

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

Second, he argues that the trial court erred in excluding evidence that the prior victim previously made allegedly false allegations of sexual assault against other people. Finding no error, we affirm.

Background

On May 17, 2013, Davison married M.K., who gave birth to Victim (Davison's child) on July 21, 2013. The relationship did not last, however, and M.K. filed for divorce in May of 2017. Because there were allegations that Davison had physically abused Victim, a guardian ad litem (GAL) was appointed for Victim as part of the divorce proceedings.² During the divorce proceedings, Victim spent time alternating between Davison's and M.K.'s homes, primarily between October of 2017 and January of 2018. During that time, Davison lived with his mother in Bolivar, Missouri, and M.K. lived with her mother in Morrisville, Missouri.

Shortly after Victim began staying with Davison, she started exhibiting unusual behavior; specifically, she would grab M.K.'s and M.K.'s mother's crotches and say, "I got your penis." Initially, M.K. did not think much of Victim's behavior and simply corrected her, noting that it was inappropriate and Victim should not do that. But when the behavior persisted, M.K. asked Victim, "Who told you that?" and Victim responded, "My dad." M.K. then advised the GAL of Victim's conduct. Around the same time period, Victim also began refusing to wear dresses without wearing pants beneath them because "she was afraid somebody was going to see her butt."

On January 5, 2018, while the GAL was visiting Victim at M.K.'s home, Victim spontaneously told the GAL that Davison slept naked and licked Victim's butt. The GAL asked Victim what she meant by "butt," and Victim pointed to her vaginal area. The GAL advised M.K. that, if Victim made any more similar comments, M.K. needed to contact the child abuse hotline

² The abuse allegations prompting the appointment of the GAL were not sexual in nature. The GAL testified that her appointment was made in response to a situation where Davison spit on Victim. During a Child Advocacy Center interview, Victim also indicated that Davison had smacked her across the cheek.

and report Davison. A day or so later, Victim remarked that Davison slept naked with her, and M.K. contacted the child abuse hotline on January 9, 2018. An investigator for the Children's Division went to Davison's home in response to the call, where she spoke with Davison and Victim. Victim told the investigator that she wanted to speak in the bedroom, and as the investigator and Victim headed towards the bedroom, Davison joined them and volunteered to the investigator that he had been sleeping in the same bed as Victim but had purchased an air mattress to keep in another room and thought it would be best if he started sleeping in a separate bedroom.

On January 11, 2018, Victim was interviewed at the Child Advocacy Center. During the interview, Victim revealed that she shared a bed with Davison, that he slept in only his underwear, and that he licked her "butt," a word she used to refer to her vaginal area as well as her bottom. When provided with anatomically correct dolls to demonstrate what happened between her and Davison, Victim showed the girl doll with her face on the boy doll's penis and moved the head up and down. At another point, when shown anatomically correct drawings of a boy and a girl, Victim actually licked the penis on the paper depicting a boy when discussing what she meant when she said she saw Davison's "butt." Victim also indicated that Davison had touched her "butt" (which she clarified referred to her vaginal area) with both his tongue and his hands. A subsequent search of Davison's home revealed multiple children's items mingled with Davison's items in a single bedroom, and Davison's mother verified that Victim and Davison, in fact, shared the bedroom.

The State charged Davison with two counts of first-degree child molestation (one count for Davison licking Victim's vagina and one count for Davison placing his penis in Victim's mouth) and one count of incest because Victim was Davison's descendant by blood. Before trial, the State filed a motion to offer propensity evidence under § 18(c) of the Missouri Constitution in the form of testimony from M.O. The motion suggested that M.O. would testify that, "when she was around

four years old, [Davison] took her to a bedroom, exposed his penis and placed his penis inside her mouth until he ejaculated.” The trial court held a hearing, wherein it received testimony from M.O. that was consistent with the State’s representation in its motion. After the hearing, the trial court made the following findings:

The Court has considered the evidence and arguments of the parties in looking at the probative side of this. The Court has looked at whether or not the evidence is sufficient for the jury to conclude the defendant committed the prior criminal act. The Court acknowledges that it is simply the victim’s testimony as opposed to a conviction; however, a victim’s testimony can be sufficient for a jury to believe that the [defendant] committed the act.

Does the evidence tend to show the defendant actually had the propensity to commit the crime charged? In that regard, we look at the similarity of the offenses. We have similar gender, similar age, similar locations within a home. And the Court believes the acts, while not identical, are similar enough.

The Court looks at the State’s need for the evidence. In this case before the Court, as far as the Court is aware, there is no scientific or forensic evidence. And, therefore, it is simply the victim’s statements and the statements she made to other people. But, primarily, it’s what the victim said and whether or not the victim [sic] is going to believe. And in the cases the Court has looked at, that weighs heavily in the Court’s decision for the probative side.

As to the prejudicial side, the Court acknowledges that one of the issues it’s going to face is whether the jury can know or infer that the defendant was punished for the past act. It’s very obvious here that the defendant, if they believe that he committed the past act, was never punished for it. It also looks at the fact that this is live testimony, which is another issue that the courts have indicated is a factor that it must consider on the prejudicial side. And whether or not it eclipses or overshadows the evidence of the crime charged, the Court would note for the record that the testimony of [M.O.] was less than ten minutes. We’ve spent far more time arguing about whether or not to let it in than—than the actual testimony would take. And, of course, the manner in which the State uses the evidence and the State should not be allowed to use an undue amount of time on the evidence, again that goes to the ten-minute testimony.

The Court has also looked at the lapse of time, which I think is approximately ten years. But, again, when you’re looking at the lapse of time you look at the similarity of the events, and the events are very, very similar.

The Court is going to find that the evidence is both logically and legally relevant, and that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

At trial, M.O. (who was 16 years old at the time) testified as the State's final witness consistent with her pretrial hearing testimony. Her testimony (both direct and cross-examination) comprised a total of ten pages of the 435-page transcript. Davison sought to question M.O. about prior sexual assault allegations M.O. made that he alleged were false and negatively affected M.O.'s credibility, but the trial court did not allow it, so he instead made an offer of proof by questioning M.O. outside the presence of the jury. The offer of proof consisted of the following:

Q. Hi, [M.O.]. [M.O.], you claimed in the past to have been drugged and raped by former aunts and their family.

A. Yes.

Q. Okay.

A. Yes.

Q. Because this is being recorded, it's—there's not a court reporter.

A. Sorry.

Q. There were eight people involved?

A. Yes.

Q. You've claimed that you had a cousin that was forced to rape you in that incident?

A. Yes.

Q. He was initially hiding under the bed?

A. Yes.

Q. You were pretty much unconscious the whole time?

A. Yes.

Q. You reported this incident to the Division of Family Services?

A. Yes.

Q. And they had a worker that you believed was involved in those rapes?

A. Yes.

Davison offered no further evidence to support his assertion that M.O.'s prior allegations were false. The trial court denied Davison's offer of proof.

The jury found Davison guilty as charged, and the trial court sentenced him to concurrent terms of eighteen years' imprisonment on each child molestation count, and a consecutive four-year term on the incest count for a total of twenty-two years' imprisonment. Davison appeals.

Analysis

Davison raises two points on appeal. First, he argues that the trial court abused its discretion in admitting propensity evidence from M.O. Second, he argues that the trial court abused its discretion in denying his offer of proof with respect to M.O.'s prior sexual assault allegations against other people. Finding no error, we affirm.

I. Standard of Review

Both of Davison's points allege evidentiary error. "The circuit court's decision to admit evidence . . . under article I, section 18(c), like all claims of evidentiary error, is reviewed for an abuse of discretion." *State v. Williams*, 548 S.W.3d 275, 287 (Mo. banc 2018). "The circuit court's evidentiary ruling 'will not be disturbed unless it is clearly against the logic of the circumstances.'" *Id.* (quoting *State v. Prince*, 534 S.W.3d 813, 818 (Mo. banc 2017)). "[I]f reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Id.* (quoting *Anglim v. Mo. Pac. R.R. Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992)).

II. The trial court did not abuse its discretion in allowing propensity evidence.

In his first point, Davison argues that the trial court abused its discretion in admitting propensity evidence under § 18(c) of the Missouri Constitution in the form of M.O.'s testimony. We disagree.

Section 18(c) provides:

Notwithstanding the provisions of sections 17 and 18(a) of this article to the contrary, in prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim's testimony or demonstrating the defendant's propensity to commit the crime with which he or she is presently charged. The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

Mo. Const. art. I, § 18(c).

“Before propensity evidence can be said to have any probative value, it must be sufficient for the jury to conclude the defendant actually committed the prior criminal act.” *Williams*, 548 S.W.3d at 288. And the evidence “must tend to show the defendant actually had a propensity to commit the charged crime at the time it is alleged to have occurred.” *Id.* at 289. In determining whether the evidence demonstrates a propensity, there is an inverse relationship between the similarity of a prior criminal act and the amount of time that has elapsed between the prior and the charged acts. *Id.* “For example, an inference of propensity might be proper notwithstanding a significant time lapse between the prior crime and the charged crime if the two crimes are highly similar.” *Id.* “On the other hand, an inference of propensity might not be proper if the prior crime and the charged crime are only somewhat similar unless the two occurred over a short span of time.” *Id.* “Finally, in determining the probative value of a particular item of propensity evidence, courts have looked to the prosecution's need for that evidence to prove its case.” *Id.*

Here, the propensity evidence had probative value. To begin, the jury had sufficient evidence through M.O.’s testimony from which it could conclude that Davison actually committed the alleged prior act. Second, M.O.’s testimony demonstrated Davison’s propensity to engage in deviate sexual intercourse with young girls. Though the prior act was about ten years before the charged acts, they were nevertheless quite similar, as the trial court found. Both involved four-year-old girls who were taken into bedrooms by Davison, where he then put his penis in their mouths. Finally, as the trial court found, the State had an appreciable need for the evidence given that there was no forensic or scientific evidence corroborating Victim’s allegations, and the State’s primary evidence came from statements of a four-year-old child. Thus, the trial court did not err in finding that the propensity evidence had probative value.

“Probative value, however, is only one side of the scale. The other side is the risk of unfair prejudice.” *Id.* at 290.

Some of the factors bearing on the prejudicial effect of propensity evidence are: “[1] whether the jury knows or can fairly infer the defendant was punished for his past criminal acts. . . . [2] the manner in which the [S]tate proves the prior criminal act at trial. . . . [3] whether the evidence of the defendant’s prior criminal act eclipses—or is overshadowed by—the evidence of the charged crime. . . . [and] [4] the manner in which the [S]tate uses the evidence at trial.”

State v. Banks, 582 S.W.3d 919, 925-26 (Mo. App. E.D. 2019) (quoting *Williams*, 548 S.W.3d at 290-91).

Here, the prejudicial effect inherent in all propensity evidence did not substantially outweigh the probative value of M.O.’s testimony. As the trial court noted, “It’s very obvious here that the defendant, if they believe that he committed the past act, was never punished for it.” Additionally, the trial court considered the fact that “this is live testimony, which is another issue that the courts have indicated is a factor that it must consider on the prejudicial side.” But the trial court also noted that “the testimony of [M.O.] was less than ten minutes,” and the attorneys had

“spent far more time arguing about whether or not to let it in than—than the actual testimony would take.” The trial court noted that the ten-minute length of the testimony favored a determination that its prejudicial effect did not substantially outweigh its probative value. We agree.

Though live testimony of a prior victim increases the potential for prejudice, that potential is limited where the testimony is “only as elaborate as . . . necessary to describe the incident and illustrate the similarities between” the prior and charged acts. *Id.* at 926. M.O.’s testimony was limited to a brief description of Davison’s prior act against her and the surrounding circumstances. Thus, it did not exceed what was necessary to describe the incident and establish the similarity with Davison’s acts against Victim. And, as the trial court noted, her substantive testimony about the prior act was very brief—spanning about four pages total—and therefore certainly did not eclipse the evidence of the charged crime. Furthermore, the manner in which the State used M.O.’s testimony was appropriate. The State used her testimony solely to establish Davison’s propensity to engage in deviate sexual intercourse with young girls, as evidenced by the brief questioning of M.O. and the fact that the prosecutor spoke only two sentences in all of closing argument about M.O.’s testimony. Finally, while the fact that the jury likely assumed that Davison was not punished for his act against M.O., this is but one factor to consider in the overall balancing test and is not determinative. In short, though M.O.’s testimony was likely prejudicial to Davison’s case, the prejudice did not substantially outweigh its probative value. Therefore, the trial court did not abuse its discretion in allowing admission of M.O.’s testimony.

Point I is denied.

III. The trial court did not abuse its discretion in excluding evidence of M.O.’s prior sexual assault allegations against other people.

In his second point on appeal, Davison argues that the trial court abused its discretion in excluding evidence about prior sexual assault allegations made by M.O. Davison contends that the evidence was relevant to directly challenge M.O.’s credibility and was, therefore, admissible.³ We disagree.

“Where . . . a witness’[s] credibility is a key factor in determining guilt,” evidence that the witness made a prior false allegation “is highly relevant to a crucial issue directly in controversy[—]the credibility of the witness.” *State v. Long*, 140 S.W.3d 27, 30-31 (Mo. banc 2004). To be admissible, the evidence of a prior false allegation must satisfy the legal relevance balancing test, where the probative value outweighs potential prejudice. *Id.* at 31. And “[t]he relevance of the prior false allegation is . . . derived primarily from the fact that the allegation was false” *Id.* Thus, before evidence of a prior false allegation is admissible, the proponent must show both that the allegation was false and that the declarant knew it was false. *Id.* at 31-32. If the proponent fails to show that the prior allegation is, in fact, false, there is no error in excluding the evidence. *State v. Abbott*, 412 S.W.3d 923, 929 (Mo. App. S.D. 2013).

Here, evidence of M.O.’s prior sexual assault allegations against other people was inadmissible because Davison showed neither that the allegations were false nor that M.O. knew them to be false. Davison argues, as he did below, that M.O.’s allegations are simply too outlandish to be true. Though M.O.’s allegations were unusual, that alone does not render them false as a matter of law, and Davison provides us no authority indicating otherwise.

³ Davison also contends, in response to the prosecutor’s argument below, that this evidence was not barred by § 491.015 (commonly known as the Rape Shield Statute) because the statute was inapplicable. Although the trial court mentioned a “statute” in its ruling, the crux of its ruling was that Davison had failed to prove that M.O.’s prior allegations were false, which is an independent basis for the court to have excluded the evidence; thus, we need not consider whether § 491.015 applies under these circumstances.

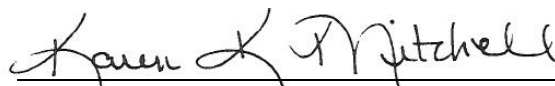
“[A] prior report of sexual abuse that [is not shown to be] false does not ‘speak to,’ does not ‘b[ear] on,’ and is not ‘relevant’ to the ‘ultimate issue of a witness’s credibility.’” *Id.* at 929-30 (quoting *Mitchell v. Kardesch*, 313 S.W.3d 667, 677-79 (Mo. banc 2010)). And if the proponent of the evidence fails to show the falsity of the prior allegation, then he is “not entitled either to cross[-]examine [the witness] about her prior report of sexual abuse or to introduce extrinsic evidence of that report for the purpose of impeaching [the witness’s] credibility” because, without evidence of falsity, “the report [i]s neither logically nor legally relevant to discrediting [the witness’s] credibility.” *Id.* at 930.

In short, Davison failed to prove that M.O.’s prior allegations were false; therefore, he failed to establish either logical or legal relevance of the challenged evidence. The trial court did not abuse its discretion in excluding evidence of M.O.’s prior allegations.

Point II is denied.

Conclusion

The trial court did not abuse its discretion in either admitting evidence that Davison had engaged in a similar act with M.O. or excluding evidence of M.O.’s prior sexual assault allegations against other people. Its judgment is affirmed.



Karen King Mitchell, Judge

W. Douglas Thomson, Presiding Judge, and Alok Ahuja, Judge, concur.