



In the Missouri Court of Appeals Eastern District

DIVISION TWO

STATE OF MISSOURI,	)	ED109155
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
v.	)	1922-CR00095-01
	)	
BENJAMIN STIFF,	)	Honorable Madeline O. Connelly
	)	
Appellant.	)	Filed: July 27, 2021

Benjamin Stiff (Defendant) appeals from the trial court's judgment convicting him of first-degree statutory sodomy, in violation of Section 566.062,¹ and sentencing him to 20 years in prison. We affirm.

BACKGROUND

The State of Missouri (State) charged Defendant with statutory sodomy in the first degree, in violation of Section 566.062, alleging that Defendant touched J.L.'s² vagina with his hand while in bed between June 1, 2017, and August 15, 2017. A jury trial was held on December 9 and 10, 2019, where the following evidence was adduced.

J.L. (Victim) was born in 2010. Victim's mother, Dawn Stiff (Mother), married Defendant in 2014, and later that year they had a child together (Sister). In 2016, Mother left

¹ All statutory references are to RSMo (2016) as updated, unless otherwise indicated.

² The victim's name is redacted pursuant to Section 595.225.

Defendant and moved to Kentucky, with Victim and Sister. In summer 2017, Victim and Sister returned to St. Louis to visit with Defendant when he was residing with Shelby Prevost (Prevost). Defendant wanted to spend time with his daughter, and did not want Victim to feel left out. The girls wanted to stay with Defendant longer when Mother arrived to pick them up, so she agreed to let them stay until school started and returned to Kentucky. In December 2017, Mother again took Victim and Sister to visit Defendant for Christmas.

In August 2018, when Mother, Victim, and Sister were residing with Danielle Davenport (Davenport) and her children, Davenport noticed two of her children and Victim playing in a room with the door shut, which she did not permit in her home. She opened the door and saw Victim kneeling in front of her five-year-old son, whose pants were down. She became angry and when she frantically asked what was going on, Victim ran out of the room, and Davenport's daughter explained what had happened. Davenport took all the children into her bedroom and put on a movie so she could keep her eye on all of them. During the movie, Victim climbed up onto the bed and told Davenport that Defendant touched her when he gave her baths. Victim also said that when Defendant spanked her, he would make her touch him. Victim explained that she had not said anything before because she didn't want her mom to get into trouble. Victim then cried uncontrollably for 35 minutes. Davenport called Mother and reported what Victim said to her.

Victim was interviewed at the Child Advocacy Center (CAC) in Kentucky. Victim told the interviewer that Defendant had touched her two times on her "cootie," which she identified as her vaginal area. She said it first happened when Mother and Defendant lived together in St. Louis and she had fallen asleep in Defendant's bedroom while Mother was at work and the other children were outside. The other time was when she was staying with Defendant at Prevost's

home for the summer. She was sleeping in a bed between Sister and Defendant while Prevost slept on the floor. After she fell asleep, she saw Defendant's hand, and felt it in her pants.

Victim stated she was afraid to say anything because Defendant told her he would do it again if she ever told Mother.

Shortly before trial, Defendant filed a "Motion to Admit Evidence of Prior Sexual Conduct Pursuant to Section 491.015 RSMo."³ The motion declared Defendant's intent to adduce evidence at trial that Victim had made prior unrelated accusations of sexual abuse by different individuals. The motion claimed that this evidence would not constitute evidence of prior sexual conduct, but that it was filed out of an abundance of caution pursuant to Section 491.015.3.⁴ Defendant sought admission of evidence that Victim had previously made reports of sexual abuse, was familiar with how such reports were made, and the subsequent investigations that took place because the State endorsed an expert to explain the process of delayed disclosure. He argued that the prior investigations would be relevant in considering Victim's statement that she did not disclose earlier because Defendant threatened to touch her again. Defendant did not raise a constitutional issue in the motion or at trial.

The trial court took up Defendant's motion during a recess on the first day of trial, after the jury was seated. Defendant's trial attorney (Defense Counsel) argued that the evidence he

³ Section 491.015.1 prohibits opinion and reputation evidence of the complaining witness' prior sexual conduct in prosecutions under Chapter 566 and 568; and evidence of specific instances of the complaining witness' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where certain exceptions apply, including (1) reasonably contemporaneous evidence of the sexual conduct of the complaining witness with the defendant to prove consent as a defense to the alleged crime; (2) evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease; (3) evidence of immediate surrounding circumstances of the alleged crime; or (4) evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution. Section 491.015.1.

⁴ Section 491.015.3 requires the defendant to file a written motion and provide an offer of proof if he proposes to offer evidence of the sexual conduct of the complaining witness under this section. This subsection provides for a recorded in camera hearing for the court to determine the sufficiency of the offer. The court's order should then state the scope of the evidence allowed and its reasons for its ruling. Either side may make objections.

sought did not fall under the rape shield law because he planned to show only that there had been prior investigations relating to Victim after she disclosed sexual conduct, not to show the specific details of that sexual conduct. Defense Counsel asserted that Victim's delay in disclosing the sexual conduct would be a large part of the case, and that the immediacy of her prior disclosures showed that she knew the process of making a complaint and knew that adults would protect her and make sure that she was okay. The trial court ruled that this evidence fell under the rape shield statute as specific instances of the complaining witness' prior sexual conduct.

Defense Counsel argued that the evidence of the prior investigations fell under Section 491.015.2 because it was evidence that was relevant to a material fact or issue. Specifically, he argued the prior investigations were relevant to Victim's knowledge of sexual matters at such a young age, her delay in disclosing the sexual conduct, and potentially Victim's benefit of keeping Defendant away from the family. Defense Counsel made an offer of proof, stating that through the testimony of Victim and Mother, he would introduce evidence of prior Children's Division investigations into disclosures she made while staying in a homeless shelter with her siblings and Mother. Victim told volunteers that an unknown boy touched her in her vaginal area, "humped" her, and did "nasty things" to her. Victim also reported sexual activity of other children, such as an eight-year-old that spoke about sexually explicit things she did at school, and a four-year-old that also used sexually explicit language. Upon Victim's disclosures, the homeless shelter immediately informed Mother. However, Victim was not interviewed following her reports of these prior incidents and the State noted, "nothing materially changed in her life" due to her allegations. In addition, the Children's Division investigation report allegedly stated that the investigators did not believe Victim would know these kinds of sexually

explicit details without talking to those kids and the occurrence with the unknown boy actually happening to her.

The trial court denied Defendant's motion, finding he failed to establish a material fact or issue that the evidence would aid the jury, and that the evidence was more prejudicial than probative. The trial court added that if the State opened the door by arguing or implying that Defendant was the sole source of Victim's knowledge of sexual matters or inappropriate touching, then Defendant could adduce the contested evidence.

During trial, Victim testified that when she stayed in Prevost's home, she slept in bed with Sister and Defendant, and Prevost slept on the floor. When she was in bed, she kept feeling tickling things on her "haha," which is what she used to go to the bathroom. She would wake up and Sister was near her. She never saw a hand or anything near her "haha."

The State called Linda McQuarry (Expert), the forensic director at the CAC in St. Louis, to testify to the process of disclosure, the purpose of the forensic interview and how one is conducted in St. Louis. She did not know the facts of the case and had neither met Victim nor reviewed her CAC interview. She testified that a "purposeful disclosure" occurs when a child chooses to tell someone what happened, while an "accidental disclosure" occurs when the information is disclosed not because the child made a choice but is discovered in a different way, for example walking in on an abusive scenario or reading about something in a diary.

Expert explained the "different steps" that many children go through with an accidental disclosure, although every child may not experience each step in a "chronological manner." Denial is often the first step, followed by a "tentative disclosure" where a child does not fully deny but also does not give a full account. For example, "maybe something happened one time," or "I don't remember everything," or "I really don't want to talk about it." She identified the

next step as “active disclosure,” where a child fully discloses what has happened. She explained that some children may then recant and/or later reaffirm their initial disclosures. She compared disclosure to the way people enter a swimming pool – some dive right in while others slowly test the water. Expert further testified that delayed disclosure is the “norm” in her work, for reasons such as reluctance to hurt family or cause someone to go to jail, feeling ashamed or embarrassed, or afraid of being blamed.

During closing argument, the State reminded the jury of Expert’s testimony regarding the types of disclosure and argued that Victim’s disclosure was accidental in that she did not want to tell anyone because she was afraid of Defendant and he had told her he would do it again if she told. Defense Counsel argued Victim was not telling the truth, and the inconsistencies could not be explained by the delay or incremental disclosure testimony as seen in the timeline where Victim continued to go stay with Defendant even after the alleged abuse; Victim did not say anything or act differently after the alleged incidents. Defense Counsel questioned the reason Victim gave the CAC interviewer for her delay in making the allegations and said this should give the jurors pause and find Defendant not guilty. The State’s rebuttal asked the jurors to recall Expert’s testimony regarding the delayed disclosure to give them the whole picture for a child’s disclosure. The State reminded the jurors why children delay in disclosing and that Victim’s process was consistent with delayed disclosure.

The jury found Defendant guilty of first-degree sodomy as charged. The trial court found he was a prior offender and sentenced him to 20 years of imprisonment in the Missouri Department of Corrections. This appeal follows.

DISCUSSION

In his sole point on appeal, Defendant alleges the trial court plainly erred in excluding evidence of prior disclosures of sexual conduct made by Victim, which are not protected by Section 491.015, the rape shield statute. Defendant claims such exclusion violated his constitutional rights to confrontation, fair trial, and due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Defendant alleges the trial court's ruling resulted in manifest injustice because such exclusion prejudiced his defense by his constitutional rights to present his defense in a case where the evidence of guilt was not overwhelming and was entirely dependent on Victim's credibility.

Standard of Review

Ordinarily, "whether a criminal defendant's rights were violated under the Confrontation Clause . . . is a question of law that this Court reviews de novo." *State v. Campbell*, 600 S.W.3d 780, 788 (Mo. App. W.D. 2020) (citing *State v. March*, 216 S.W.3d 663, 664-65 (Mo. banc 2007)). That assumes, however, that the constitutional challenge has been properly preserved. *Id.* "[T]he rule is clearly established that in order to preserve a constitutional issue for appellate review, it must be raised at the earliest time consistent with good pleading and orderly procedure and must be kept alive during the course of the proceedings." *Campbell*, 600 S.W.3d at 788 (citing *Kirk v. State*, 520 S.W.3d 443, 457 (Mo. banc 2017) (quoting *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. banc 2012))).

Moreover, where a court excludes evidence prior to trial, the ruling is interlocutory only and subject to change during trial. *State v. Dowell*, 25 S.W.3d 594, 601 (Mo. App. W.D. 2000). The proponent of the evidence must attempt to admit the evidence at trial and make an offer of

proof to preserve the issue for appellate review. *State v. Purlee*, 839 S.W.2d 584, 592 (Mo. banc 1992). An offer of proof must establish what the evidence will be, its purpose and object, and each fact essential to establishing the admissibility of the evidence. *Terry v. Mossie*, 59 S.W.3d 611, 612 (Mo. App. W.D. 2001).

Although Defendant raised the issue of Victim’s previously disclosed instances of sexual conduct in his “Motion to Admit Evidence of Prior Sexual Conduct Pursuant to Section 491.015 RSMo.” at the pretrial hearing, Defendant failed to attempt to elicit the contested evidence at trial and concedes the issue was not preserved for appellate review. He therefore requests plain error review pursuant to Rule 30.20.

Any issue not preserved at the trial level can be reviewed only for plain error. *State v. Pierce*, 548 S.W.3d 900, 904 (Mo. banc 2018). Relief under the plain error rule is granted only when the alleged error so “substantially affects” the rights of the accused that a “manifest injustice or miscarriage of justice inexorably results if left uncorrected.” *Id.* (quoting *State v. Hadley*, 815 S.W.2d 422, 423 (Mo. banc 1991)).

Appellate courts use a two-step process when reviewing for plain error. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). First, a court must determine “whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted.” *Id.* (quoting *State v. Worthington*, 8 S.W.3d 83, 87 (Mo. banc 1999)). Plain errors are those which are evident, obvious, and clear. *Id.* Second, if plain error is found, a court must determine “whether the claimed error resulted in manifest injustice or a miscarriage of justice.” *Id.* at 607-08 (quoting *Steve v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. E.D. 1999)). When reviewing for plain error, the defendant bears the burden of establishing manifest injustice as determined by the facts and circumstances of the case. *Pierce*,

548 S.W.3d at 904. Plain error must be outcome determinative. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006); *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002).

Analysis

Defendant argues it is clear, evident and obvious that the trial court plainly erred in excluding evidence of Victim's prior disclosures of sexual conduct pursuant to the rape shield statute, Section 491.015. He asserts the trial court violated his constitutional rights because the disclosures did not fall within the rape shield law and that the exclusion of this evidence prevented him from challenging the veracity of Victim's allegation against him and deprived him of a fair trial. We disagree.

The trial court is vested with broad discretion regarding questions of relevance and admissibility of evidence. *State v. Davis*, 186 S.W.3d 367, 373 (Mo. App. W.D. 2005). Moreover, the scope of cross-examination and determination of matters that bear on witness credibility are largely within the discretion of the trial court. *Id.* Such discretion should not be overturned on appeal absent a clear abuse of discretion. *Id.*

As outlined *supra*, Section 491.015.1 prohibits opinion and reputation evidence of the complaining witness' prior sexual conduct in prosecutions under Chapter 566 or 568; and evidence of specific instances of the complaining witness' prior sexual conduct or the absence of such conduct is inadmissible, except where certain exceptions apply to those specific instances, including (1) reasonably contemporaneous evidence of the sexual conduct of the complaining witness with the defendant to prove consent as a defense to the alleged crime; (2) evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease; (3) evidence of immediate surrounding circumstances of the alleged crime; or (4) evidence relating to the previous chastity of the complaining witness in cases, where, by statute,

previously chaste character is required to be proved by the prosecution. Section 491.015.1. However, Section 491.015.2 mandates that even if the evidence of the complaining witness' sexual conduct is offered pursuant to one of these four exceptions, it is only admissible to the extent the court finds the evidence relevant to a material fact or issue. Section 491.015.2.

Defendant asserts *State v. Lampley*'s holding is binding here in that evidence of a victim's prior complaints, as opposed to prior sexual conduct, does not fall within the ambit of Section 491.015. 859 S.W.2d 909, 911 (Mo. App. E.D. 1993). In *Lampley*, the prior unrelated complaint was introduced to establish a motive to fabricate the accusation against him. *Id.* at 911. There the defendant argued the prior complaint resulted in the accused being removed from the home, which was a benefit that the victim wished to repeat. *Id.* The court held the defendant could cross-examine the child victim about a motive to fabricate based on the prior allegation. *Id.*

In dicta, the *Lampley* court proposed a "very simple" cross-examination that "may show motive to fabricate and never implicate" the rape shield statute. *Id.* at 912. We respectfully disagree and find the first question – "Did you make a *complaint like this* a few years ago?" (emphasis added), expressly implicates the victim's prior sexual conduct because the "*complaint like this*" specifically referred to the alleged sex crimes against victim for which the defendant was on trial. *Id.* While we agree that the prejudicial effect can be reduced by skillful questioning, we find this rationale ignores the fundamental purpose of the rape shield statute to prohibit such evidence except in four specific circumstances. Section 491.015.1. It is only if one of these apply, that the prejudicial effect is then considered. Section 491.015.2. Therefore, Section 491.015 is unequivocally applicable to a victim's prior complaint when it is inherently premised upon prior sexual conduct.

We find instructive the Missouri Supreme Court’s clarification of the rape shield statute in *McIntosh v. State*, 413 S.W.3d 320, 331 (Mo. banc 2013), which considered a claim that trial counsel was ineffective for failing to introduce evidence of a child victim’s prior sexual abuse allegations in the defendant’s first-degree statutory sodomy trial. *Id.* at 330. The defendant argued the evidence would have impeached the victim and rebutted the state’s closing argument regarding the victim’s veracity. *Id.* However, the Court held the victim’s prior sexual abuse allegations “would not be admissible at trial except under limited circumstances” specifically set forth in the rape shield statute because Section 491.015 “creates a presumption that evidence of a victim’s prior sexual conduct is irrelevant.” *Id.* at 331. The Court ultimately concluded that the prior allegation had not been proven false and was not admissible as a prior false allegation to generally impeach the victim’s credibility. *Id.*

Here, we find Victim’s disclosures were evidence of specific instances of prior sexual conduct and inadmissible under Section 491.015.1. Admission of these disclosures as only “complaints” raised for timing purposes without details does not exempt them from the rape shield statute. Like *McIntosh*, Defendant here did not allege Victim’s prior allegations of sexual conduct were false or that she had age-inappropriate sexual knowledge to explain. In fact, Defendant sought to introduce the evidence of prior sexual conduct allegations in order to impeach the victim,⁵ but none of Section 491.015’s limited circumstances were established to admit this prohibited evidence. Therefore, the trial court did not err in ruling Victim’s disclosures inadmissible because they did not meet any of the four exceptions to the rape shield statute.

⁵ The evidence of Victim’s prior sexual conduct complaints was actually an attempt to discredit Expert’s testimony that a delayed disclosure was normal in abuse cases such as the one at issue. However, Expert’s testimony was clear that she had not reviewed the specifics of Victim’s case and that disclosure comes in many different forms.

Once the trial court determined that the rape shield statute applied, any further argument regarding the admissibility of Victim's disclosures should have concluded pursuant to Section 491.015. However, the trial court heard additional arguments regarding the admissibility of the evidence beyond the limited exceptions set forth in Section 491.015 and weighed the probative value versus the prejudicial effect of the evidence as though the rape shield statute exceptions applied, which they did not. Section 491.015.2 does not create "an independent statutory basis for admitting specific instances of a complaining witness's sexual conduct, and instead must be read in conjunction with the exceptions described in Section 491.015.1(1)-(4), none of which are argued by [Defendant] to apply." *State v. Campbell*, 600 S.W.3d 780, 790 (Mo. App. W.D. 2020).

However, evidence prohibited by the rape shield statute may still be admissible pursuant to the rights conferred by Confrontation Clause to cross examine witnesses to expose bias or a motive to fabricate. *See State v. Samuels*, 88 S.W.3d 71, 82 (Mo. App. E.D. 2009) (defendant's due process rights violated in banning evidence that victim gained unusual sexual knowledge from a source other than defendant); *State v. Montgomery*, 901 S.W.2d 255, 257 (Mo. App. E.D. 1995) (prior allegations of sexual abuse where witness received benefits were relevant to witness credibility); *Lamley*, 859 S.W.2d at 911 (evidence of a victim's prior sexual abuse complaint was admissible to show motive to fabricate); *State v. Douglas*, 797 S.W.2d 532, 535 (Mo. App. W.D. 1990) (if the state seeks to introduce evidence of a defendant's guilt or creates an inference of a defendant's guilt, the rape shield statute may not be used to prohibit the defendant from introducing contrary evidence without violating a defendant's constitutional right to a fair trial).

However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross examination based on concerns about, among

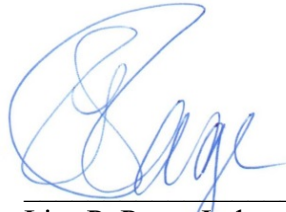
other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.” *Campbell*, 600 S.W.3d at 789 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). Similar to *Campbell*, here Defendant never asserted a constitutional challenge in his “Motion to Admit Evidence of Prior Sexual Conduct Pursuant to Section 491.015 RSMo.,” which by its nature is limited to the rape shield statute and can only be raised pursuant to Section 491.015.3. Constitutional issues are separate and distinct claims that must be expressly raised at the earliest possible time “consistent with good pleading and orderly procedure and must be kept alive during the course of the proceedings.” *Campbell*, 600 S.W.3d at 788.

In conclusion, we hold exclusion of the evidence would not have risen to the level of plain error. Even though a relevance inquiry was not required pursuant to Section 491.015.2, we agree with the trial court’s analysis that the instances of prior sexual conduct were completely unlike the allegations against Defendant here. Facts demonstrating that a boy had previously touched Victim’s vaginal area, “humped” her, and did other “nasty things” to her, and that she heard of others’ engaged in sexual activity and “sexually explicit language” from another child, did not reveal any connections in the conduct or outcomes relevant to help demonstrate that Victim was lying in this matter. The prior allegations were directed toward children while this one accused an adult step-parent. Victim was not interviewed following her reports of these prior incidents and “nothing materially changed in her life” due to her allegations. Moreover, it is an uncontroverted fact that Defendant effectively challenged Victim about her motives to falsely accuse him due to the circumstances surrounding her disclosure without the evidence of Victim’s prior sexual conduct complaints.

Defendant’s point is denied.

CONCLUSION

The judgment of the trial court is affirmed.



Lisa P. Page, Judge

Sherri B. Sullivan, C.J. and
Thom C. Clark, II, J., concur.