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IN THE
SUPREME COURT OF INDIANA

Case No.: _____

Lawrence E. NUNLEY

Appellant (Defendant Below)

vs.

STATE of Indiana

Appellee (Plaintiff Below)

Court of Appeals Cause No:
31A01-0902-CR-00088

Appeal from Harrison
Superior Court

Case No.: 31D01-0805-FA-389

The Honorable Roger D. Davis,
Judge

APPELLANT'S SUPPLEMENTAL
PETITION TO TRANSFER

Matthew Jon McGovern
Attorney #: 21016-49
5444 East Indiana Street, #375
Evansville, IN 47715
(812) 842-0286
Attorney for Appellant

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ISSUES WARRANTING TRANSFER

Whether Indiana Rule of Evidence 608(b) should yield to a criminal defendant's right of cross-examination when the complaining witness admits to a prior false accusation, if this evidence is probative of the witness' veracity and even if the prior accusation is not identical to the instant allegation?

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ARGUMENT

I. INDIANA EVIDENCE RULE 608(b) SHOULD YIELD TO THE DEFENDANT'S RIGHT OF CROSS-EXAMINATION WHEN THE COMPLAINING WITNESS ADMITS TO PRIOR FALSE ACCUSATIONS

A. *This Court Has Held that Rule 608(b) May Not Trump a Criminal Defendant's Right of Cross-Examination*

Indiana Evidence Rule 608(b) states as follows:

For the purpose of attacking or supporting the witness's credibility, other than conviction for 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.

Ind. Evid. R. 608(b). In *Beaty v. State*, our Court of Appeals held that "Indiana Evidence Rule 608(b) contains a broader limitation than that found in the Federal Rules of Evidence, which do not limit simple inquiry into specific instances of conduct." *Beaty v. State*, 856 N.E.2d 1264, 1269, n.2 (*Ind. Ct. App.* 2006), *trans. denied*. Indeed, Indiana's version of Rule 608(b) has been consistently interpreted as a blanket prohibition against challenging the credibility of a witness by cross-examining her about specific instances of untrustworthiness. See 13 Robert L. Miller, Jr., *Indiana Practice, Evidence* §§ 608.201, 608.205.

I. *In State v. Walton, this Court Held that Evidence Rule 608(b) Must Yield to a Defendant's Right of Confrontation*

Under certain circumstances, however, the blanket prohibition under Indiana Evidence Rule 608(b) may run afoul of a criminal defendant's Sixth Amendment right of confrontation and cross-examination. This potential incompatibility between Rule 608(b) and the right of cross-examination was addressed in by this Court in *State v. Walton*, 715 N.E.2d 824 (*Ind.* 1997). In *Walton*, the defendant proceeded to trial on charges of rape and sexual deviate conduct. At trial,

the trial court permitted the defendant to introduce evidence that the victim had made prior allegations of rape but later denied having been raped on previous occasions. *Walton*, 715 N.E.2d at 825. The defendant was acquitted, and the State initiated an appeal on a reserved question of law. *Id.* On appeal, the Court of Appeals determined that the evidence of prior allegations of rape should not have been admitted. *Id.* This Court accepted transfer and affirmed the trial court's decision to allow this evidence. *Id.*

This Court noted that the rape shield law, codified at *Ind. Code 35-37-4-4*, contained exceptions to the prohibition of evidence of prior sexual conduct. The exception relevant to the defendant's appeal permitted the admission into evidence of (1) prior false accusations of rape or (2) demonstrably false prior allegations. This Court held that the rape shield rule, Indiana Evidence Rule 412, which did not contain this exception, was not incompatible with the exception because prior false allegations of rape constituted verbal conduct rather than prior sexual conduct. *Walton*, 715 N.E.2d at 826. Thus, this Court held that the admission of prior false allegations were not precluded under Rule 412. *Id.*

Indiana Evidence Rule 608(b), however, prohibited the admission of this evidence, as it prohibited any cross-examination regarding specific instances of untrustworthiness. *Id.* at 827-28. Nevertheless, this Court held that "evidentiary constraints must sometimes yield to a defendant's right of cross-examination[.]" and that "[a] defendant's Sixth Amendment right of confrontation requires that the defendant be afforded an opportunity to conduct effective cross-examination of State witnesses in order to test their believability." *Id.* This Court noted that prior to the adoption of Rule 608(b), Indiana, like the majority of jurisdictions, recognized this principle. *Id.* Thus, this Court held that evidence of the victim's prior accusations of rape were

admissible to attack her credibility, “notwithstanding the general exclusionary edict of Rule 608(b).” *Id.*

2. *Our Rules of Evidence Provide an Adequate Model for Admitting Evidence of Prior Instances of Untrustworthiness for Preventing Juror Confusion and for Protecting Victim’s of Sexual Assault*

Even without the blanket prohibition of Rule 608(b), our Rules of Evidence provide a good model for preventing juror confusion and for protecting victims of sexual assault when evidence of a witness’ instances of untrustworthiness are at issue. All evidence admissible under our Rules of Evidence are otherwise subject to review under Evidence Rule 403, which prevents the admission of evidence that is confusing, misleading, or which has a probative value far outweighed by the danger of unfair prejudice. *Ind. Evid. R. 403*. Rule 403 would prevent the unfettered admission of evidence of prior instances of untrustworthiness. Furthermore, to the extent that cross-examination of a child witness or other victim of sexual assault poses the threat of harassment or embarrassment, Indiana Evidence Rule 611 provides the trial court with the authority to control how this evidence is presented in order to protect the witness from such dangers. *Ind. Evid. R. 611*.

Under Federal Evidence Rule 608(b), cross-examination into such instances are admissible. Federal Evidence Rule 608(b) states in pertinent part as follows:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in Rule 609, may not be proved 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 (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.

Fed. Evid. R. 608(b). Contrary to the holding in *Beaty*, the federal incarnation of Rule 608(b) does not allow general, unfettered inquiries into a witness' prior instances of untruthfulness. The rule contains two safeguards: (1) the admission of the evidence must involve the discretion of the trial court, and (2) the evidence must be probative of truthfulness. As noted above, these limitations are also inherent in Indiana's Rules of Evidence, and eliminate the potential that evidence of prior instances of untrustworthiness would confuse the jury or traumatize a child witness.

B. In this Case, the Exclusion from Evidence of the Prior False Accusation Violated Nunley's Right of Cross-Examination Even Though the Prior Accusation is Not Identical to the Instant Allegation

In this case, the prior false allegation is not an allegation of prior sexual assault. However, this fact should not distinguish the instant case from *Walton*; for, the focus in *Walton* was on the defendant's ability to probe the believability of the complaining witness. *Walton*, 715 N.E.2d at 827. Here, A.Y. and her mother lived with Eddie Foreman at some point in time. (*Appellant's App.* 8-9). During this time, Foreman abused A.Y.'s mother. (*Appellant's App.* 201-02); (*tr.* 379-80). A.Y. informed the police that Foreman also physically abused her because she "just wanted him to go to jail, really, 'cause he deserved it." (*Appellant's App.* 203). Weeks later, she recanted in a note that she presented to the State. (*Tr.* 379-80).

In this case, there are similarities to this prior false allegation. Her prior allegation was directed at a male friend of her mother, (*Appellant's App.* 201-02), and in this case, she is directing her accusation at Nunley, another male friend of her mother. (*Tr.* 535-36). In the prior false accusation, she recanted in a written note, (*tr.* 379-80), and in this case, she made her initial allegation against Nunley in a written note. (*Tr.* 437). A.Y. presented the only evidence against Nunley. Evidence of A.Y. accusing another adult male friend of her mother of wrongdoing was

crucial to his defense, and presented the very real possibility that A.Y. fabricated her accusations against Nunley. In short, she demonstrated the ability to fabricate an accusation in order to obtain a specific end. Nunley was deprived of his right of cross-examination under the Sixth Amendment by testing A.Y.'s believability about her accusation against him.

The Court of Appeals' holding to the contrary conflicts with the Court's holding in Walton, making transfer appropriate under Indiana Appellate Rule 57(H)(2).

C. The State Used Evidence Rule 608(b) as a Shield and a Sword, Mislead the Jury on A.Y.'s Veracity, and Opened the Door to A.Y.'s Prior False Accusation

This evidence was made all the more crucial by the State when in its closing arguments it vouched for A.Y.'s credibility. Incredibly, the State used Rule 608(b) as both a shield and a sword. The State informed the jury that A.Y. "I submit she hasn't even been taught to lie." (*Tr.* 797). This statement left the jury with the false impression that A.Y. did not know how to lie. The State's assertion was clearly false, and if it did not know it was false, it should have known based upon A.Y.'s deposition testimony that she lied in order to get someone else in trouble (*Appellant's App.* 203). The State's conduct is all the more incredible when it is considered that it argued vehemently to prevent the admission into evidence of A.Y.'s prior lie. As argued in Brief of Appellant, even if the evidence was not admissible pursuant to Nunley's right of confrontation, it should have been admissible to counter the false impression left by the State's closing argument. As noted in Appellant's Petition for Transfer, conflicts with this Court's opinion in Quarles v. State, 493 N.E.2d 1297 (*Ind.* 1986), again rendering transfer appropriate under Appellate Rule 57(H)(2).

CONCLUSION

Wherefore, Appellant, by and through counsel, respectfully requests this Honorable Court to accept transfer of this cause.

Respectfully submitted,



Matthew Jon McGovern

Attorney for Appellant

Attorney No.: 21016-49


5444 East Indiana Street, #375

Evansville, IN 47715

(812) 842-0286

WORD COUNT CERTIFICATE

I verify that this “Appellant’s Supplemental Petition to Transfer” contains no more than three thousand seven hundred and fifty (3,750) words.



Matthew Jon McGovern

Attorney for Appellant

Atty. No.: 21016-49

5444 East Indiana Street, #375

Evansville, IN 47715

(812) 842-0286

CERTIFICATE OF SERVICE

I hereby certify that the forgoing has been served upon the following counsel of record by first class United States Mail, postage prepaid, this 12th day of February, 2010: Joby D. Jerrells, Indiana Deputy Attorney General, Government Center South, 402 West Washington Street, Indianapolis, IN 46204.



Matthew Jon McGovern

Attorney for Appellant

Attorney No.: 21016-49

5444 East Indiana Street, #375

Evansville, IN 47715

(812) 842-0286