric record, which included previous apparently false reports. As a result, the defendant was able to present extrinsic evidence to the jury that a physician had treated the complainant regarding an alleged prior rape, for which he found no supporting physical evidence, and a police officer testified that the complainant had filed between six and seven complaints of alleged rapes, of which only the present offense resulted in charges, and the officer labeled the complainant a "chronic reporter." ***Id***. at 305-06.

Here, Mr. Long had similar evidence, yet he was unable to present it to the jury. Further, as noted in Point IV, Mr. Long was also prevented access to Ms. Flower's psychological and psychiatric reports, which apparently contained some evidence similar in nature to that proffered by Mr. Long (Tr. 401-02). As a result of that non-disclosure, Mr. Long was prevented from using those records to cross-examine or impeach Ms. Flower's credibility (See Point IV and cases discussed therein).

Respondent complains that Mr. Long "did not try to cross-examine the victim regarding her alleged past acts of untruthfulness, but instead only tried to prove the victim's alleged propensity to falsely accuse people through extrinsic evidence of those accusations." (Resp. Br. at 16). But a review of the complete record indicates that had Mr. Long attempted to cross-examine Ms. Flower, the State would have objected, and the trial court would have sustained the objection. Thus, the same result would have occurred: the jury would not hear the false allegations. So, the failure of Mr. Long to attempt cross-examine Ms. Long about the false allegations does not matter.

Detective Cummings testified in her offer of proof that in the summer following the alleged crime, Ms. Flower reported that she had been threatened by Timothy Wilson (Tr. 295-96). Ms. Flower later called Cummings and said that the suspect who had threatened her was not Wilson (Tr. 297-98). Defense counsel argued that the evidence was admissible to show "how Debbie Flower can make mistakes about what she claims are the facts" and that she "has a tendency to make

. . . either false or mistaken police reports" (Tr. 300-01). The trial court inquired why Mr. Long did not "inquire of Debbie Flower when she was on the stand about this," and defense counsel replied, "I'm not sure" and that he intended on having Wilson testify about it (Tr. 300). The trial court made no further comment on the failure to cross-examine Ms. Flower about this. The State objected to the evidence based upon relevance and because "you can't bring in specific instances of lies or untruths" (Tr. 299, 301). The trial court ruled that the evidence was inadmissible because it was not relevant and it was not "proper character evidence"; the court did not mention the failure to confront Ms. Flower as a basis of its ruling (Tr. 301).

During the next offer of proof involving Leland Tucker (see Point VI), when defense counsel indicated that he was going to ask Mr. Tucker about a bizarre rape allegation that Ms. Flower had concocted, the assistant prosecutor noted that Ms. Flower was not asked about it and so therefore it was hearsay (Tr. 326). When defense counsel asked the prosecutor, "Are you saying you would not have objected to that question if we asked her that?" the prosecutor replied, "Well, sure I would" (Tr. 326). When the trial court asked defense counsel about the failure to question Ms. Flower, defense counsel noted that Ms. Flower's answer would not matter (Tr. 326).[17]

[17] In other words, if Ms. Flower said the alleged prior rape had not happened, the jury would hear her admission about the false allegation. On the other hand if she

Later, Wilson testified in an offer of proof that about a year-and-a-half before trial, Ms. Flower falsely accused him of hitting her with a rock, which she later recanted (Tr. 360, 361). He also testified that after the date of the charged offenses, Ms. Flower accused him of threatening her (Tr. 357). Later, she recanted by leaving a voice message on Wilson's home telephone service (Tr. 358).

After Wilson's offer of proof was completed, regarding the alleged threat, the prosecutor objected that the proposed testimony was irrelevant and that it was hearsay regarding what Ms. Flower had said to Wilson (Tr. 365-366). The trial court ruled that it was not hearsay, but that testimony was not relevant and "comes real close to being evidence of specifics of untruthfulness" (Tr. 366). The trial court also sustained that State's objections to the rock incident (Tr. 366-367).

During Sharrie Clark's offer of proof, Ms. Clark testified that about two years before trial, Ms. Flower told her that Wilson had put his finger up her privates (Tr. 506-07). About two weeks after Ms. Flower's complaint, Ms. Flower called Clark and said that Clark must have misunderstood what she said (Tr. 508). Clark replied that she did not misunderstand especially since Ms. Flower had used vulgar words when she said where Wilson put his finger, particularly since Ms. Flower had said the same thing three or four times during the initial complaint (Tr. 508). Ms. Flower then said, "oh, no, well, that's not what I meant to say" (Tr.

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said that the prior rape had happened, Mr. Long should be able to present evidence that it did not happen.

508). Ms. Flower said Wilson was a friend and would never do anything like that to her (Tr. 508).

After initially sustaining the State's objection to Clark's testimony (Tr. 509), the trial court indicated that he had "an uneasy feeling about sustaining an objection about a recanted allegation of sexual abuse" (Tr. 511). The prosecutor objected that what Ms. Flower told Clark was hearsay and was not admissible since Ms. Flower was not questioned about it when she testified (Tr. 511-512). The trial court disagreed with the prosecutor's hearsay position (Tr. 512), and ruled that "a witness who has made up an allegation of sexual abuse in the past" is "admissible evidence" (Tr. 516-517). After a break, however, the trial court changed his mind, ruling that while the evidence was not hearsay, it was not admissible "[j]ust to show that people have made up things, even in an area that is closely related" (Tr. 517-518).

In the case of ***In the Matter of C.B.N.***, 499 A.2d 1215 (1985), the government argued that the appellant had not laid a foundation for the introduction of extrinsic evidence by questioning the witness about an alleged attempted blackmail. ***Id***. at 1220. Nevertheless, the appellate court did not find that the absence of a foundation was fatal to the appellant's argument. In so finding, the court noted the trial judge expressly ruled that the evidence was not relevant, thus indicating that a request to recall the witness would have been fruitless. ***Id***. at 1220-21. *Cf*., ***State v. Wolfe***, 13 S.W.3d 248, 274 (Mo.banc 2000) (Wolff, J., dissenting) (Wolfe's trial counsel did not try to impeach on this lie, but in view of

the trial court's ruling excluding the first incident, such an attempt probably would have been futile.").

Similarly, in ***People v. McClure***, 356 N.E.2d 899, 901 (Ill.App. 1976), on appeal the state argued that the defendant did not cross-examine the complainant about the prior incident and hence failed to lay a foundation for the witness' testimony. ***Id***. at 901. The court noted, "A foundation would have been necessary if the purpose of the proffered testimony had been to impeach something the complainant had said while testifying, but this was not its purpose. Its purpose, as we have said, was to show her predilection under certain circumstances to charge men with rape."

In ***State v. Pierson***, 85 S.W.2d 48, 54-55 (Mo. 1935), at trial, the state objected that witness could not be impeached by extrinsic evidence from a physician because it was inadmissible for any purpose and also because no foundation had been laid therefore by cross-examination, In reversing, this Court held, "From the whole record, it is clear that the state's objections and the court's rulings were not because of any informality or insufficiency of defendant's offers of proof, but because the court considered the evidence inadmissible." ***Id***. at 54.

As in ***McClure***, **C.B.N.**, and ***Pierson***, Mr. Long's failure to attempt to cross-examine Ms. Flower about the false allegations, should not be deemed fatal because the record indicates it would have been a futile act since the trial court would have prohibited such an inquiry based upon relevance. The record shows that the State would have objected to any cross-examination of Ms. Flower about

the false allegations and the trial court would have sustained those objections since the trial court believed that the subject matters were inadmissible.

Respondent also complains that Wilson's, Cumming's and Clark's offers of proof were defective because the contained hearsay (Resp. Br. at 19-20). The problem with that argument is that the trial court overruled or discounted the State's hearsay objections at trial (Tr. 366, 511-12). Regardless whether those rulings were correct or not, Mr. Long had a right to rely upon the court's rulings. If the trial court had sustained the hearsay objections, Mr. Long could have attempted to adduce other evidence, including recalling Ms. Flower to the stand to question her about her alleged statements to those witnesses. And, regarding Cumming's offer of proof, the State made not hearsay objection at trial, and thus should be precluded from raising such an objection now. *See,* ***State v. Basile***, 942 S.W.2d 342, 357 (Mo.banc 1997) (hearsay may be considered if there is no objection); ***Smith v. State***, 377 S.E. 2d 158, 159 n.2 (Ga. 1989) (noting that some of the proffered testimony may be subject to other objections, such as hearsay, "However, because the objection to this proffered evidence was based solely on the rape-shield law, and because the trial court excluded the testimony on that ground, we need not rule on this question now.").

II.

The trial court erred in overruling Mr. Long's motion for judgment of acquittal at the close of all of the evidence and in sentencing him upon his conviction for forcible rape, Section 566.030, because the State did not prove beyond a reasonable doubt that either Mr. Long or his codefendant (Manning) had sexual intercourse with Ms. Flower, in violation of Mr. Long's right to due process of law as guaranteed by the 14th Amendment to the United States Constitution and Art. I, Section 10 of the Missouri Constitution, in that there was insufficient evidence that any alleged penetration of Ms. Flower's sex organ was by either Mr. Long's or Mr. Manning's sex organ; Ms. Flower said that she did not think that either suspect had sexual intercourse with her, though she was not sure; no semen or sperm was found; and the examining nurse only testified that Flower's physical examination of her sex organ revealed abrasions of her labia and inflammation of the vagina, indicative of some sort of non-consensual sex act or forced penetration, but did not testify that such injuries were the result of penetration by the male sex organ as opposed to some other source.

Mr. Long was charged in Count I with forcible rape, **Section 566.030**, which alleged that "the defendant or Christian Manning had sexual intercourse with Deborah Flower" (L.F. 23). In his opening brief, Mr. Long claimed there was insufficient evidence that either Mr. Long or Mr. Manning had sexual

intercourse with Ms. Flower in that there was no evidence of "any penetration, however slight, of the female sex organ by the male sex organ." **Section 566.010(4)**.

There was no direct evidence of penetration by the male sex organ. Ms. Flower said she did not think that she was raped (Tr. 190-91, 240-42). When asked whether "either man force[d] their penis into [her] vagina," she testified she "didn't feel them go in my vagina" (Tr. 190). Further, she told Nurse Albaugh that she did not think her vagina was penetrated with a penis (Tr. 240-42). Although there was physical evidence that her vagina had been penetrated by something (Tr. 228-244), there was no sperm or semen found (Tr. 233-34, 239, 502-02), which is consistent with her belief that she was not raped. In the opinion below, the Western District noted that Ms. Flower's testimony would not allow a reasonable inference of penetration of the vagina by the male sex organ. ***State v. Long***, No. WD61050, slip op. at 5, (Mo.App.W.D. 2003). "Proof that something *might* have happened or *could have* occurred is not, without something more, sufficient to sustain the State's burden of proof beyond a reasonable doubt of each element of the crime." ***Id***.

Notwithstanding Ms. Flower's belief that there was no sexual intercourse, both Respondent and the Western District believe that Albaugh's testimony permits a reasonable inference of penetration by the male sex organ (Resp. Br. at 22-25; ***Id***., slip op. at 7-8). Albaugh testified that Ms. Flower suffered abrasions to the opening of her labia (Tr. 228). She described the location of the injuries

looking at the labia "as a clock," with the clitoris being twelve o'clock and the bottom near the rectum and anus being six o'clock (Tr. 228). The abrasions to Flower's labia were found "from five o'clock to seven o'clock" and Albaugh noted "that's indicative of, you'll see most of your injuries in that area from non-consensual sex acts." (Tr. 228). When asked, "Why is that?", she explained, "The positioning of a person, with non-consensual sex you have less cooperation between partners. You don't have the pelvic tilt upwards accommodating the penis. You don't have the lubrication of the vaginal area. So it's like getting a burn from friction in that area." (Tr. 228-229). Albaugh testified that the injuries were indicative of "non-consensual sex acts" or "sexual activity" or some kind of "forced penetration" (Tr. 228-29, 230-31, 242). But since she did not indicate that such acts would necessarily be caused by the male sex organ it is possible such "sex acts" or activity were other than by the male sex organ. Although this Court might speculate that the injuries might have been caused by either suspect's sex organ, this Court may not give the state the benefit of speculative or forced inferences. ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo.banc 2001).

Nevertheless, Respondent asserts, "This testimony describing the injuries to the lower portion of the labia shows that the injuries were caused by the downward thrusting of a penis from someone on top of the victim, as opposed to the direct insertion of an object." Mr. Long disagrees. Albaugh gave *generalized* testimony regarding how such types of injuries *could* occur; she did not state that it was her opinion that a penis was involved in this case. She was never asked, and never

testified, that in her opinion the injuries to Ms. Flower's vaginal area were from a penis instead of some other object. It would be shocking for an expert to testify that they could tell the injury was from a penis rather than another instrument when there is no evidence of semen, sperm, or something like that, which would indicate that a penis was used. Other items could have caused the abrasions. *See*, ***State v. Sipes,*** 651 S.W.2d 659, 661 (Mo. App. S.D. 1983) (physician testified that if a foreign body, such as a hammer, had passed the lips of the vagina it ordinarily would leave abrasions or scratches or bruising of the lining of the vaginal canal).

In ***Strawderman v. Com.***, 108 S.E.2d 376 (Va. 1959), a doctor's examination of the victim revealed "a somewhat bloody 'spread apart' vagina within which the hymen and surrounding tissues were torn." ***Id***. at 378. The doctor testified that "in his professional opinion the injury was caused by a male penis, adding that any other possibility was so remote that 'he did not give it a second consideration', there being no visible bruises, scratches or cuts in or about the area." ***Id***. The ***Strawderman*** court found this evidence insufficient to support a verdict of rape. ***Id***. at 379. The court noted that while the necessary element of sexual intercourse may be proved by circumstantial evidence, the proof must go beyond the mere showing of injury to the genital organs of the female and an opportunity on the part of the accused to have committed the offense. ***Id***. The Court concluded that the doctor's testimony that the injury to the victim was caused by a male penis was insufficient to prove the act of sexual intercourse beyond a reasonable doubt. ***Id***. In doing so, the court held, "it is a matter of

common knowledge, notwithstanding the doctor's statement, that the injuries described could have been caused by means other than the one related. [The doctor's] statement as to the cause of the injury to the child was, of necessity, pure speculation and guess." ***Id***. at 380. *In accord*, ***State v. Wright***, 834 So.2d 974, 986 (La. 2002) (medical experts are unable to determine anything more than that vaginal and anal wounds are "consistent with" having been caused by a penis); ***Commonwealth v. Brown***, 711 A.2d 444, 479-480 (Pa. 1998) ("Dr. Preston's testimony that someone penetrated Rafael's anus with a penis or an object similar to a broom handle established at best a 50 percent likelihood that Brown raped Rafael with his penis. This evidence is not sufficient, as a matter of law, to establish Brown's guilt of rape beyond a reasonable doubt."); ***State v. Robinson***, 313 S.E.2d 571, 574-575 (N.C. 1984) (examining doctor's testimony that a male sex organ "could" cause the vaginal condition he found was insufficient to submit the charge of the crime of rape to the jury).

Respondent principally relies upon ***State v. Dunn***, 7 S.W.3d 427, 430 (Mo.App.W.D. 1999) (Resp. Br. at 13). However, in that case, the victim testified that Dunn had earlier raped her in her upstairs bedroom and then afterwards, she testified, he forced her to return to the bedroom when he "tried to rape [her] again for quite a while." ***Id***. She elaborated that she thought that he stuck his penis in her vagina again, and "couldn't tell" how far his penis penetrated her vagina. ***Id***. Thus, it could be inferred that Dunn's penis penetrated the victim's vagina. However, in the instant case, Ms. Flower testified that she did not think that the

defendants raped her, nor did she infer that there was any penetration, or even attempted penetration, of her vagina by their penises.

State v. Stackhouse, 146 S.W. 1151, 1152 (Mo. 1912) also does not help respondent. There, the question was whether the evidence established *any* penetration. The case is also distinguishable because the victim testified that the defendant placed his privates between her legs, and also to other acts which tended to prove an assault with intent to rape. The two out-of-state cases cited by Respondent (Resp. Br. at 22-23) suffer from similar deficiencies.

IV.

The trial court abused its discretion in not disclosing to the defense the psychological, psychiatric, and medical records of Deborah Flower (Exhibits Nos. 47, 49, 50), because such ruling violated Mr. Long's rights to confront the witnesses against him, to due process and a fair trial, to compulsory process, and to present a defense, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this precluded Mr. Long from fully exploring Flower's credibility, bias, and her ability to discern reality on the day of the charged offense and during her testimony. Mr. Long was precluded from discovering possible evidence of false reports, of a history of psychiatric disorders manifesting themselves in manipulative and destructive conduct, of mental disorders having a high probative value on the issue of credibility, and of mental defects that materially affected the accuracy of Ms. Flower's testimony or tended to produce bias in her testimony. Further, there was a waiver of the privilege since the jury was informed by the state, including through Ms. Flower's testimony, that she was "mentally handicapped," had "a caseworker through Tri-County," received "disability income," and was taking several medications for her disability.

Respondent asserts that Mr. Long's claim is not properly preserved for appeal (Resp. Br. at 34-35). Respondent contends: (1) the only relief Mr. Long requested was an in camera review, which was done, so he received all the relief he requested; (2) Mr. Long's claim on appeal is different than that in his motion for new trial; and, (3) Mr. Long failed to raise the waiver issue at trial. Respondent is wrong. This point is properly preserved.

The record does *not* reflect that all Mr. Long wanted was an in camera review of the records. He knew that the law allowed the trial court to first make an inspection before making the records available to the defense. But that does not mean Mr. Long did not want the records disclosed so that he could use any relevant information in those records. The issue came up because Mr. Long subpoenaed Ms. Flower's mental health records and a motion to quash that subpoena was filed (Tr. 8-10, 287-92). Mr. Long noted that under "State v. Newton" he was entitled to "at least" an "in camera review" of the psychiatric records" (Tr. 10). The trial court indicated that he would review the records and disclose any "exculpatory information" to Mr. Long (Tr. 288, 289-90, 291-92). The trial court said that he would sort through the records and provide "exculpatory information that may be contained therein" (Tr. 292).

The trial court then asked Mr. Long what he thought the trial court should be looking for (Tr. 292). Mr. Long asked the trial court to look for: any record that Ms. Flower would drink alcohol with her medication; a history of her not remembering where she had been or hallucinating and coming up with stories that

turned out to not be true; a history of her abusing her prescribed medications with a history of hallucinations or not being truthful; or, any fixation about rape or psychological problems regarding rape or untrue claims about rape (Tr. 292-94). Clearly Mr. Long would not have requested the trial court to look for these matters if he did not also want disclosure of them.

After the trial court reviewed the Tri-County records, the trial court made available to the parties copies of "cumulative, and very short at that, statements as to what was said." (State's Exhibit No. 48; Tr. 400-01). That disclosure involved only a three sentence paragraph regarding Ms. Flower reporting the charged incident to her case manager (State's Exhibit No. 48; Tr. 400-01). The court noted, however, that he used the "same standards" he had used in ruling on Mr. Long's other motions in limine (Tr. 401). So, there "may be a lot of things in there," if Mr. Long had access to them, that he would attempt to introduce into evidence (Tr. 401). The trial court then made the following comment:

> If the rulings I've made on things that are before and before everybody don't stand up, if this case does result in a conviction and an appeal, and the Court of Appeals would say, Maloney [the trial judge] did it wrong in keeping out some of this evidence that you want in, you should ask that the material be reviewed again, and it should be reviewed again ahead of time before the next trial of case because if it's me, I would want, I'd have the guidance of the appellate court, and I might take a little different view of some of the things that are in there.

> If my rulings hold up, nothing that's in that has anything to do with the issues in this case. I'm referring to Exhibits 49 and 50. Forty-eight will be part of the record only to demonstrate to any reviewing Court the sole part of the record, the only part of the record that was revealed after the in-camera inspection.

(Tr. 401-02) (emphasis added).

Later, the trial court reviewed the Public Administrator's file so he could determine if there was anything in those records that would be "admissible in evidence" (Tr. 484-485). The trial court ruled that there was no exculpatory information contained therein (Tr. 518).

Thus, it is clear that an in camera review was not the end all. Mr. Long wanted all exculpatory evidence that the records contained so that he could use them at trial.

As noted above, Respondent also asserts Mr. Long's claim in his motion for new trial is different than that on appeal since the point on appeal complains of the failure to disclose records and the motion for new trial claims the trial court erred when it "excluded the jury from hearing" the evidence found in those records (Resp. Br. at 35). But clearly one cannot use evidence until it is first disclosed. Further, that claim begins, "The trial court erred to the prejudice of the defendant by excluding relevant portions of the alleged victim's psychiatric records" (L.F. 33-34; claim 6). This exclusion occurred when the trial court failed to disclose

those records, which is the claim raised on appeal. Mr. Long has not changed his theory on appeal.

Regarding the waiver issue, in discussing the timing of the issue, Mr. Long noted that after Ms. Flower testified, he expected the privilege would be waived (Tr. 9). The trial court responded that even if a person has waived the physician-patient privilege, that did not mean that everything in those records is admissible; relevancy still needed to be determined (Tr. 10). Thus, the topic of waiver was first brought up at trial.

Respondent also asserts that Mr. Long has failed to establish that the trial court's decision not to disclose the records prejudiced Mr. Long (Resp. Br. at 37). Similarly, Respondent argues that since Mr. Long could not have introduced any of the non-disclosed records, the outcome of the trial could not have been affected (Resp. Br. at 37).

Of course, because the records were sealed and neither party has viewed those records it is difficult to make argument, pro or con, as to whether the failure to disclose those records is prejudicial since neither party knows what is in the records. *See,* ***United States v. Strifler***, 851 F.2d 1197 (9th Cir. 1988) ("The court's ruling is unusual in the sense that, unlike most other rulings, the defendants do not have within their own control means to show whether the trial court may have erred. Only an appellate court, with access to the file, is in a position to say whether the trial court's decision was correct."). This Court can review those records and make that determination. ***State v. Parker***, 886 S.W.2d 908, 917

(Mo.banc 1994) (this Court inspected disciplinary records of officer); ***State v. Newton***, 963 S.W.2d 295, 297 (Mo.App.E.D. 1997) (this Court ordered the Eastern District to conduct such an investigation). Apparently, at least some of the records either involved prior bad acts or false allegations by Ms. Flower (Resp. Br. at 37, n.10; Tr. 401-02). Depending upon the circumstances and nature of these acts or allegations, the information could have been used during Ms. Flower's cross-examination. E.g., ***State v. Williams***, 492 S.W.2d 1 (Mo.App.E.D. 1973); ***State v. Wolfe,*** 13 S.W.3d 248, 274 (Mo.banc, 2000) (Wolff, J., dissenting). Also see the cases cited in Point I. *Cf.* ***State v. Robinson***, 835 S.W.2d 303, 306 (Mo.banc 1992) (duty to disclose exculpatory evidence required the disclosure of the psychiatric records of the victim, including previous false reports).

CONCLUSION

For the reasons presented in Point II, this Court should reverse Mr. Long's conviction for forcible rape and order Mr. Long discharged as to that count; For the reasons presented in Points I and III-VI, this Court should reverse Mr. Long's convictions and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,639 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on February 18, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of February, 2004, to Richard Starnes, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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