No. SC85620

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

JEFFREY D. LONG,

Appellant.

Appeal from the Circuit Court of Clay County, Missouri
7th Judicial Circuit, Division 1
Honorable Michael J. Maloney, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from conviction for forcible rape, § 566.030, RSMo 2000, and forcible sodomy, § 566.060, RSMo 2000, obtained in the Circuit Court of Clay County, and for which appellant was sentenced to consecutive terms of twenty years in the custody of the Department of Corrections. The Missouri Court of Appeals, Western District, affirmed appellant's convictions and sentences. State v. Long, WD61050, slip opinion (Mo. App., W.D. September 30, 2003). On November 25, 2003, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Jeffrey D. Long, was charged by indictment with forcible rape and forcible sodomy (L.F. 6). A substitute information was later filed charging appellant as a prior and persistent offender (L.F. 8). This cause went to trial by jury beginning on December 10, 2001, in the Circuit Court of Clay County, the Honorable Michael J. Maloney presiding (L.F. 2; Tr. 8).

The sufficiency of the evidence is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: In April 2001, the victim, 39-year-old Debbie Flower, lived alone at the Lakeview Terrace Mobile Home Park in the North Kansas City area (Tr. 143, 145, 258). The victim could only read on a fourth-grade level, collected disability, took numerous medications, and had a caseworker through an organization called "Tri-County" (Tr. 143-144). While living at the trailer park, the victim only had a bicycle for transport, and would often get a ride to the grocery store with a neighbor, Adeline Moore (Tr. 145, 258-259).

On the afternoon of Saturday, April 20, 2001, Moore took the victim to a Price Chopper grocery store (Tr. 147, 259). In the parking lot, Chris Manning, another neighbor of the victim, called out to the victim, and she ran over to talk to him (Tr. 147-148, 260). Manning asked the victim if she wanted to go to a party with him and some other friends from the trailer park, and she agreed (Tr. 148, 261). Moore and the victim then left the store, eventually returning to the trailer park (Tr. 149, 261).

When the victim got back to her trailer, Manning walked up to the trailer, and

the two left together (Tr. 150). She and Manning got into a white pickup truck with green lettering on the side that was driven by appellant (Tr. 150, 167; St. Exh. 26). They drove to a nearby liquor store, where Manning and appellant bought the victim a bottle of vodka (Tr. 150-151). Appellant then took the victim and Manning to his apartment, located in an apartment complex on North Highland in Clay County, Missouri (Tr. 151-152, 271).

Upon entering the apartment through one of the two doors leading from outside into the apartment, appellant, Manning, and the victim started drinking vodka from mason jars (Tr. 154-155, 179). The victim told the men that she could only drink "a little bit" because she was taking medication (Tr. 155). Appellant and Manning also used a metal pipe to smoke a powdery yellow substance (Tr. 152). Appellant turned on the television and started playing a pornographic videotape (Tr. 153, 181). The victim decided that she did not want to be in the apartment and went to open the door (Tr. 153). Appellant grabbed the victim's shirt and hair and pulled her to the floor, ripping her T-shirt in the process (Tr. 153, 156-157). Appellant took off the victim's shorts and underwear (Tr. 153, 157). Manning grabbed the victim's legs and held them up near her head, and appellant inserted his penis into the victim's rectum, hurting the victim badly (Tr. 153, 158-159). The victim struggled violently during the attack, kicking, scratching, and biting at her assailants (Tr. 162). After ejaculating into her rectum, appellant put his penis in the victim's mouth, and she bit it (Tr. 160, 187). Appellant responded by slapping the victim in the face with the back of his hand, knocking her

unconscious (Tr. 160).

After being knocked out, the victim slipped in and out of consciousness (Tr. 161). She believed she saw appellant and Manning engaging in sexual activity with each other (Tr. 161). Manning also inserted his penis into the victim's anus and mouth, and appellant inserted his penis into her rectum a second time (Tr. 161, 186). The victim could not tell whether or not Manning ejaculated in her anus because she was in so much pain from appellant sodomizing her (Tr. 161-162). She also was unsure whether or not either appellant or Manning had inserted their penises into her vagina because of the pain from the sodomy (Tr. 190-191).

When appellant and Manning finished their assault, appellant told Manning that the victim had "to go out with the trash" (Tr. 162-163, 195). They picked up the victim and threw her out one of the apartment doors into a hallway (Tr. 163). They also threw out all of her clothes except her shoes (Tr. 163). The victim lay in the hallway all night because she was scared to get up and go home, and was in so much pain that she urinated on herself (Tr. 163, 197-198). At one point, the victim asked a passing woman for some help, but the woman said she did not want to get involved (Tr. 163).

In the morning, the victim got up, put on the remainder of her clothes, and walked to a nearby Sunfresh Grocery Store (Tr. 163). She told a security guard that her boyfriend had left her (because she was too ashamed to tell the truth) and that she needed a taxi (Tr. 164). The guard called her a taxi, and she returned home, where she soaked in a bath to try to ease the pain and stop the bleeding in her rectum (Tr. 159,

164).

The victim did not plan on telling anyone about the assault, as she believed it was her fault for going to appellant's apartment in the first place (Tr. 164-165). However, after a couple of days, when the bleeding from her rectum did not stop, she was scared something was wrong, so she told Moore what had happened (Tr. 165, 262). When she told Moore, she looked ragged and had bruises on her face and legs (Tr. 262). Moore told the victim to call the police, and then took her to North Kansas City Hospital (Tr. 165, 262). North Kansas City transferred her to Truman Medical Center, where Sexual Assault Nurse Examiner Debra Albaugh examined her (Tr. 165, 218-220, 263). An external body exam revealed multiple bruising and abrasions to the victim's head, chin, arms, fingers, legs, and shoulders, consistent with the victim's description of how she was held by her assailants (Tr. 220-227). Albaugh also examined the victim's vaginal and rectal areas (Tr. 227). The victim suffered abrasions to the opening of her labia and inflammation inside of and at the end of her vagina, indicative of forced penetration (Tr. 228-231). There was extensive bruising, swelling, and abrasions inside and around the rectum, causing so much pain that the victim could barely sit down (Tr. 232, 235). The victim also brought her clothes to the exam, and Albaugh noted that the victim's shorts smelled of urine (Tr. 234).

Detective Gail Cummings of the Kansas City Police Department Sex Crimes Unit investigated the assault (Tr. 267-268). Based on the victim's "excellent" description of appellant, his truck, and his apartment, Cummings was able to identify the apartment

complex at which the rape and sodomy occurred, and then with the help of the apartment manager discovered appellant's identity (Tr. 271-274). Cummings then compiled a photo lineup for the victim, and using the lineup, the victim positively identified appellant (Tr. 274-277).

Appellant testified in his own defense, claiming that the victim consented to having sex with him and Manning, and that they only engaged in consensual oral sex with the victim until she passed out from drinking too much (Tr. 434-437). He testified that she became extremely agitated when she woke up and attacked them, and that they left her at the apartment to get away from her (Tr. 442-451). Appellant also presented testimony from other witnesses in an effort to impeach the victim's testimony (Tr. 371-388, 403-407, 491-499, 528-529).

At the close of the evidence, instructions, and arguments of counsel, appellant was found guilty of forcible rape and forcible sodomy (L.F. 28-29; Tr. 580). The court sentenced appellant to consecutive terms of twenty years in the custody of the Department of Corrections (L.F. 42-43; Tr. 601). Appellant appealed to the Western District Court of Appeals, which affirmed his convictions and sentences. State v. Long, WD61050, slip opinion (Mo. App., W.D. September 30, 2003). On November 25, 2003, this Court granted appellant's application for transfer. This appeal follows.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S OFFERS OF PROOF AND REFUSING TO ADMIT EVIDENCE THAT THE VICTIM HAD ALLEGEDLY MADE "FALSE ACCUSATIONS" OF THREATS, PHYSICAL ABUSE, AND MENTAL ABUSE BY DEFENSE WITNESS TIMOTHY WILSON BECAUSE SUCH EVIDENCE WAS INADMISSIBLE IN THAT IT WAS AN IMPROPER ATTEMPT TO PROVE THE VICTIM'S UNTRUTHFULNESS WITH EXTRINSIC EVIDENCE OF SPECIFIC ACTS OF CONDUCT. FURTHER, TWO OF APPELLANT'S OFFERS OF PROOF WERE DEFECTIVE AS THEY CONTAINED EITHER INADMISSIBLE HEARSAY AND/OR EVIDENCE BARRED BY THE RAPE SHIELD STATUTE.

Appellant claims that the trial court abused its discretion in denying his offers of proof and refusing to admit evidence that the victim allegedly made false accusations against defense witness Timothy Wilson and then recanted the accusations (App.Br. 28-32). Appellant argues that this evidence was relevant to the victim's "veracity" and to demonstrate that, due to "mental abnormality or alcohol impairment" the victim had a history of making false accusations and later recanting them (App.Br. 34, 36-37, 38-39).

A. Facts

Appellant presented an offer of proof through State's witness Detective Gail

Cummings (Tr. 295-298). She testified that, in the summer after the assault, the victim had made a report alleging that a man named Tim Wilson had threatened her, saying that "he was going to get her or bomb her or something" (Tr. 296-297). Cummings interviewed Wilson, who denied that he even knew the victim (Tr. 297). Cummings testified that the victim later called her and said that Wilson was not the man who threatened her (Tr. 297-298). She stated that charges were never filed against Wilson (Tr. 298).

The State objected to this offer of proof because it was not connected to the charged offense (Tr. 299). Appellant argued that it showed that the victim "can make mistakes about what she claims are the facts" (Tr. 300). The court asked why appellant failed to inquire of the victim about this incident, and counsel stated that he did not know, and that he guessed he was simply going to prove the false allegation through Tim Wilson's testimony (Tr. 300). The State responded that it was improper to present evidence of specific instances of a witness' untruthfulness (Tr. 301). The court sustained the objection (Tr. 301-302).

Timothy Wilson, one of the victim's neighbors, testified in an offer of proof that he had been picked up by Cummings for questioning (Tr. 357). He believed it was for threatening another resident of the trailer park (Tr. 357). However, his attorney told him that he had been accused of threatening the victim (Tr. 357-358). He testified that the victim later called and left a message on his answering machine saying he was not the person who threatened her (Tr. 558). Wilson testified about another incident, about

three years prior to trial, where he found the victim laying flat on the ground outside of his trailer (Tr. 359-360, 363). One side of her face was pressed against the concrete and a small pool of blood was around part of her head (Tr. 360). Police and paramedics arrived at the scene (Tr. 360). The first officer on the scene told Wilson that the victim had accused him of hitting her in the head with a rock (Tr. 360). He testified that she later told the authorities that she had actually fallen from her bicycle (Tr. 360-361). Wilson also testified about an occasion when the victim made sexual advances toward him and his wife (Tr. 361-362).[1] The court found that these incidents were irrelevant and evidence of specific acts of untruthfulness, and denied the offer of proof on this issue (Tr. 366-367). However, Wilson was allowed to testify as to other matters, including that the victim's reputation in the community for truthfulness was not good (Tr. 381).

Sharrie Clark was the property manager for the mobile home park in which the victim and Wilson lived (Tr. 565). Clark testified in an offer of proof that the victim told her that Wilson had lured her outside her trailer by pretending to be a security guard and then had put his finger in her "privates" (Tr. 506). Two weeks later, the victim called Clark and said that Clark must have misunderstood her because Wilson was her friend and would never do anything like that (Tr. 507-508). The state objected that this testimony was irrelevant and hearsay (Tr. 508-509). The defense responded

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[1]This portion of the offer of proof is discussed in more detail in Point IV, infra.

that it was relevant to show that the victim had a history of making false allegations of sexual abuse (Tr. 509-510). The State also argued that it was improper evidence of a specific instance of untruthfulness (Tr. 514). After conducting research during a recess, the court ruled the evidence inadmissible (Tr. 517-518).

B. Standard of Review

Trial courts are vested with broad discretion over the admissibility of evidence, and appellate courts will not interfere with those decisions unless there is a clear showing of an abuse of that discretion. State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000). The trial court clearly abuses that 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. State v. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997). If reasonable persons can differ about the propriety of an action taken by the court, it cannot be said the trial court abused its discretion. Id.

C. Extrinsic Evidence of Specific Acts of Untruthfulness was Inadmissible

Appellant's proffered evidence of the victim's accusations against Wilson was inadmissible for two principal reasons. First, it was inadmissible because it was improper specific evidence of untruthfulness. A complaining witness in a sex offense case may be impeached by evidence that her general reputation for truth or veracity is bad, but not by acts of specific conduct. State v. Strughold, 973 S.W.2d 876, 884-85 (Mo. App., E.D. 1998); State v. Edwards, 918 S.W.2d 841, 845 (Mo. App., W.D. 1996); State v.

Foster, 854 S.W.2d 1, 4 (Mo. App., W.D. 1993). As this Court stated in State v. Wolfe, 13 S.W.3d 248 (Mo. banc 2000):

> "Impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity. [Citation omitted]. In other words, specific acts of misconduct, without proof of bias or relevance, are collateral, with no probative value."

Id. at 258. **In this case, appellant attempted to introduce this evidence to show that the victim was untruthful in this case because she had allegedly been untruthful in her accusations against Wilson (Tr. 300, 366, 509; App.Br. 44, 50) This is clearly evidence of specific acts of past untruthfulness, which is prohibited.**

Further, appellant 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. When asked why he did not ask the victim about these accusations, counsel stated, "I'm not sure. I guess I was just going to - - we have Tim Wilson under subpoena and wanted to bring him in in the Defendant's case" (Tr. 300). 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. Rousan v. State, 48 S.W.3d 576, 590 (Mo. banc 2001); State v. Raines, 118 S.W.3d 205, 212 (Mo. App., W.D. 2003). Because appellant only attempted

to prove the prior allegations with extrinsic evidence, the trial court did not abuse its discretion in denying the offers of proof.[2]

Appellant claims that the Eastern District's holdings in State v. Lampley, 859 S.W.2d 909 (Mo. App., E.D. 1993), and State v. Montgomery, 901 S.W.2d 255 (Mo. App., E.D. 1995), permit evidence of other accusations of abuse (App.Br. 49-50). However, appellant's reasoning reaches too far. In Lampley and Montgomery, the previous allegations of abuse provided a specific motive, i.e. benefit, that each child victim may have believed they would receive for making their respective allegations of abuse.

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[2]**The defendant may introduce extrinsic evidence to prove bias, as bias is never collateral. State v. Paro, 952 S.W.2d 339, 344 (Mo. App., E.D. 1997). However, appellant's proposed evidence did not prove a bias against him, but merely demonstrated a propensity to make false accusations, and as such, at best, was only general impeachment evidence, rendering the extrinsic evidence collateral. Wolfe,** 13 S.W.3d at 258

Lampley 859 S.W.2d at 911 (evidence that previous allegation against another man led to his removal from child victim's home provided motive for victim to make allegation at issue where child victim disliked defendant); Montgomery, 901 S.W.2d 256-57 (evidence that the child victim made prior allegations which resulted in her getting attention from her mother provided motive for victim to make allegation at issue where child victim testified she wanted her mother's attention). In this case, appellant identified no benefit that the victim would receive from falsely accusing appellant. In stark contrast, appellant argues that this evidence showed that the victim merely "had a *tendency* to falsely accuse people of crimes, sometimes of a sexual nature" (App.Br. 50)(emphasis added). Therefore, this evidence was simply propensity evidence—the victim lied before, so she's lying now—which cannot be proven with evidence of specific conduct.

Further, both Lampley and Montgomery, as well as State v. Williams, 492 S.W.2d 1 (Mo. App., St.L. Dist. 1973), granted the defendants (or, in Williams, the State) the right to confront witnesses *on cross-examination* with their prior false allegations. Lampley, 859 S.W.2d 910-912; Montgomery, 901 S.W.2d at 256; Williams, 492 S.W.2d at 5-6 . As stated before, appellant did not attempt to cross-examine the victim regarding the alleged false accusations, but only tried to introduce extrinsic evidence of those accusations (Tr. 500). Because Lampley, Montgomery, and Williams do not create any right to present extrinsic evidence of false reports to prove mere propensity

to make false reports, these cases provide appellant no relief.[3]

Appellant's claim that the court's action in denying the offers of proof violated his constitutional rights to due process, to present a defense, and to a fair trial are also without merit. As the Western District noted in its thorough review of federal constitutional law regarding this question in Raines, "The Supreme Court has never 'held--or even suggested--that the longstanding rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems.'" Raines, 118 S.W.3d at 212-13, quoting Hogan v. Hanks, 97 F.3d 189, 191 (7th Cir. 1996). **Therefore,**

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[3]**Several other states which permit the defense to cross-examine a victim about prior false allegations do not permit extrinsic evidence to prove the allegations. See State v. Olson, 508 N.W.2d 616, 620 (Wis.Ct.App. 1993); State v. Boggs, 588 N.E.2d 813, 816-17 (Ohio 1992); State v. Scott, 828 P.2d 958, 963 (N.M.Ct.App. 1991); State v. Kringstad, 353 N.W.2d 302, 311 (N.D. 1984); State v. Cox, 469 A.2d 319, 323-23 (Md. 1983).**

appellant's constitutional claims must fail.

D. The Offers of Proof were Defective

Further, the trial court did not abuse its discretion in denying the offers of proof of because the offers of proof contained other inadmissible evidence. First, the only evidence in Timothy Wilson's offer of proof that the victim had made allegations against him was hearsay. First, he testified that his attorney told him the victim made the threat allegations (Tr. 357). Second, he testified that the first police officer on the scene of the "bike accident" told him that the victim accused him of hitting her with a rock (Tr. 360-361). These statements were both introduced for the truth of the matters asserted—that the victim made allegations against Wilson. Therefore, they were inadmissible hearsay. State v. Archuleta, 955 S.W.2d 12, 16 (Mo. App., W.D. 1997). Cumming's offer of proof also contained hearsay—that she interviewed Wilson and he denied making the threat (Tr. 297). Finally, both Cumming's and Clark's offers of proof contained hearsay from the victim—her statements that she was mistaken about Wilson making the threat or assault (Tr. 297-298, 507-508) as those statements were offered for their truth—that the allegations were not true.

Further, Wilson's offer of proof contained evidence of sexual advances made by the victim to Wilson and his wife (Tr. 361-362). This evidence was inadmissible evidence of previous sexual conduct, as barred by the rape shield statute. § 491.015.1,

RSMo 2000; see State v. Hale, 917 S.W.2d 219, 221 (Mo. App., W.D. 1996).[4] If an offer of proof is inadmissible in part, the entire offer fails. State v. Broussard, 57 S.W.3d 902, 911 (Mo. App., S.D. 2001); State v. Nettles, 10 S.W.3d 521, 525 (Mo. App., E.D. 1999). Thus, because those offers of proof contained inadmissible hearsay, the offers of proof in their entirety were defective.

Because appellant's offers of proof contained inadmissible evidence of specific instances of untruthfulness, hearsay, and evidence barred by the rape shield statute, the trial court did not abuse its discretion in denying appellant's offer of proof and refusing to admit evidence of alleged false accusations made by the victim. Therefore, appellant's first point on appeal must fail.

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[4]This issue is thoroughly discussed in Point V, infra.

II.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND IN SENTENCING APPELLANT FOR HIS CONVICTION FOR FORCIBLE RAPE ON THE GROUND THAT THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT OR ACCOMPLICE CHRIS MANNING PENETRATED THE VICTIM'S SEX ORGAN WITH THE MALE SEX ORGAN BECAUSE THERE WAS SUFFICIENT EVIDENCE OF VAGINAL PENETRATION BY THE PENIS OF ONE OF APPELLANT'S ASSAILANTS IN THAT MEDICAL TESTIMONY ESTABLISHED THAT THE VICTIM'S VAGINA WAS FORCIBLY PENETRATED IN A MANNER CONSISTENT WITH PENILE PENETRATION, AND THE VICTIM'S TESTIMONY ESTABLISHED THAT HER ASSAILANTS DID NOT PENETRATE HER WITH ANYTHING OTHER THAN THEIR PENISES.

Appellant contends that there was insufficient evidence to convict him of forcible rape (App.Br. 42). Appellant argues that, while the evidence did show that the victim suffered injuries to her vagina and labia which were consistent with forced penetration, the evidence did not establish that these injuries were caused by the male sex organ instead of some other object (App.Br. 42-44). Appellant claims that the inference that the victim had been forcibly raped would be giving the State "the benefit of speculative or forced inferences" (App.Br. 44).

In examining the sufficiency of the evidence, appellate review is limited to a

determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc), cert. denied 525 U.S. 1021 (1998). The appellate court does not act as a "super juror" with veto powers, but gives great deference to the trier of fact. Id. In applying the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id.

To convict appellant of forcible rape, the State was required to prove that either appellant or Manning used forcible compulsion to penetrate the victim's sex organ with his sex organ. §§ 566.010(4), 565.030, RSMo 2000. Proof of penetration may be shown by direct or circumstantial evidence. State v. Hill, 808 S.W.2d 882, 890 (Mo. App., E.D. 1991).

Even when the victim is unable to testify to penetration or testifies equivocally regarding penetration, other evidence supporting penetration will be sufficient to uphold a jury's finding of penetration. See State v. Dunn, 7 S.W.3d 427, 430 (Mo. App., W.D. 1999)(victim saying "I think so" when asked if she was penetrated a second time sufficient to establish a second count of rape when there were serious injuries to the vaginal area); State v. Stackhouse, 146 S.W. 1151, 1152 (Mo. 1912)(where victim's testimony alone did not establish penetration, medical testimony regarding appearance of and injury to the victim's genitals provided sufficient evidence of penetration); Boyd v. State, 699 So.2d 967, 970 (Ala.Crim.App. 1997)(evidence of penetration sufficient

when victim, who was unconscious during actual rape, saw defendant unbuttoning pants prior to rape and felt sensations of wetness and soreness consistent with intercourse after the rape); State v. Thrash, 497 So.2d 414, 416-417 (La.App. 3rd Cir. 1986)(vaginal injuries and presence of pubic hair consistent with defendant in the diaper of 17-month-old victim, who could not testify, sufficient to establish penile penetration).

Here, there was sufficient medical evidence to prove that appellant or Manning penetrated the victim's sex organ with his penis. Sexual Abuse Nurse Examiner Debra Albaugh testified that the victim suffered abrasions to the opening of her labia and inflammation inside of and at the end of her vagina, indicative of forced penetration (Tr. 228-231). She stated that the injuries, concentrated in the lower portion of the labia[5] were indicative of "non-consensual sex acts," and 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*" (Tr. 228-229)(emphasis added).[6]

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[5]Albaugh 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 the victim's labia were found between five o'clock and seven o'clock (Tr. 228).

[6]Appellant attempts to minimize this language, which was relied on in part by the Western District in denying appellant's claim below, claiming that "Just because the nurse used the word 'penis' in [her] explanation as to why, in general, there would be

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. This evidence alone was sufficient to establish that the victim's sex organ was penetrated by the male sex organ of one of the victim's attackers.

Further, the victim testified that she was penetrated in the vaginal/rectal area three times and the mouth twice, and she did not testify that she was penetrated by anything *other than* a penis throughout the attack (Tr. 159-162, 186-188). While, as appellant points out, the victim testified that she did not think that her assailants put their penises in her vagina and said that she did not "feel them go into" her vagina

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abrasions 'from non-consensual sex acts' does not mean the nurse believed that the abrasions came from a penis in this case" (App.Br. 45). Appellant fails to comprehend that the testimony dealt not only with the use of the word penis, but with relative body placements, body actions, and the location of the abrasions, which would tend to be found with penile penetration from an assailant atop the victim.

(App.Br. 42; Tr. 190-191), she also stated that she was "not exactly sure they went there," that her "rectum was hurting so, so bad that I'm not exactly sure they went there" and she "wouldn't be able to tell you that because of the excruciating pain" in her rectum due to appellant sodomizing her (Tr. 159, 190). Because the sodomy was the first sexual act appellant committed against the victim, the most reasonable inference raised from this evidence was that either appellant or Manning penetrated the victim's vagina with his penis after appellant first penetrated her anus with his penis, and that the victim was simply unable to discern that her vagina was being penetrated due to the pain from the earlier sodomy. As this was not only a reasonable inference drawn from the evidence, but the most reasonable inference, the State presented sufficient evidence to convict appellant of forcible rape.

For the foregoing reasons, appellant's second point on appeal must fail.

III.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE VICTIM'S STATEMENT TO LAW ENFORCEMENT OFFICIALS TO BE SEEN BY THE JURY DURING DELIBERATIONS BECAUSE ALLOWING THE JURY TO VIEW SUCH AN EXHIBIT IS WITHIN THE TRIAL COURT'S DISCRETION IN THAT THE VICTIM'S VERSION OF EVENTS WAS ALREADY THE CENTRAL PIECE OF EVIDENCE IN THE CASE, AND THUS COULD NOT HAVE BEEN "OVEREMPHASIZED," AND VARIOUS MISSOURI APPELLATE COURTS, INCLUDING THE MISSOURI SUPREME COURT, HAVE UPHELD SUCH EXERCISES OF DISCRETION.

Appellant claims that the trial court abused its discretion in allowing the victim's statement to law enforcement officials to be viewed by the jury during deliberations because the statement was testimonial in nature (App.Br. 46, 49). Appellant argues that allowing the jury to view the statement during deliberations gave the State "an unfair advantage" because it "bolstered" the victim's testimony, while the jury had to rely on only its memory to review his own testimony (App.Br. 52).

A. Facts

During the direct examination testimony of Detective Gail Cummings, the State offered into evidence a transcript of a statement given by the victim to Cummings (Tr. 273-276, St. Exh. 26). Appellant's counsel objected, stating, "I'm just concerned it would carry too much weight, and the witness has already testified" (Tr. 276). The court then expressed its opinion that it was hearsay, and sustained the objection on that

basis (Tr. 276).

During cross-examination, appellant repeatedly questioned Cummings about the contents of the statement (Tr. 280-286). On redirect, the prosecutor again offered the statement as evidence, arguing that appellant had asked "question after question" about the contents of the statement, thereby opening the door to its introduction (Tr. 318-319). Counsel again objected, claiming that it was hearsay, and once again stating that he was concerned that the statement would go to the jury room and be given undue weight (Tr. 319). The court ruled that the statement was now admissible due to the extensive questioning by both parties about the statement, but granted both parties the opportunity to object to any portion being seen by the jury prior to allowing the jury to view it (Tr. 319).

During deliberations, the jury asked to view the statement (Tr. 564). Appellant again raised his objection to the jury seeing the statement on the bases that 1) the jury would give undue weight to the victim's testimony, and 2) that the statement contained "extraneous parts" (Tr. 565-566). The court allowed the parties to suggest redactions, created a redacted version, and sent a photocopy of the redacted version to the jury (Tr.

566-574; St. Exh. 26).[7]

B. Standard of Review

The decision whether or not to allow the jury access to exhibits during their deliberations is a matter within the sound discretion of the trial court. State v. Roberts, 948 S.W.2d 577, 596 (Mo. banc 1997), cert. denied 522 U.S. 1056 (1998). To constitute an abuse of discretion, the decision must be untenable, clearly against reason, and work an injustice. State v. Mitchell, 897 S.W.2d 187, 191 (Mo.App., S.D. 1995). "An objecting party has the burden of showing the prejudicial result of sending exhibits to the jury." State v. Sullivan, 925 S.W.2d 483, 485 (Mo.App., E.D. 1996).

C. There Was No Abuse of Discretion

The general rule is that exhibits that are testimonial in nature cannot be given to the jury during deliberations. State v. Evans, 639 S.W.2d 792, 795 (Mo. banc 1982).

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[7]**The redactions were achieved by placing pieces of paper over the redacted portions, so it appears that one could simply lift the paper and see the redacted portions (St. Exh. 26). However, because the court gave the jury a photocopy, the portions covered by paper on the original would simply have appeared as blank space (Tr. 572).**

However, this rule is not inflexible, as at least one exception is made for a defendant's confession, because the "centrality to the case" of a confession warrants sending it back to the jury. Id. Therefore, it stands to reason that it is not an abuse of discretion to send the jury an exhibit that is "central" to the State's case, as it seems logically impossible to "overemphasize" what is already the key piece of evidence.

That allowing the jury to view the statement of a witness other than the defendant is not an abuse of discretion is evidenced by the fact that this Court and the Courts of Appeal have upheld such an exercise of discretion, apparently because one cannot unduly emphasize the contents of a matter that is central to the case by allowing it to be read one more time if the case revolves around it. In Sullivan, the Eastern District found that there was no abuse of discretion in allowing the jury to see three written statements by the complaining witness during deliberations in a sodomy and deviate sexual assault trial, because the exhibits were properly admitted, objectionable portions were redacted, and the defendant had used the statements to his advantage in cross-examination. Sullivan, 925 S.W.2d at 485-486. In State v. Moutray, 728 S.W.2d 256 (Mo.App., W.D. 1987), there was no abuse of discretion in sending a written statement of the defendant's daughter, a defense witness, to the jury during deliberation. Id. at 263-264. In State v. Graham, 641 S.W.2d 102 (Mo. banc 1982)[8], there was no abuse of

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[8] **Graham was decided by the Missouri Supreme Court less than five months after Evans, which would suggest that the Court did not believe that the "rule" in Evans**

discretion in allowing the jury to see medical records containing statements made by the victim and her mother, because the victim and her mother testified at trial. Id. at 107-108.

Looking at these cases, it is clear that allowing the jury to see the victim's police statement was not an abuse of discretion. Like Graham, the victim testified to those things which were visible to the jury in the copy of the statement (Tr. 147-168; St. Exh. 26). Like Sullivan, portions of the statement not in evidence or otherwise objectionable were redacted, and appellant repeatedly used the statement while questioning Detective Cummings about the victim's prior inconsistent statements (Tr. 280-286, 566-574). Because the trial court's discretionary decision to allow the jury to view the statement was in line with these precedents, it cannot be said that the court's decision was "untenable" or was "clearly against reason."

Further, appellant has not demonstrated that he was prejudiced by the jury being allowed to view the statement during deliberations. Any emphasis on a "testimonial" exhibit being viewed by the jury is diminished when the jury is permitted to view a number of exhibits. State v. Jennings, 815 S.W.2d 434, 440 (Mo. App., E.D. 1991). In

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prohibited the jury from seeing a witness' statement during deliberations. Graham, 641 S.W.2d at 102; Evans, 639 S.W.2d at 792.

this case, in addition to Exhibit 25, the court sent the jury State's Exhibits 3-21, 23, and 28 (Tr. 564, 573-574). Therefore, any potential emphasis on the statement was diminished by the number of other exhibits viewed by the jury.

Appellant takes exception with the Western District's finding below that he was not prejudiced by the use of the statement because he used the victim's written statement for his benefit to impeach her, and argues that any use he made of the statement was not substantial (App.Br. 51). However, the record shows that appellant not only questioned the victim several times about what she had told the police (Tr. 181, 183, 186, 187, 188), but also repeatedly and directly referred to the contents of the statement in his cross-examination of Detective Cummings (Tr. 279-286). Further, appellant repeatedly referred to the written statement and what she told the police in closing argument, claiming that, "Every time she tells her story, it changes" (Tr. 543-544, 545, 546, 548-549). Because appellant repeatedly used the statement to his benefit, he cannot demonstrate prejudice from the court including that exhibit among the many shown to the jury. Sullivan, 925 S.W.2d at 486 ("After using the written statements for his benefit, defendant cannot demonstrate prejudice from a decision which allowed the jury to view all the exhibits during its deliberations **. . .").**

For the foregoing reasons, appellant's third point on appeal must fail.

IV.

THE TRIAL COURT DID NOT PLAINLY ERR IN REFUSING TO DISCLOSE THE VICTIM'S MENTAL HEALTH RECORDS BECAUSE APPELLANT HAS FAILED TO DEMONSTRATE MANIFEST INJUSTICE IN THAT APPELLANT RECEIVED AN *IN CAMERA* REVIEW OF THE RECORDS BY THE COURT, WHICH WAS ALL THE RELIEF APPELLANT REQUESTED AT TRIAL, THE RECORDS WERE PROTECTED BY THE PHYSICIAN-PATIENT PRIVILEGE, THOSE PORTIONS NOT DISCLOSED CONTAINED ONLY INADMISSIBLE OR IRRELEVANT EVIDENCE, AND THE VICTIM DID NOT WAIVE HER PHYSICIAN-PATIENT PRIVILEGE.

Appellant claims that the trial court abused its discretion in failing to disclose records of the victim's psychiatric and psychological treatment following an *in camera* review (App.Br. 54-56). Appellant argues that the records "may shed light" on a wide range of issues, including potential evidence "of false reports" or of psychiatric disorders that "manifest themselves in manipulative conduct," that would affect the credibility, accuracy, or bias of the victim's testimony (App.Br. 60-61). Appellant complains that the court's ruling prevented him from "fully exploring [the victim's] credibility, bias, and her ability to discern reality on the day of the charged offense and during her testimony" (App.Br. 54). Appellant further argues that the victim waived any privilege relating to these records because the State presented argument and evidence about the victim's disability (App.Br. 61-62).

A. Facts

Prior to trial, appellant served subpoenas on the Tri-County Mental Health Services and the Clay County Public Administrator's Office, seeking the victim's psychiatric treatment records (Tr. 8-9). Counsel for Tri-County filed a motion to quash the subpoena (Tr. 8; L.F. 2). Appellant argued that he was entitled to at least an *in camera* inspection of the records by the court (Tr. 10). The court stated that it would conduct an *in camera* review of any records "relevant to the issues" (Tr. 10).

During the presentation of the State's case, the court took a recess to take up the motion to quash (Tr. 287). Counsel for Tri-County produced two volumes of records for *in camera* review, and the court stated that it would review the records for any "exculpatory information" (Tr. 288-292). The court admitted the records for purposes of the *in camera* review, and placed the records under seal (Tr. 292; Def. Exh. 49, 50). The court then asked appellant what information he wanted the court to look for (Tr. 292). Counsel for appellant responded that he wanted records showing that the victim: 1) would drink liquor while using medications, causing either a loss of memory or hallucinating "stories" that turned out not to be true; 2) abused medications in a way that caused her to hallucinate or not "know what the truth is;" and 3) has any "particular fixation about rape or some kind of psychological problem regarding rape" causing her to repeatedly claim that people had raped or tried to rape her (Tr. 292-293). The State objected that anything about rape would be barred by the rape shield statute, but the Court replied that a fixation or untrue allegations of rape would not be (Tr. 293-

294).

Later in the trial, the court disclosed portions of the records that it believed were relevant to the parties, noting that the information in the disclosed records were cumulative to what had already been testified to (Tr. 400-401). The court noted that it did not disclose matters in the record that were inadmissible, consistent with rulings made on appellant's offers of proof as to prior unrelated bad acts of the victim (Tr. 401).[9]

Prior to the end of the defense case, the court took up the matter of the Public Administrator's records (Tr. 484). The court stated that it had received the records and noted that the records, for the years 1991-1993, "overlapped" the records from Tri-County, which had contained nothing that was exculpatory or admissible, so the court expected to find nothing to be disclosed (Tr. 484-485). The next day, the court announced that it had reviewed the file and found that there was no "exculpatory information," so nothing was disclosed (Tr. 518). The court noted that the file from the Administrator's office was an original, so it was returned to that office, with notice that the file may be needed for appellate review at a later date (Tr. 518).

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[9]The substance of these offers of proof are discussed in Points I, supra, and V and VI, infra.

B. Preservation

Appellant's claim on appeal, that the trial court abused its discretion "in not disclosing to the defense" the records in question, thus depriving him "from discovering possible evidence" of various problems the victim may have had, is not preserved for appeal. First, while appellant had requested the records by subpoena from the various agencies, at trial, the only relief he requested was the *in camera* review, which was conducted (Tr. 10, 288-294, 400-403). After disclosing the relevant portions and explaining why the rest was inadmissible, the court asked counsel if he had "enough record" on the issue (Tr. 400-402). Counsel raised no objection to not receiving the balance of the record, but simply said that he thought the record was "sufficient" (Tr. 402). Having received all the relief he requested and requesting no more, appellant may not now claim error on appeal. State v. Stewart, 18 S.W.3d 75, 88 (Mo. App., E.D. 2000). Further, appellant's claim in the motion for new trial was that the court erred when it "excluded the jury from hearing" evidence found in the records, not when it failed to disclose those records. Appellant may not change his theory on appeal. State v. Wendleton, 936 S.W.2d 120, 123 (Mo. App., E.D. 1996). Finally, appellant failed to raise below his claim that the victim waived any privilege to the documents at all. Therefore, review of this entire claim is available, if at all, only for plain error. Supreme Court Rule 30.20.

C. Standard of Review

Plain error review is used sparingly and does not justify review of every alleged

trial error not preserved for review. State v. Dowell, 25 S.W.3d 594, 606 (Mo.App., W.D. 2000). Relief under the plain error standard is granted only when there is a strong, clear demonstration that a defendant's rights have been so substantially affected that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. State v. Hyman, 11 S.W.3d 838, 842 (Mo.App., W.D. 2000). In reviewing a claim of plain error, this Court first looks to see if "evident, obvious, and clear" error appears on the face of the claim. Dowell, 25 S.W.3d at 606. Only if error appears on the face of the claim does this Court then exercise its discretion to determine whether or not a manifest injustice has occurred. Id. The burden is on appellant to prove that an error resulted in a manifest injustice. Id. A mere allegation of prejudice will not suffice. Id.

D. Analysis

Missouri's physician-patient privilege, which prevents testimony regarding information giving to a health professional for the purposes of treatment, also prevents the disclosure of medical records. § 491.060(5), RSMo 2000 ; State ex rel. Dixon Oaks Health Center, Inc. v. Long, 929 S.W.2d 226, 229 (Mo. App., S.D. 1996). That privilege may only be waived by the patient. Dixon Oaks, 929 S.W.2d at 229. The privilege is not absolute, and may give way to some extent when there is a "stronger countervailing societal interest." Id. at 230. However, a criminal defendant is not entitled to information on the mere possibility that it might be helpful, but must make a plausible showing as to how the information is material and favorable. State v. Goodwin, 65 S.W.3d 17, 21 (Mo. App., S.D. 2001); State v. Seiter, 949 S.W.2d 218, 220-221 (Mo. App.,

E.D. 1997).

Here, appellant has failed to establish how the trial court's decision not to disclose the records was plainly erroneous or resulted in manifest injustice. The trial court reviewed the documents and disclosed those portions which were relevant to the issues at trial (Tr. 400-401). Appellant made no attempt to examine witnesses about the records or introduce these records into evidence before the jury. The trial court ruled that the information in the other portions of the records as not relevant to the issues in the case and as therefore inadmissible (Tr. 401-402).[10] Because appellant could not have introduced any of this information at trial, the fact that it was not disclosed could not have resulted in manifest injustice, as it could not have affected the outcome of the trial. See State v. Armentrout, 8 S.W.3d 99, 110 (Mo. banc 1999), cert. denied 529 U.S. 1120 (2000).

Further, appellant never asked the court to review the records and disclose numerous items of information he now requests, such as "evidence of false reports, of

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[10]The court indicated that this information dealt with prior bad acts by the victim, which the court ruled inadmissible (Tr. 401-402). The admissibility of this type of evidence is discussed in Points I, supra, and V and VI, infra.

a history of psychiatric disorder that manifest themselves in manipulative or destructive conduct, of mental disorders that have a high probative value on the issue of credibility, and of mental defects that affect the accuracy of testimony or tend to produce bias in a witness' testimony" (App.Br. 60-61). All that appellant asked for was disclosure of information regarding the victim's alcohol and medication use and regarding a "fixation" on rape (Tr. 292-293). A trial court will not be convicted of error for failing to take some action that was never requested. State v. Gray, 926 S.W.2d 29, 34 (Mo. App., W.D. 1996).

Additionally, appellant was permitted wide latitude in his cross-examination of the victim. Appellant specifically asked about the victim's alcohol use, medications, and the use and affect of alcohol on those medications, include the affect on her memory (Tr. 201-202, 206-207). Appellant also established that the victim sometimes provided incomplete or strange information, including that she was born "under a rock" and that she could not remember where she went to school (Tr. 207-208). The right to confront is satisfied if defense counsel receives wide latitude at trial to cross-examine witnesses. Goodwin, 65 S.W.3d at 21. Appellant's rights were not hindered by not having the medical records disclosed. Therefore, appellant has completely failed to demonstrate how the court plainly erred in denying him the opportunity to go on a fishing expedition through the victim's medical records.

Appellant's unpreserved claim that the victim waived her physician-patient privilege by testifying also lacks merit. Appellant claims that Brandt v. Medical

Defense Associates, 856 S.W.2d 667 (Mo. banc 1993), required disclosure once the victim testified about the facts that she received disability payments, had a case worker at "Tri-County," and was on various medications (App.Br. 61). Brandt does stand for the proposition, which is also stated in numerous other cases, that a *party* waives the privilege when that party testifies as to their medical condition or places that condition into question. Id. at 672-73; see, e.g., State v. Johnson, 968 S.W.2d 123, 131 (Mo. banc), cert. denied 525 U.S. 935 (1998)(a defendant waives the privilege by putting his mental status in issue). However, the victim was not a party to this case, but a witness. A non-party who was unfortunate enough to be the victim of a crime should not lose his or her statutory right to privacy in their medical treatment.

However, that a non-party's statutory right to privacy is waived for all purposes when he or she testifies is exactly what appellant argues, citing State v. Evans, 802 S.W.2d 507 (Mo. banc 1991), in support. Evans should not be construed to support such a broad rule. In Evans, the defendant was charged with a rape that was discovered when the nine-year-old victim's mother found a brown discharge in the victim's underwear, and the victim was diagnosed with vaginal and rectal gonorrhea. Id. at 510. The defense called defendant's girlfriend, who testified she had not ever had gonorrhea, had never shown any symptoms of gonorrhea, and had never been treated for gonorrhea. Id. at 511. On cross-examination, she was confronted with medical records showing she had been treated for gonorrhea while sexually involved with the defendant, and admitted that the records were true. Id. at 510.

This Court rejected appellant's challenge that the records were inadmissible due to the physician-patient privilege because appellant did not have standing to assert the privilege—it was up to the witness to assert the privilege and object to the records, which she did not choose to do. Id. at 511. Even though the standing issue completely resolved the issue raised on appeal, this Court further stated that the witness had waived her privilege because her testimony placed her medical condition at issue. Id. at 512. Because that conclusion was not necessary to the determination of the case, it was dicta, and has no bearing on this case. State on Information of Dalton v. Miles Laboratory, 282 S.W.2d 564, 573 (Mo. banc 1955); State ex rel. Anderson v. Houstetter, 140 S.W.2d 21, 24 (Mo. banc 1940).

Even if the language appellant relies on in Evans was not dicta, it still does not aid his claim. First, the testimony in Evans directly put into issue whether or not the witness had gonorrhea, and that issue was directly relevant to guilt or innocence, not merely impeaching the witness's credibility. Evans, 802 S.W.2d at 512. Here, the victim's testimony regarding her mental health was mere background information, and the existence of that condition was not contested by the defense nor was it directly relevant to the issue of whether appellant raped and sodomized the victim. Thus, the incidental mention that she was on disability, had a case worker, and took medication did not put her overall health problems "at issue" meriting the waiver of the victim's physician-patient privilege.

Second, in Evans, neither the witness nor her physicians or counselors ever

attempted to invoke the privilege. Id. at 510-512. Here, Tri-County appeared to assert the victim's privilege and moved to quash the defense subpoena, leading the court to conduct an *in camera* inspection of the records (Tr. 287-292). According to Evans, when the health care provider asserts the privilege, the privilege should "be slightly modified to allow *in camera* review of such documents" for relevant information. Id. at 511. That is exactly what happened here, which was sufficient to protect the victim's rights and allow appellant access to material, relevant information. Therefore, appellant's claim of waiver should fail.

Because appellant received all of the relief requested at trial, was given wide latitude on cross-examination of the victim, and failed to request almost all of the information he now claims he was entitled to on appeal, and because the victim did not waive her physician-patient privilege, appellant has not proven that the trial court plainly erred or committed manifest injustice in failing to disclose inadmissible evidence found in the victim's privileged medical records. Therefore, appellant's fourth claim on appeal must fail.

V.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S OFFERS OF PROOF AND REFUSING TO ADMIT EVIDENCE THAT THE VICTIM ENGAGED IN "SEXUALLY PROVOCATIVE ACTIONS" WHEN DRINKING ALCOHOL BECAUSE THAT EVIDENCE WAS INADMISSIBLE IN THAT IT IS EVIDENCE OF THE VICTIM'S PRIOR SEXUAL CONDUCT, WHICH IS BARRED BY THE RAPE SHIELD STATUTE.

Appellant claims that the motion court erred in denying his offers of proof and refusing to admit evidence that the victim "engaged in sexually provocative actions" when drinking alcohol (App.Br. 63, 67). Appellant argues that this evidence was admissible because it was consistent with his testimony that the victim engaged in "sexual misconduct" following the consumption of alcohol (App.Br. 67).

A. Facts

Appellant presented the testimony of Kevin Bonei, one of the victim's neighbors, as an offer of proof (Tr. 336-344). Appellant asked Bonei (among other things) if he had every seen the victim exhibit "strange behavior" when drinking alcohol (Tr. 338). Bonei testified that the victim had succeeded in getting Bonei and his wife to take off their clothes in an attempt to "get sex" (Tr. 338).

After the offer of proof, the prosecutor objected to this evidence as inadmissible under the Rape Shield Statute and as irrelevant (Tr. 342). Appellant argued that Bonei had not said that "any sex occurred," and that the evidence was simply introduced to

show that the victim "acts strangely when she mixes liquor and meds, and took off her clothes and tried to take off other people's clothes" (Tr. 342). The court stated that it believed that the testimony was about sexual activity, and gave appellant an opportunity to inquire further (Tr. 342-343). That questioning occurred as follows:

> **Q. Mr. Bonei, the night that Debbie acted strange and took her clothes off, you said she succeeded. What did you mean by that?**
>
> **A. As a single person I felt that I was being attacked. Because I'm married now - - she pulled my shirt up over my head, took it off, talked us into it. I mean, she was more or less helping herself to our vulnerability, okay, so that we kind of went along with her after about 30 minutes of trying, and that's the best I can answer that.**
>
> **Q. Okay, well - -**
>
> **A. Yes, sir?**
>
> **Q. Do you recall we talked about this previously. Are you telling the judge that you and Debbie Flower engaged in some type of sexual activity that night?**
>
> **A. Positions, but never no orgasm.**
>
> **Q. When you would tell somebody what happened, I understand it's very personal, but when you would tell**

somebody what happened, would you say you had sex with Debbie Flower?

A. No, I would not say that.

Q. When you say, she succeeded, what did you mean by, she succeeded?

A. I meant that she got our clothes off and got into a position. We all three got in bed together and tried. I mean, it was, we broke it up after a while because we felt, well, this ain't going to do it.

Q. Whose idea was it to do all this?

A. This was Debbie's.

(Tr. 343-344). After discussing the issue with the parties, the court ruled the evidence about the victim's solicitation and sexual encounter with Bonei and his wife inadmissible, but did allow Bonei to testify as to other issues (Tr. 349-350, 371-373).

Appellant also presented an offer of proof through witness Timothy Wilson (Tr. 352-364). Wilson testified about occasions when the victim accused him of threatening or injuring her (Tr. 357-361).[11] Wilson then testified about an occasion about three years prior to trial when the victim came into his front yard and started yelling towards his trailer that she wanted to have sexual intercourse with Wilson's wife (Tr. 361, 363).

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[11]This portion of the offer of proof is discussed more fully in Point I, supra.

Wilson chased her off (Tr. 362). The victim came back to Wilson's yard hours later that same day (Tr. 362). The victim was naked other than for a pair of underpants (Tr. 362). She was yelling for Wilson to come out of the trailer so that she could "show me how she was going to really make love to a man and how good she could be" (Tr. 362). Wilson believed the victim was intoxicated because of the way she smelled (Tr. 362). The court ruled this testimony inadmissible, but allowed Wilson to testify about other issues (Tr. 364-368).

B. Standard of Review

Trial courts are vested with broad discretion over the admissibility of evidence, and appellate courts will not interfere with those decisions unless there is a clear showing of an abuse of that discretion. State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000). The trial court clearly abuses that 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. State v. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997). If reasonable persons can differ about the propriety of an action taken by the court, it cannot be said the trial court abused its discretion. Id.

C. The Evidence was Inadmissible Under the Rape Shield Statute

Under the "Rape Shield Statute," § 491.015, RSMo 2000, evidence of specific instances of the complaining witness' prior sexual conduct is inadmissible in a prosecution brought under Chapter 566, RSMo, except for evidence of: 1) sexual

conduct with the defendant to prove consent when consent is at issue; 2) sexual activity to show alternative sources of semen, pregnancy, or disease; 3) immediate surrounding circumstances of the crime; or 4) previous chastity when that is required to be proved by the prosecution. § 491.015.1, RSMo 2000. Only if the evidence fits into one of these exceptions does the court then examine whether the evidence is relevant to a material fact or issue. § 491.015.2, RSMo 2000; State v. Smith, 996 S.W.2d 518, 522 (Mo. App., W.D. 1999). If the evidence does not fit into one of the exceptions, it is of no material significance and is therefore irrelevant and collateral. Smith, 996 S.W.2d at 522.

Here, the evidence that appellant presented in his offer of proof is prohibited by the rape shield statute. Appellant attempted to present testimony that, in the past, the victim: 1) engaged in various sexual positions with a married couple at her urging while all three were naked; and 2) tried to solicit sexual "intercourse" with another married couple on two different occasions, one while naked (Tr. 361-362). Appellant even admits in his Point Relied On that the purpose of this evidence was to show that the victim is "sexually provocative" when drinking (App.Br. 26, 63). As the purpose of the rape shield statute is to protect the victim of a sexual assault, the use of this evidence to prove the promiscuity of the victim is clearly barred by the statute. State v. Madsen, 772 S.W.2d 656, 659 (Mo. banc 1989); State v. Sloan, 912 S.W.2d 592, 598 (Mo. App., E.D. 1995). Therefore, the trial court did not abuse its discretion in ruling this evidence inadmissible.

Appellant does not attempt to argue that the rape shield statute does not apply to

this evidence, or that this evidence fits into one of the statutory exceptions, but argues that the rape shield statute must be disregarded in favor of his "right to present a defense," citing State v. Douglas, 797 S.W.2d 532 (Mo. App., W.D. 1990). However, there is no merit to this argument, as Douglas is inapposite. In Douglas, the State was permitted to introduce evidence that the victim's hymen was broken, but the defense was not permitted to show that the victim had sex with her boyfriend prior to the examination of her genitalia, which could have provided an alternative explanation for the broken hymen. Id. at 534. Thus, the Western District found that it was a constitutional violation for the State to be permitted to introduce evidence in order to present an implication—that the defendant caused the broken hymen—without allowing the defense to refute that implication with evidence of another cause. Id. at 535-536. The court stated that, but for this inference raised by the State, the evidence would have been inadmissible under the statute.

In State v. Sales, 58 S.W.3d 554 (Mo. App., W.D. 2001), the Western District faced a claim that Douglas permitted the defendant to cross-examine the child victim about prior sexual abuse by another person to explain his unusual sexual knowledge. Id. at 557. That court explained that Douglas provided no relief, stating that excluding evidence under the rape shield statute does not violate constitutional rights where the evidence does not fall within one of the exceptions and the State does not introduce other evidence implying that the defendant was the sole possible source for the victim's sexual knowledge. Id. at 559.

In this case, the evidence that appellant wished to present was not in order to present an alternative explanation for some unfair inference by the State, but simply to show that the victim was promiscuous after drinking (App.Br. 63, 67). Therefore, it is precisely the type of evidence that the rape shield statute was designed to prohibit, and the application of the statute to this evidence did not impinge on any constitutional right to present a defense or to present "relevant" evidence. See Madsen, 772 S.W.2d at 658-659.

Because the evidence of the victim's promiscuity was prohibited by the rape shield statute and does not fall into any recognized exception to that prohibition, the trial court did not abuse its discretion in refusing to admit the evidence. Therefore, appellant's fifth point on appeal must fail.

VI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S OFFERS OF PROOF AND REFUSING TO ADMIT EVIDENCE THAT THE VICTIM "WOULD MAKE UP BIZARRE TALES" OF ATTEMPTED RAPE AND THAT THE VICTIM HAD A "TENDENCY TO RETALIATE AGAINST OTHERS" BECAUSE THE EVIDENCE WAS INADMISSIBLE IN THAT IT WAS IMPROPER EVIDENCE OF SPECIFIC ACTS OF UNTRUTHFULNESS, IMPROPER EVIDENCE OF PRIOR BAD ACTS, OR IMPROPER PROPENSITY EVIDENCE.

Appellant argues that the trial court abused its discretion in denying his offers of proof and refusing to admit evidence that the victim "would make up bizarre tales of sexual assaults" (App.Br. 69, 72-73). Appellant claims that evidence that the victim told others of an incident where she allegedly broke the neck of someone who tried to rape her was "important since it supported [appellant]'s defense that [the victim] would make up bizarre tales of sexual assaults" (App.Br. 72).

A. Facts

Prior to the start of the defense case, the defense presented a number of offers of proof regarding prior bad acts and stories told by the victim. Leland Wayne Tucker, a longtime neighbor of the victim, testified that the victim told him a story about a man from Kansas who took her out on a date (Tr. 332). She told him that the man took her to his home and attempted to rape her, so she fought him and broke his neck (Tr. 332-333). After that occurred, the Wyandotte County Court called and asked Tucker's wife

if they would take custody of the victim (Tr. 333). The court sustained the prosecutor's relevance objection and denied the offer of proof (Tr. 334-336).[12]

Kevin Bonei also testified that the victim told him that a man took her to his home and tried to "have a relationship" with her and forcibly took her clothes, so she twisted his neck (Tr. 340). Bonei testified that she actually did hurt the man because she "was in trouble for it" (Tr. 340). Bonei also testified about other matters, including a previous sexual experience with the victim (Tr. 338, 343-344).[13]

Timothy Wilson testified that the victim told him that she went on a date with a man who "tried to do something wrong to her," so she had either broken his neck or cut him in the neck (Tr. 356).

Kirsten Todtenhausen, Chris Manning's former girlfriend, testified that the

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[12]The court subsequently denied each offer of proof about the attempted rape for the same reasons by simply referring back to this ruling (Tr. 342, 364-365, 397, 482).

[13]The substance of this portion of the Bonei's offer of proof is discussed in Point V, supra.

victim told her that she met a man over the Internet and went on a date with him (Tr. 395). The man, who she discovered was a "he-she," took her to his home and tried to rape her, so she broke his neck (Tr. 395). She said that she "did time in Wyandotte County for it" (Tr. 395).

Appellant also testified about this story in an offer of proof (Tr. 479-480). Appellant said that, on the day of this rape and sodomy, the victim told him that she went on a date with a man she had met through a dating service (Tr. 479). She said that the man had both a penis and a vagina (Tr. 479). She said that the man tried to rape her, so she broke his neck (Tr. 479). She said she was charged with murder in Wyandotte County because of this incident (Tr. 480).

B. Standard of Review

Trial courts are vested with broad discretion over the admissibility of evidence, and appellate courts will not interfere with those decisions unless there is a clear showing of an abuse of that discretion. State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000). The trial court clearly abuses that 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. State v. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997). If reasonable persons can differ about the propriety of an action taken by the court, it cannot be said the trial court abused its discretion. Id.

C. Appellant's Proposed Evidence was Inadmissible

Appellant attempted to introduce the evidence of the prior rape story to show that the victim had made up the allegations of rape in this case because she had allegedly made up another story of someone attempting to rape her (Tr. 325-326; App.Br. 72). However, the first problem with this argument is that appellant's offers of proof failed to prove that this man who took the victim out did not try to rape her, and actually support the inference that she had some kind of confrontation with the man. Tucker testified that the authorities in Wyandotte County had taken the victim into custody, and Kevin Bonei also testified that the victim actually got in trouble over the incident, consistent with the victim's statements that she "did time" in Wyandotte County due to the event (Tr. 333, 340, 396). Because appellant failed to prove that this attempted rape and the victim's subsequent assault of the intended rapist did not actually occur, he failed to demonstrate that this unrelated attack was at all relevant to the victim's credibility or to any issue at trial.

Even if appellant had established that the victim's story about the attempted rape was false, this is simply an attempt to prove the victim's character for untruthfulness through extrinsic evidence of showing specific instances of telling untruths. A complaining witness in a sex offense case may be impeached by evidence that her general reputation for truth or veracity is bad, but not by extrinsic evidence of acts of specific conduct. Rousan v. State, 48 S.W.3d 576, 590 (Mo. banc 2001); State v. Raines, 118 S.W.3d 205, 212 (Mo. App., W.D. 2003); State v. Edwards, 918 S.W.2d 841, 845 (Mo. App., W.D. 1996); State v. Foster, 854 S.W.2d 1, 4 (Mo. App., W.D. 1993). As in Point

I, this the type of evidence is clearly prohibited. Because appellant was not permitted to prove the victim's alleged untruthful character through evidence of specific conduct, the trial court did not abuse its discretion in denying these offers of proof.

For the foregoing reasons, appellant's final point on appeal must fail.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 12,180 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 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, postage prepaid, this 29th day of January, 2004, to:

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APPENDIX