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**State of Michigan**

**In the**

**Supreme Court**

**APPEAL FROM THE MICHIGAN COURT OF APPEALS  
R.A. Griffin, P.J.; M.J. Cavanagh and K.M. Fort Hood, J.J.**

**PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,**

**V**

**Supreme Court  
No. 1271293**

**GENNARO JOSEPH PISCOPO,  
Defendant-Appellant,**

**Court of Appeals No. 245835  
Macomb Circuit No. 02-1210-FH**

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**BRIEF ON APPEAL – APPELLEE**

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**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

Supreme Court  
No. 1271293

-vs-

Court of Appeals  
No. 245835

GENNARO JOSEPH PISCOPO,  
Defendant-Appellant,

Macomb Circuit  
No. 02-1210-FH

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August 22, 2007

**ISSUES PRESENTED**

**ISSUE I**

**DOES THE RAPE-SHIELD STATUTE, MCL 750.520J, BAR THE ADMISSION OF EVIDENCE OF PAST SEXUAL ASSAULT, THE ADMISSION OF EVIDENCE OF IMAGINARY SEXUAL ACTIVITY AND THE ADMISSION OF UNSUBSTANTIATED ALLEGATIONS OF PRIOR SEXUAL ASSAULT?**

**The Plaintiff-Appellee contends the answer is “YES”.**

**The Defendant-Appellant contends the answer is “NO”.**

**ISSUE II**

**DOES THE RAPE-SHIELD LAW PROHIBIT EVIDENCE OF ALLEGATIONS OF PAST SEXUAL ASSAULTS, UNSUBSTANTIATED SEXUAL ASSAULTS AND EVIDENCE OF IMAGINARY SEXUAL CONDUCT THEREBY MAKING A TEST TO DETERMINE ADMISSABILITY MOOT AND THE BURDEN OF PROOF TO PROVE OTHERWISE ON THE DEFENDANT?**

**The Plaintiff-Appellee contends the answer is “YES”.**

**The Defendant-Appellant contends the answer is “NO”.**

### **ISSUE III**

**WAS THE DEFENDANT DENIED HIS  
CONSTITUTIONAL RIGHT OF  
CONFRONTATION OR THE RIGHT TO  
PRESESENT A DEFENSE WHEN THE TRIAL  
COURT CORRECTLY EXCLUDED  
IRRELEVANT INFORMATION RELATING TO A  
PAST SEXUAL ASSAULT ON THE VICTIM?**

**The Plaintiff-Appellee contends  
the answer is “NO”.**

**The Defendant-Appellant contends  
the answer is “YES”.**

### **ISSUE IV**

**DID THE TRIAL DID COURT ERR IN BARRING  
THE ADMISSION OF EVIDENCE REGARDING  
THE QUESTIONNAIRE FILLED OUT BY THE  
VICTIM PRIOR TO THE CHURCH RITUAL?**

**The Plaintiff-Appellee contends  
the answer is “NO”.**

**The Defendant-Appellant contends  
the answer is “YES”.**

### **ISSUE V**

**DID THE TRIAL COURT VIOLATE THE  
DEFENDANT’S CONSTITUTIONAL RIGHTS BY  
EXCLUDING THE IRRELEVANT TESTIMONY  
OF A WITNESS?**

**The Plaintiff-Appellee contends  
the answer is “NO”.**

**The Defendant-Appellant contends  
the answer is “YES”.**

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## **STATEMENT OF JURISDICTION**

The Plaintiff-Appellee accepts the Defendant-Appellant's Statement of Jurisdiction.

## **COUNTERSTATEMENT OF FACTS**

The Plaintiff-Appellee accepts all nonargumentative portions of the Defendant-Appellant's Statement of Facts.

## ISSUE I

### **THE RAPE-SHIELD STATUTE, MCL 750.520J, BARS THE ADMISSION OF EVIDENCE OF PAST SEXUAL ASSAULT, THE ADMISSION OF EVIDENCE OF IMAGINARY SEXUAL ACTIVITY AND THE ADMISSION OF UNSUBSTANTIATED ALLEGATIONS OF PRIOR SEXUAL ASSAULT.**

#### **STANDARD OF REVIEW**

The Court reviews a trial court's decision to admit or deny evidence for an abuse of discretion. *People v. Layher*, 464 Mich. 756, 761; 631 NW2d 281 (2001). To the extent this decision involves a question of law, the review is de novo. *Id.* Statutory interpretation presents a question of law that is reviewed de novo. *People v. Nimeth*, 236 Mich.App 616, 620; 601 NW2d 393 (1999).

#### **ARGUMENT**

The defendant argues the Rape-Shield Statute bars evidence of a victim's prior consensual sexual history but does not bar evidence of the victim's prior sexual abuse, the admission of imaginary sexual activity and admissions of prior unsubstantiated sexual abuse. The People submit the Rape-Shield Statute prohibits any and all of the victim's prior sexual conduct, which includes consensual sexual activities, *and* prior sexual abuse or assaults. The latter is extremely critical to maintaining the policy underlying the Rape-Shield Statute which prevents a victim

from being scrutinized for irrelevant and non-material issues which do not directly relate to the case being tried.

The determination of admissibility of evidence under Rape-Shield statutory exceptions is entrusted to sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation. *People v. Adair*, 452 Mich. 473, 550 N.W.2d 505 (1996).

In enacting the Rape-Shield Law, the legislature more than addressed the concerns of the defendant that he would be prejudiced by not allowing any and all possible prior sexual allegations whether unsubstantiated, real, or imaginary, to be introduced into evidence at trial.<sup>1</sup>

The People submit the language of the Rape Shield Statute barring evidence of the “victim’s sexual conduct” is **unambiguous**. In deciding

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<sup>1</sup> MCL 750.520j states: (1) Evidence of specific instances of the **victim's sexual conduct**, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact **at issue in the case** and that its inflammatory or prejudicial nature does not outweigh its probative value: (a) Evidence of the victim's past sexual conduct with the actor. (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). [Emphasis added]

whether evidence of a “victim’s sexual conduct” is barred by the Rape Shield Statute, the court must apply the law as written. The function of a reviewing court resolving disputed interpretations of statutory language is to effectuate the legislative intent. *People v. Valentin*, 457 Mich. 1, 5; 577 NW2d 73 (1998). Evidence of specific instances, opinion evidence or reputation evidence of the victim’s sexual conduct “**shall**” not be admitted.

The heart of the question before the court is what constitutes “conduct” and whether the statute as written adequately defines conduct. The defendant argues that conduct is described in the dictionary as “personal behavior or manner of acting or controlling oneself.”<sup>2</sup> The People submit based on the broad wording of the language in the statute, conduct can be either active or passive.

### ***Past Sexual Assault***

Involuntary or passive conduct is still conduct under the plain meaning of the statute. Crimes of assault do not happen in a vacuum. When a person is a victim of sexual assault there is still conduct on the part of the victim, albeit passive or involuntary. It is disingenuous for the defendant to argue the victim had no role or conduct in the prior assault, basically stating she was not involved in any way. By making this statement the defendant purports to re-victimize the victim which is exactly what the Rape-Shield Statute was enacted to prohibit. One could

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<sup>2</sup> Webster’s New Universal Unabridged Dictionary pg.306.

not fathom that being raped does not constitute any conduct on behalf of the victim, specifically, involuntary or passive conduct. Conduct is conduct. It takes two for a crime of sexual assault to take place. For the defense to argue the statute did not intend to bar the victim's prior sexual assaults, imaginary sexual assault or unsubstantiated assaults because they do not include conduct on the part of the victim is absurd. Additionally to argue that victims of sexual assault do not have the same concerns for privacy, embarrassment or harassment as those persons engaged in consensual sex is insulting, ignorant, and degrading.

The Rape-Shield Statute was aimed at stopping the practice of allowing defendant's to impeach a victim's testimony with evidence of the victim's prior sexual conduct. The victim's sexual history with others is generally irrelevant with respect to alleged sexual assault by defendant and, more importantly, a witness' sexual history is almost always irrelevant as impeachment evidence because it has no bearing on character for truthfulness. M.C.L.A. § 750.502j(1); *People v. Adair*, 452 Mich. 473, 485; 550 NW2d 505 (1996).

The Rape-Shield Law encourages victims to report assault by protecting a victims' sexual privacy and bars evidence that may prejudice and mislead the jury and is only of arguable probative worth. *People v. Wilhelm*, 190 Mich.App 574, 476 N.W.2d 753 (1991) ; appeal denied 485 N.W.2d 546, 439 Mich. 1013, reconsideration denied 495

N.W.2d 391, certiorari denied 113 S.Ct. 2359, 508 U.S. 917, 124 L.Ed.2d 266.

The Rape-Shield Law also has as a purpose to minimize the prior practice of trying the victim for her character instead of the defendant for his conduct. It is important not to overlook this public policy issue, which if allowed would confuse the fact finder with non-relevant matters. *People v. Stull*, 127 Mich.App. 14, 338 N.W.2d 403, appeal denied. (1983).

This court denied cert in *People v. Wilhelm* 190 Mich.App. 574, 476 N.W.2d 753 (Mich.App.,1991).

The Rape-Shield Law encourages the victim to report assault by protecting victim's sexual **privacy** and bars evidence that may prejudice and mislead the jury. M.C.L.A. § 750.520j. What could be more private than a prior sexual assault?

### ***Imaginary or Demon Sexual Assault***

In the case at bar the People contend that the purported evidence of imaginary or demon sexual assault is also barred by the Rape-Shield Statute.

The victim went to the defendant's church for a deliverance or exorcism. Prior to this event she answered a forty-page questionnaire that dealt with everything from filling out a detestable object sheet, to a sheet on inner healing and life cycle. There was a "snare" sheet which asked the participants to check off a laundry list of things they had been

involved with which included, “excessive interest in spook houses or Halloween, any game centered on magic, esp, **demons**, ect.” The questionnaire also asked whether the participant had ever committed themselves to a secret society such as the boy scouts, camp-fire girls, shriners, masons and a whole host of normal societal associations.

The defendant’s witness, Bishop Cannistraci, from the victim’s church testified as followed:

“A woman was brought in chains in Durbin, South Africa. Chains. And I – I said to my interpreter, why is she chained? Because she was violent and would kill. And I exorcised in the name of Christ, just like the Bible said, and that evil spirit left her and she became calm and they unchained her, and she is perfectly normal. And, actually she had not even held her baby since it was born, because this demon had invaded her at the – at the birth of her child. And they gave her the baby there, before thousands of people, and she was calm.”  
(TT\_defendant’s appendix pg.156a,”

He continues on page 157a as follows:

...I’ve had people come and say they were sexually violated by demons, or they have the urge to kill...This is a – horrible thing this demon possession or demon habitation. It’s horrible.”

To argue the victim is delusional and the statement of being raped by demons in the questionnaire puts her credibility into issue when this is the foundation of the religion she and the defendant were involved in would put their entire religion on trial. The defendant cannot say these

demon experiences were not real to her. They are her religious sexual conduct. The defendant cannot argue this is not real because this is the core issue recognized in delivering or exorcising the victim. Based on these facts specific to this case, the defendant cannot argue he was prejudiced by not being allowed to cross-examine the victim about this issue, which he espouses and believes to be true.

***Unsubstantiated allegations of sexual assault***

With respect to the victim statements about her pastor/father abused her, the trial court noted that while the victim's parents denied the accusations, there was no proof that the allegations were false. The People note the court is not mandated to conduct a trial within a trial to determine the veracity of the allegations, nor is the defendant entitled to conduct a fishing expedition. *People v Hackett*, 421 Mich 338, 350-351; 365 NW2d 120 (1984).

The defendant was not able to prove these allegations false. The trial court correctly excluded this evidence, whether it was by imaginary or real third parties. In this case, the defendant failed to offer any concrete evidence establishing that the complainant ever made any false allegation of sexual misconduct against anyone. At best, defendant merely suggested that the complainant's allegations of sexual abuse as to the victim's pastor father were false because her father denied the allegations. Mere allegations are not necessarily false accusations. Accordingly, not only was the defendant's proffered evidence not relevant,

it was also insufficient to establish a prior false accusation of sexual abuse. See *People v. Adamski*, 198 Mich.App 133; 497 NW2d 546 (1993).

It is befuddling to the People how in *People v. Parks*, 478 Mich 14, 733 N.W.2d 14, 17 (2007), Justice Markman found the “earlier complaint by the alleged victim, the ensuing investigation, and the absence of eventual charges resulting from the investigation” was enough to overcome the bar to the Rape-Shield Statute. Justice Markman does not identify any concrete testimony to demonstrate the falsity of the prior allegations. Opening the door to the mere fact that charges were never filed does not prove that the allegations were false. As Justice Corrigan writes in her dissent, which the People agree with, “a prosecutor at his discretion may decline to file charges for any number of reasons.” Therefore allowing the defendant to delve into the victims’ sexual conduct without the prima facie showing that the act was patently false allows for the repudiation of the Rape-Shield Law and the re-victimization of the victim, ignoring the plain language of the statute.

### ***Statutory Construction***

The function of a reviewing court resolving disputed interpretations of statutory language is to effectuate the legislative intent. *People v. Valentin*, 457 Mich. 1, 5; 577 NW2d 73 (1998). When the language of the statute is clear, the Legislature intended the meaning plainly expressed, and the statute must be enforced as written. *Id.* It is presumed that every word has some meaning, and a construction that would render part of

the statute surplusage or nugatory must be avoided. *People v. Borchard-Ruhland*, 460 Mich. 278, 285; 597 NW2d 1 (1999). The fair and natural import of the terms of the statute, in view of the subject matter of the law, is what must govern. *People v. Morey*, 461 Mich. 325, 330; 603 NW2d 250 (1999).

In *People v. Giovannini* 478 Mich. 852, 731 N.W.2d 85 (2007), this court stated, “We do not apply preferential rules of statutory interpretation ... without first discovering an ambiguity and attempting to discern the legislative intent underlying the ambiguous words. *Crowe v. Detroit*, 465 Mich. 1, 13, 631 N.W.2d 293 (2001). Only if that inquiry is fruitless, or produces no clear demonstration of intent, do we resort to a preferential or “dice-loading” rule. *Koontz v. Ameritech Services, Inc.*, 466 Mich. 304, 319, 645 N.W.2d 34 (2002).

The People submit the statute as written is unambiguous. The enacted statute would not allow this court to legislate what they now find undesirable about the statute as written, that being protection of the defendant at the cost of the victim.

In upholding the defendant’s conviction in this case, the Court of Appeals correctly held the trial court properly excluded the questionnaire evidence as irrelevant and contrary to the rape shield law. However, the Court of Appeals did not answer the question of why this evidence was barred by the Rape Shield Statute. The People would submit the reasoning is again placed with the clear statutory construction, that

being, it was barred because it was evidence of the victims' sexual conduct.

***Relevancy***

Additionally, the People submit the evidence of the victim's past sexual assault, imaginary or demon sexual abuse or unsubstantiated sexual assault was properly excluded because it was not relevant to this defendant or his act. It is hard to imagine that while the statute specifically does not allow evidence of prior consensual sex between the victim and the defendant, which could be argued as a close nexus relating to relevancy, it would allow evidence of third party contacts. This nexus is more remote because it does pertain to the defendant and therefore would be irrelevant.

Under MRE 401 "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In this case the People contend allegations of any prior sexual abuse conduct of the victim are irrelevant. The victims' sexual conduct would not show that the acts in this case were more probable than not because of this prior conduct. It would not have aided the jury in deciding whether **this** assault in fact did occur. As the trial court so aptly opined, any of the victim's statements would not have shed any light on the elements of this case.

Prior case law supports the statute in not allowing irrelevant evidence of unsubstantiated sexual abuse of the victim with a third party. In *People v. Mikula*, , 84 Mich.App. 108, 269 N.W.2d 195. (1978), the appellate court held, in prosecution for a sexual offense the defendant may cross-examine complainant regarding prior false accusations of a similar nature and, if she denies making them, submit proof of such charges; but the basis of impeachment thereby is not that complainant is shown to be unchaste but that she lied concerning similar charges in the past.

In this case, the unsubstantiated prior sexual conduct of the victim is remote and in no way similar to the allegations at bar, making them irrelevant and therefore not admissible.

## ISSUE II

### **THE RAPE-SHIELD LAW PROHIBITS EVIDENCE OF ALLEGATIONS OF PAST SEXUAL ASSAULTS, UNSUBSTANTIATED SEXUAL ASSAULTS AND EVIDENCE OF IMAGINARY SEXUAL CONDUCT THEREBY MAKING A TEST TO DETERMINE ADMISSABILITY MOOT AND THE BURDEN OF PROOF TO PROVE OTHERWISE ON THE DEFENDANT.**

#### **STANDARD OF PROOF**

This court review a trial court's decision whether to admit evidence for an abuse of discretion. *People v. McDaniel*, 469 Mich. 409; 412; 670 NW2d 659 (2003).

#### **ARGUMENT**

The Rape-Shield Law prohibits evidence of past sexual abuse, allegations of unsubstantiated sexual assaults and evidence of imaginary sexual conduct because evidence of a victims' sexual conduct is specifically barred thereby making a test to determine admissibility moot.

However, the question of false allegations hangs in the air. When, if ever, can a defendant make an assertion that inadmissible evidence barred by the Rape-Shield Statute should be admitted. Arguably the **only** way to admit such evidence is when the evidence can be shown to be "demonstrably" false.

The defendant may request the trial court to hold an evidentiary hearing based on the “false” allegations. But, the standard to overcome a bar to the Rape-Shield Law thus re-victimizing the victim should be almost impossible to hurdle. If the defendant makes a claim that the victim has made “demonstrably” false allegations thereby triggering a hearing, the evidence should be unimpeachable. For example, if the victim were claiming she was raped by George W. Bush, the President of the United States, yesterday when it was a factual impossibility because he was in Washington and she was in Michigan, a hearing could be triggered.

If in fact this hurdle can be jumped and this allegation or “prior act” is probative of the victim’s credibility than MRE 608 would come into play, allowing the defendant to cross-examine the witness but without introducing extrinsic evidence. There is a real danger in allowing a defendant to hold a hearing or inquiry into any and all allegations of prior “false” sexual conduct of the victim. There must be a clear showing that the allegation is patently false.

If this runaway train is allowed without constraint, victims would not come forward if there were any truthful, unreported or uncharged sexual abuse allegations in their past for which their credibility might be called to task, making them prove the veracity of these claims before the current crime charged could move forward to trial. This would in the

People's opinion, thwart all the progress and protections the Rape-Shield  
Law was enacted to prevent.

### **ISSUE III**

**THE DEFENDANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT OF CONFRONTATION OR THE RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT CORRECTLY EXCLUDED IRRELEVANT INFORMATION RELATING TO A PAST SEXUAL ASSAULT ON THE VICTIM.**

### **STANDARD OF REVIEW**

Since the defendant did not raise this argument below, the trial court's decision is reviewed *de novo*. *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984).

### **ARGUMENT**

The defendant claims that his constitutional right to confrontation was violated when the trial court denied his request to cross-examine the victim regarding her past sexual abuse. First, the defendant did not properly preserve this issue for appeal since the defendant did not object to the trial court's ruling on confrontation clause grounds. Since the defendant did not object below, the issue is not preserved. This issue was not raised in the Court of Appeals, although the Court briefly addressed this issue. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). The error is harmless if it did not affect the verdict and was not so offensive to the maintenance of a sound judicial system that it could never be regarded as harmless. The error, however, is not harmless if it

deprived the defendant a fundamental element of the adversarial process. *People v Minor*, 213 Mich App 682, 685-686; 541 NW2d 576 (1995). The scope of cross-examination is within the trial court's discretion. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984).

It is the defendant's initial burden is to establish relevance. *People v Byrne*, 199 Mich App 674; 502 NW2d 386 (1993). In the instant case, the defendant could not establish relevance. The defendant purported to confront the victim about her past sexual abuse conduct based on responses she made on a questionnaire filled out prior to the sexual assault by the defendant. The trial court determined the questionnaire contained mere allegations of sexual abuse by the victim's father and therefore the questionnaire was not relevant. Since it was not relevant, it was not admissible pursuant to MRE 402.

The Court of Appeals reviewed the trial court's ruling for an abuse of discretion and found none. The Court did not feel this hampered the defendant's right of confrontation triggered the balancing test of probative vs. prejudicial in *Michigan v. Lucas*, 500 U.S. 145; 111 S Ct 1743; 114 L.Ed.2d 205, 212 (1991).<sup>3</sup>

To raise a proper claim that exclusion of evidence under the Rape shield statute violates the defendant's constitutional right to

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<sup>3</sup> In *Lucas*, the United States Supreme Court questioned the Michigan Supreme Court's opinion in *People v. Hackett* 421 Mich 338, 365 N.W. 2d 120 (1984), indicating the Michigan Supreme Courts opinion was in direct conflict with the Rape-Shield Statute enacted by the legislature. The U.S. Supreme Court stated that none of the relevant purposes for sexual conduct evidence mentioned in *Hackett* appear in the Rape-Shield Statute as an exception to the general provision, that being evidence of sexual conduct with the accused and alternative consequences evidence as being the only exceptions.

confrontation, the defendant must make offer of proof and demonstrate its relevance to purpose for which it is sought to be admitted; a motion is to be denied unless there is "sufficient" showing of relevancy, and only if there is sufficient offer of proof concerning defendant's constitutional right to confrontation will in camera evidentiary hearing be warranted. *People v. Adair* , 207 Mich.App. 287, 524 N.W.2d 256 (1994), appeal granted 539 N.W.2d 506, 450 Mich. 874, reversed 550 N.W.2d 505, 452 Mich. 473.

In *People v. Hackett* 421 Mich. 338, 365 N.W.2d 120, (1984), this court specifically held, "We find that the trial court's exclusion of this proffered evidence of complainant's prior sexual conduct with persons other than the defendant, either as reputation or specific instances of conduct, did not deprive defendant of his right to confrontation because this right does not extend to cross-examination on irrelevant matters". The People contend, and this court has held any past sexual assault directly related to the victim's conduct whether it is consensual or non-consensual is barred by the Rape Shield Statute.

Even where defendant makes offer of proof demonstrating relevance of evidence of victim's past sexual conduct, the next step is not admissibility at trial, but in camera evidentiary hearing to determine admissibility of evidence in light of constitutional right to confrontation inquiry. *People v. Byrne*, 199 Mich.App. 674, 502 N.W.2d 386 (1993).

Here, again the People submit to trigger a hearing into the victim's past sexual conduct a prima facie showing must be made that the allegation is "demonstrably" false.

In this case the defendant was not denied his right to confront the victim through cross-examination, rather, the defendant was able to extensively cross-examine the victim about her testimony and was only limited in not cross-examining her regarding the alleged abuse by her father and her statement regarding demons. Additionally, the defendant was able to testify about the victim's alleged abuse. (363a ,364a, 373a-374a. 9b). The trial court's decision did not deprive the defendant of a fundamental right. The trial court decision denying the defendant's request to cross-examine the victim was not a violation of the defendant's confrontation clause rights.

A trial court's limitation of a defendant's right of cross-examination may implicate the associated right to confrontation. *People v. Frazier (After Remand)*, 446 Mich. 539, 543; 521 NW2d 291 (1994). However, the right of cross-examination is limited and "neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject." *People v. Adamski*, 198 Mich.App 133, 138; 497 NW2d 546 (1993). The Confrontation Clause only guarantees a defendant an opportunity for cross-examination, there is no requirement that this examination be successful or effective. *People*

*v. Watson*, 245 Mich. 572, 584; 629 NW2d 411 (2001); *People v. Chavies*, 234 Mich.App 274, 283; 593 NW2d 655 (1999).

The trial court's exclusion of evidence of rape or the victim's prior sexual conduct with persons other than defendant, either as reputation or specific instances of conduct, did not deprive defendant of his right to confrontation where such evidence was irrelevant. *People v. Hackett*, 421 Mich. 338, 365 N.W.2d 120 (1984).

In the instant case, the defendant's interest in showing the victim's possible motive must be balanced against the potential prejudice that would arise from an allegation of past sexual assault that was collateral, and substantially different to the instant action. The People submit, because there is a danger of unfair prejudice, and the defendant was able to present his theory and was able to allude to the prior sexual allegations without specifically discussing the alleged sexual assault, the defendant was not denied his rights to confrontation and due process. The People argue the defendant has failed to establish plain error. In *People v. Byrne* 199 Mich.App. 674; 502 N.W.2d 386 (1993), the court stated, "Evidence of criminal sexual conduct allegedly perpetrated by seven-year-old victim's father on victim was relevant in prosecution for criminal sexual conduct only if conduct of which defendant was accused was highly similar to that charged against the victim's father."

## **ISSUE IV**

### **THE TRIAL DID COURT DID NOT ERR IN BARRING THE ADMISSION OF EVIDENCE REGARDING THE QUESTIONNAIRE FILLED OUT BY THE VICTIM PRIOR TO THE CHURCH RITUAL.**

#### **STANDARD OF REVIEW**

This court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v. McDaniel*, 469 Mich. 409; 412; 670 NW2d 659 (2003).

#### **ARGUMENT**

The defendant sought to have the deliverance questionnaire authored by the victim admitted into evidence. The defendant also sought to cross-examine the victim on two issues, her statement regarding abuse by her father and her statement about having sex with demons. The trial court heard arguments on all of the above matters and issued a written opinion excluding this evidence as irrelevant. In deciding the issue, the trial court first noted the questionnaire was not relevant to MRE 401 because the victim authored the paperwork prior to the alleged sexual assault and therefore there wasn't a link between the questionnaire and the sexual assault. Further, the admission of the statements would not make it more or less probable than not that the alleged assault did or did not occur.

The Court of Appeals reviewed the trial court's ruling for an abuse of discretion and found none. In analyzing this issue they used the "similarity" test. They indicated for the defendant to hurdle the Rape-Shield Law and relevancy prong, at a minimum he would have to establish an act "highly similar" to the act in question. The allegations made in the questionnaire were "markedly different" than the allegations made against the defendant, and therefore irrelevant.

The Court also indicated the questionnaire was contrary to the Rape-Shield Statute, and therefore did not feel the need to consider whether this evidence might have come in under the business exception or whether it was hearsay. Although the Court of Appeals did not answer the question as to why it was excluded under the Rape-Shield Law, the People submit it was excluded because it was evidence of the victims' sexual conduct and therefore properly excluded.

Further, even if there was error, the People submit it was harmless error because evidence of the victim's claims of past sexual abuse was admitted through various witnesses. Mary Ann Przyblski testified that based on Ms. Bacon's packet she knew that Ms. Bacon had "a destructive relationship with a pastor." [2b, 4b-5b]. When the defendant testified, he indicated that he touched Ms. Bacon on her arms and legs because he found that technique useful in getting a reaction from women who have been abused or misused by their fathers or men. (363a-364a). The defendant indicated that the "tapping" of a women's arms and thighs

is very effective for women who have “issues” with their fathers or who were molested. (373a-374a). The defendant also testified that he did not know at the time of the deliverance, about Kathy Bacon’s abuse or what she had been through. (6b). The defendant did not see Ms. Bacon’s paperwork until after the deliverance. (7b-8b). Therefore, the defendant did not know until later that Ms. Bacon “did have issues”. (9b). The defendant was thus able to advise the jury that Ms. Bacon had been abused and had problems relating to her father. These inferences were far worse than the questioning, because the jury was left to wonder about the actual facts underlying the defendant’s statements.

The Rape Shield statute as written and followed properly excludes any and all prior sexual allegations whether it be consensual or abusive activity with the safeguard of offering the defendant a right to offer proof prior to trial of relevancy of these prior acts to the case at hand.

## **ISSUE V**

### **THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS BY EXCLUDING THE IRRELEVANT TESTIMONY OF A WITNESS.**

#### **STANDARD OF REVIEW**

The decision whether to admit or exclude evidence rests within the trial court's sound discretion and will not be reversed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

#### **ARGUMENT**

The defendant contends that the trial court abused its discretion by refusing to allow the defendant's expert witness to testify. The People argue that the trial court did not abuse its discretion and the defendant cannot show a manifest injustice as a result of the trial court's actions.

The admission or exclusion of an expert witness is not grounds for reversal unless manifest injustice results. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The defendant bears the burden (since he claims error) of establishing prejudice by showing it was "more probable than not that a different outcome would have resulted without the error." *Id*, 495.

In the instant case, the defendant cannot sustain his burden. The defendant sought to have Dr. Okla testify to interviewing techniques and

the area of perception and memory and the affects of altered states of consciousness. Trial counsel explained, that he wanted the doctor to testify about "general believability or non-believability, the bolstering and non-bolstering". (96a). When the trial court expressed confusion about what exactly Dr. Okla would be testifying to, trial counsel tried to explain that he wanted the doctor to testify about the "brainwashing" or "intense emotional effect" that Ms. Bacon had experienced and how it related to her perception of what happened or did not happen.

It was then that the trial court inquired about what experiences Dr. Okla had with respect to deliverances. The doctor responded that she had no experience with deliverances. The trial court ruled:

"Well, unless you know something about a Deliverance and what transpires at a Deliverance, the state of mind, and you've observed those states of mind, I can't find you qualified." (284a).

The trial court further explained that since Dr. Okla had no experience with a Deliverance or talking to people who had been to a Deliverance to learn their state of mind, she could not proffer an opinion about the level of excitability the people were under. (285a).

While the defendant argues that the trial court was wrong in denying the requested expert because she had never observed or participated in a Deliverance, the record indicates that that was not the reason that the trial court denied the defendant's requested expert.

Rather in the instant case, the defendant's expert not only had not seen

a Deliverance, but also had never spoken to anyone who had participated in a Deliverance to determine what his or her state was like during the Deliverance. Dr. Okla could not proffer an opinion about the effects of the Deliverance on perceptions when she was not aware of what the effects of the Deliverance were on perceptions. The doctor had no basis for an opinion about how a Deliverance would affect a person's perceptions. This is not the case of an expert on battered women or rape cases testifying where the expert would either have personal interviews with victims or had the opportunity to review scientific articles on the subject, rather, Dr. Okla was attempting to offer an opinion about the effects of the Deliverance when she had no personal or scientific support for her conclusions.

Additionally, while the defendant wanted to have the doctor testify about interviewing techniques, there was no evidence that interviewing techniques had any bearing on the victim or her testimony.

Since Dr. Okla had no personal or scientific support for the basis of her conclusions and testimony about a participant's perceptions, the trial court did not abuse its discretion in denying the defendant's request to allow her to testify. The defendant cannot establish that manifest injustice occurred in light of the trial court's rulings. The defendant is not entitled to relief.

**RELIEF REQUESTED**

The Plaintiff-Appellee requests that this Honorable Court **DENY** the Defendant-Appellant's Appeal because of the lack of merit in the issues presented and further the People respectfully pray that this Honorable Court will **AFFIRM** the judgment of conviction.

Respectfully submitted,

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