31A01-1703-PC-547

BEFORE THE

SUPREME COURT OF INDIANA

CAUSE NO. 31A01-0902-CR-88

LAWRENCE E. NUNLEY,

Appellant (*Defendant below*),

v.

STATE OF INDIANA,

Appellee (*Plaintiff below*).

Appeal from Superior Court of Harrison County

Cause No. 31D01-0805-FA-389

Hon. Roger D. Davis, Judge

APPELLEE'S SUPPLEMENTAL RESPONSE

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APPELLEE'S SUPPLEMENTAL RESPONSE

The question posed by this Court is whether under Indiana Evidence Rule 608, the trial court properly excluded extrinsic evidence proffered to impeach a witness. Though the issue satisfies the threshold standard of presenting an undecided question of law under Indiana Appellate Rule 57(H), this Court need not grant transfer. The Court of Appeals properly decided the issue consistent with its precedent and this Court's denials of transfer of the same.[1]

ARGUMENT

THE TRIAL COURT PROPERLY EXCLUDED EXTRINSIC EVIDENCE TO IMPEACH A.Y.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Noojin v. State*, 730 N.E.2d 672, 676 (Ind. 2000). The trial court's evidentiary rulings are afforded great deference on appeal. *Bacher v. State*, 686 N.E.2d 791, 793 (Ind.

[1] *Lawrence v. State*, Cause No. 49A02-0903-CR-283 (Ind. Ct. App. Nov. 23, 2009) (memorandum decision), which raises the same legal issue as the instant case, is currently pending on transfer.

1997). "[R]eversal is appropriate only where the decision is clearly against the logic and effect of the facts and circumstances." *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997).

As a general rule, the Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). "The main and essential purpose of confrontation is to secure for the opponent an opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974) (quoting *Wigmore*) (internal quotations omitted). The Confrontation Clause, however, does not preclude a trial judge from imposing 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." *Van Arsdall*, 475 U.S. at 679. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original). Indiana's Evidence Rule 608(b) comports with the Confrontation Clause.

The Indiana Rules of Evidence were adopted on January 1, 1994. *State v. Walton*, 715 N.E.2d 824, 826 (Ind. 1999). Indiana Evidence Rule 608(b) provides as follows:

> For the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided in Rule 609, specific instances may not be inquired into or proven by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of *another witness* as to which character the witness being cross-examined has testified.

(emphasis supplied). Federal Evidence Rule 608(b) differs slightly in language, but significantly in its import, allowing extrinsic evidence: "(1) concerning the witness' character for truthfulness

or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." Indiana has adopted the latter provision in its version of Rule 608(b), but not the former. The distinction between the state and federal rules is the manner in which an opponent may attack the witness's credibility.

Under Federal Rule 608(b), the opponent on cross-examination may inquire into specific instances of conduct probative of truthfulness or untruthfulness of the witness, but the opponent must accept or take the answer from the witness and may not use extrinsic evidence to contradict the witness's answer. Edward J. Imwinkelried, *Evidentiary Foundations* 205–06, § 5.05 (bad acts that have not resulted in a conviction) (6th ed. 2005). However, pursuant to the plain language of Indiana's Evidence Rule 608(b), extrinsic evidence is admissible only when the witness has testified concerning the character of *another* witness about which the witness has testified, i.e., proof of the character trait of truthfulness or untruthfulness of another witness may be shown by extrinsic evidence. *See Beaty v. State*, 856 N.E.2d 1264, 1269 (Ind. Ct. App. 2006), *trans. denied* (noting that Rule 608(b) was inapplicable because the witness did not testify regarding the truthfulness of another witness). Therefore, cases interpreting the Federal Rules are, for the most part, inapposite.

Under Indiana Rule 608(b), the proper method of impeaching a witness's character for truthfulness may not be proven by extrinsic evidence when cross-examining the witness herself. Such extrinsic evidence is admissible so long as it is consistent with Evidence Rules 608(a) and 405, which provide that evidence of specific instances of conduct is admissible to prove that a witness's reputation within a community is one of untruthfulness. Defendant could have attempted to cross-examine A.Y.'s mother T.C. or her husband R.C. about A.Y.'s reputation in

the community for truthfulness, but he did not. Defendant also failed to call any witnesses who would have testified that A.Y.'s reputation in the community was that she was untruthful. The nature of the allegation–A.Y. had previously told the police that another man had hit her–perhaps would have been known in the community and Defendant could have attempted to explore A.Y.'s reputation for truthfulness.

Even so, extrinsic evidence of untruthfulness remains subject to Rule 403 balancing, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Ind. Evid. R. 403. Here the extrinsic evidence was not related to the instant offense, the Defendant, or even a sexual assault. In other words, the connection between the extrinsic evidence and the instant case was too strained and perhaps too remote given A.Y.'s young age. *Cf. Bassett v. State*, 795 N.E.2d 1050, 1053 (Ind. 2003) (applying Rule 404(b)). The court could have properly excluded the evidence under Rule 403, concluding that there was a danger of unfair prejudice or confusion of the issues.

The extrinsic evidence here was collateral to the instant matter. As explained by the Eighth Circuit, "[t]he purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters." *U.S. v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992); *see also Carter v. Hewitt*, 617 F.2d 961, 971 (3rd Cir. 1980) (same); *Harbsco Corp. v. Renner*, 475 F.3d 1179, 1191 (10th Cir. 2007) (discussing mini-trials on collateral issue). Indiana's Rule 608(b) excluding extrinsic evidence on cross-examination of the testifying witness avoids just that, a mini-trial of the witness. Moreover, the Federal Rule allowing such evidence adds little when the opponent is essentially "stuck" with the answer given. Thus, there is no reason for this

Court to expand the narrow exception, prior false allegations of sexual assault, to include extrinsic evidence of other acts that may go to credibility.

The limited exception, prior false allegation of sexual assault, does not apply here. The State recognizes that "evidentiary constraints must sometimes yield to a defendant's right of cross-examination." *Walton*, 715 N.E.2d at 826 (quoting *Clinebell v. Commonwealth*, 368 S.E.2d 263 (Va. 1988) (internal quotations omitted)). In *Walton*, this Court considered a reserved question of law whether a prior false allegation of rape was admissible under Rule 608(b). *Id.* This Court concluded that prior false allegation of rape to impeach the credibility of a witness was admissible and did not run afoul of the Rape Shield Rule. *Id.* at 826–27 (discussing Ind. Evid. R. 412). This Court further held that evidence of prior false allegations of rape were admissible under Rule 608(b) to attack the credibility of the complaining witness. *Id.* at 827. This Court's holding in *Walton*, however, should not be read expansively, otherwise the exception would swallow the rule, permitting counsel to cross-examine on any matter concerning credibility, even absurd questioning such as whether the witness ever stole a lollipop.

Courts interpreting the interplay between cross-examination and evidentiary constraints have done so narrowly, even under the Federal Rules. *See, e.g.*, *Tague v. Richards*, 3 F.3d 1133, 1138–39 (7th Cir. 1993) (reasoning the trial court improperly constrained cross-examination regarding direct as opposed to collateral matters). Even the *Clinebell* Court specifically stated that "a witness' character may not be impeached by showing specific bad acts of untruthfulness or bad conduct." *Clinebell*, 368 S.E.2d at 265. The court noted that the weight of the authority held in favor of a more liberal rule permitting evidence of prior false accusations as either impeachment or as substantive evidence that the charged offense did not occur. *Id.* at 265–66 (citing cases). However, the cases cited by *Clinebell* involved prior false accusations that the

complainant was sexually assaulted. Neither *Walton*, *Tague*, nor *Clinebell* can be read so expansively as to permit cross-examination into any matter regarding credibility, but rather in limited circumstances involving prior false allegations of sexual assault.

The Court of Appeals has properly applied this Court's holding in *Walton*. The defendant in *Saunders v. State*, 848 N.E.2d 1117 (Ind. Ct. App. 2006), *trans. denied*, sought to introduce evidence that one of the State's witnesses had used a false Social Security number. *Id.* at 1122. The trial court excluded the evidence. *Id.* The Court of Appeals reasoned that *Walton's* exception to Rule 608(b) was limited "to very narrow circumstances–specific prior false accusations of rape–that do not apply here." *Id.*; *see also Walton*, 715 N.E.2d at 827. The *Nunley* panel also properly recognized *Walton's* narrow holding. *Slip op.* at 14 (applying *Saunders*).

Even if the trial court abused its discretion, any resulting error was harmless. Errors arising from the Confrontation Clause are subject to harmless error analysis. *Van Arsdall*, 475 U.S. at 680; *Harrington v. California*, 395 U.S. 250, 253–54 (1969); *Schneble v. Florida*, 405 U.S. 427, 432 (1972). In determining whether a Confrontation Clause error is harmless beyond a reasonable doubt, this Court will consider a variety of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684; *see also Spivey v. State*, 761 N.E.2d 831, 836 (Ind. 2002) (applying harmless error standard); *Standifer v. State*, 718 N.E.2d 1107, 1110–11 (Ind. 1999) (same).

Certainly A.Y. was the prosecution's key witness and critical to the State's case. There was, however, some corroborating evidence, including the movie where "boys and girls were

doing bad stuff to each other" (Tr. 431; State's Exh. 2). The court did not otherwise limit cross-examination of A.Y., which is in fact slightly longer than A.Y.'s direct examination. *Compare* Tr. 417–458 (direct) *with* 458–500 (cross). The extrinsic evidence was also collateral to the instant case. Admission of extrinsic evidence would have been cumulative of Defendant's thorough attack on A.Y.'s credibility during cross-examination, where counsel probed inconsistencies in A.Y.'s testimony and prior statements. Moreover, counsel placed A.Y.'s credibility before the jury during his opening statement, saying he was not sure what A.Y. was going to say on the stand (Tr. 412–13). Whether A.Y. had lied about an unrelated incident would have mattered little in the eyes of the jury; therefore, if there was any error, it was harmless.

CONCLUSION

The logic and effect of the facts and circumstances before the trial court were: (1) Defendant sought to impeach A.Y. on cross-examination with extrinsic evidence of specific acts of A.Y.'s conduct; (2) the plain language of Rule 608(b) prohibited defense counsel from using such extrinsic evidence against the A.Y. in the manner counsel desired; (3) A.Y. was not testifying about her opinion of another witness; (4) the specific acts did not involve Defendant; (5) the specific acts did not involve a false allegation of sexual assault; (6) admitting the evidence would be inconsistent with the narrow holding of *Walton*, the Court of Appeals' application of *Walton*, and this Court's denials of transfer of the same; and (7) Defendant could still attempt to impeach A.Y. through reputation or opinion evidence and by pointing out inconsistencies in her testimony and prior statements. Thus, the trial court acted within its discretion to exclude the proffered evidence. Therefore, this Court should deny transfer and let the Court of Appeals' decision stand.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44, I verify that the Appellee's Supplemental Response contains no more than 3,750 words, excluding the items permitted by the rule.

Joby D. Jerrells
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CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties for perjury that on February 12, 2010, I served upon the opposing counsel in the above-entitled cause two copies of Appellee's Supplemental Response by causing the same to be deposited in the United States mail first-class postage prepaid, addressed as follows:

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