In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-15-00284-CR

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LEROY CRISWELL JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 21436

MEMORANDUM OPINION

A jury convicted Leroy Criswell Jr. (Criswell) of aggravated sexual assault of a child, R.H.[1] The trial court found the allegations in the prior felony enhancement paragraphs to be true and assessed punishment at forty-five years of confinement. In

[1] We use initials to refer to the alleged victim and family members. *See* Tex. Const. art. I, § 30(a)(1) (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

three appellate issues, Criswell challenges the sufficiency of the evidence supporting his conviction, asserts the State's use of a peremptory challenge to strike a juror violated Criswell's right to equal protection, and argues that the trial court's exclusion of "alternative perpetrator evidence" violated Criswell's right to present a meaningful defense and his right to confront witnesses against him.

The indictment alleged that, on or about June 1, 2002, Criswell "intentionally or knowingly cause[d] the anus of Richard Roe (a pseudonym), a child younger than 14 years of age who was not the spouse of said Defendant to contact the sexual organ of Defendant[.]" The indictment also included enhancement paragraphs alleging that Criswell had three prior felony convictions.

EVIDENCE AT TRIAL

Testimony of Sergeant Lee Rogers

Lee Rogers (Rogers), a sergeant with the Polk County Sheriff's Department, testified that on September 21, 2009, he was a patrol deputy. Rogers responded to a call to the sheriff's department made by M.P., R.H.'s mother. According to Rogers, M.P. reported that her son, R.H., who was fifteen years old at the time of the report, had been sexually assaulted.

Testimony of R.H.

R.H., twenty-one years old at the time of trial, testified that Criswell was a "father figure[]" and in a relationship with his mother when R.H. was about eight years old. R.H. explained that he remembered an instance when he was eight years old and R.H., along with R.H.'s mother and siblings, were living with R.H.'s grandmother. On one occasion, Criswell also spent the night with them at R.H.'s grandmother's house. R.H. testified that bunk beds were in the living room of his grandmother's house, and that when his family lived there, R.H. and two other siblings (one of whom was his mother and Criswell's daughter) would sleep on the bottom bunk bed, and his mother would sleep on the top bunk bed.

R.H. testified that on the particular day in question, some adults, including his mother and Criswell, were drinking at R.H.'s grandmother's house and, as a result, Criswell spent the night. R.H. remembered that Criswell and R.H.'s mother had argued that day, his mother was "super intoxicated[]" and did not want to sleep in the same bed with Criswell, and R.H. recalled he "could smell liquor on [Criswell's] breath . . . [and] could smell liquor everywhere." According to R.H., when everyone went to bed that night, one of his siblings was on the top bunk with R.H.'s mother, and Criswell's daughter was on the bottom bunk with R.H. and Criswell. R.H. testified that at some point Criswell's daughter moved to the top bunk and Criswell

pulled off R.H.'s underwear, put his hands over R.H.'s mouth, and inserted his penis in R.H.'s anus. According to R.H., "[i]t was hurting bad[]" and R.H. was kicking and attempting to "move [Criswell's] hands and . . . move him off [R.H.'s] body, but [Criswell] was too big and [R.H.] was too little."

R.H. testified that he remembered "crying going up to my momma and trying to wake her up[,]" but she would not wake up, so he went back to sleep on the top bunk with his mother. The next morning, his mother "was asking [him] where [his] underwear was at, and . . . [he] didn't know what to tell her because [he] was naked." R.H. explained at trial that after he dressed, he told his sister that Criswell had "tried to have sex" with him, but told her not to tell anyone.

R.H. testified that after getting bullied at school and having trouble at school, the first adult he told about the sexual assault was his mother, when he was fifteen or sixteen years old. According to R.H., his mother took him to the police department and he was interviewed by a detective.

Testimony of M.P.

M.P., R.H.'s mother, testified that she remembered an instance when she was living with her mother in Polk County and Criswell spent the night. M.P. explained that she had been drinking with Criswell at her brother's house, even though she and Criswell had previously broken up. She explained that Criswell "showed up" later

and he was already intoxicated. M.P. testified that she and Criswell had not argued, but that he stayed overnight because M.P.'s mother said he could because he had been drinking. M.P. explained that R.H. and Criswell slept on the bottom bunk and she and her daughters slept on the top bunk. According to M.P., R.H. had gone to bed in his jeans, underwear, and a white shirt, and at some point during the night, R.H. jumped up and said, "Mom, he keeps messing with me[,]" and M.P. said to Criswell, "What are you doing? Leave him alone[.]" M.P. testified that in the morning R.H. said, "[h]e messed with me[,]" and she said "What do you mean 'he messed with you'?" M.P. explained that she jumped up and saw that R.H. was only wearing the white shirt and had "no bottoms on or nothing." M.P. explained she confronted Criswell that morning, she retrieved a knife from the kitchen, and Criswell was "walking fast to the car" and "jumped in" as they were "having words . . . about the situation." According to M.P., Criswell returned to the house that evening to see his daughter and M.P. and Criswell were in a physical altercation "[b]ecause of what had happened that morning[]" and because "he had raped" R.H. M.P. testified that she did not call the police that day because she was "very angry and upset [and she] just wanted to kill [Criswell,]" and she was "young and scared about it[.]"

M.P. testified that in September of 2009, R.H. "got in trouble [at school for] draw[ing] naked pictures and stuff" and he got in trouble at home as well. According to M.P., a couple days afterwards, M.P. spoke with R.H. about the incident with Criswell and R.H. told M.P. that Criswell had held him down with his leg, covered R.H.'s mouth with his hand, and put his penis in R.H.'s anus. M.P. and R.H. went that day to the police station to report the sexual assault, and M.P. wrote a statement regarding what R.H. had reported.

Testimony of Detective David Galloway

David Galloway (Galloway), a detective for the Polk County Sheriff's Office in 2009, testified that he was assigned the investigation regarding the sexual assault of R.H. Galloway explained that he contacted R.H.'s mother to set up a meeting and requested that she bring R.H. to the sheriff's office to meet with Detective Christi Allen. Galloway testified that he traveled to Criswell's residence in October of 2009 in attempt to contact him for an interview. Galloway was unable to locate Criswell at the residence, and Galloway left a business card with his contact information at the residence. Galloway testified that other deputies were also unable to locate Criswell but left Galloway's contact information. According to Galloway, by the end of October 2009, the case was closed and turned over to the Polk County District Attorney's Office.

Testimony of Detective Christi Allen

Christi Allen (Allen), a detective with the sheriff's office, testified she was asked in to interview R.H, and the interview was conducted on October 1, 2009, at the sheriff's office. According to Allen, she determined R.H. knew the difference between the truth and a lie, she asked him to promise to tell the truth, and R.H. gave cohesive answers without hesitation. Allen testified that R.H. told her the details of the sexual assault, including that Criswell had put his hand over R.H.'s mouth and told R.H. not to tell. Allen acknowledged that R.H. did not tell her that after the assault he got on the top bunk and slapped his mother in an attempt to wake her up.

Testimony of Jamie Haynes

Jamie Haynes (Haynes) testified that she is a forensic interviewer at Children's Haven, the Polk County Child Advocacy Center. She explained that she had conducted approximately 360 forensic interviews at Children's Haven, and that over eighty percent of the interviews related to sexual abuse. According to Haynes, a child may delay outcry because the perpetrator is a person close to them, a family member, or someone with regular access to the child, or the child may delay outcry for other reasons such as the grooming process, fear, emotional problems related to the trauma during the incidents of abuse, caring for the perpetrator, or the perpetrator provides financial or emotional support for the family.

Testimony of B.H.

B.H. testified that she is R.H.'s sister. B.H. agreed that she remembered a night when she was five years old when Criswell, who was her sister's father, spent the night at her grandmother's house where B.H.'s family was staying, and Criswell slept in bunk beds with her and other members of her family. According to B.H., the night Criswell spent the night and slept in bunk beds with them, she, R.H., and Criswell slept on the bottom bunk, and her sister and her mother slept on the top bunk. B.H. testified that at some point during the night she moved to the top bunk because she wanted to be with her mother and sister. She fell asleep and did not hear anything. The next morning, R.H. told B.H. that Criswell had raped him, and R.H. asked B.H. not to tell anyone. B.H. testified that she did not remember exactly what words he used when he told her what had happened, but that she "knew it was something bad[.]" According to B.H., she did not tell anyone because she wanted to keep her promise to R.H.

LEGAL SUFFICIENCY

In his first issue, Criswell argues that the evidence is insufficient to support his conviction. Under a legal sufficiency standard, we assess all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v.*

Virginia, 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We give deference to the jury's responsibility to fairly resolve conflicting testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. We may not substitute our judgment for that of the fact-finder concerning the weight and credibility of the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

A person commits aggravated sexual assault of a child if the person intentionally or knowingly "causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor[,]" and the victim is younger than fourteen years of age. Tex. Penal Code Ann. § 22.021(a)(1)(B)(iv), (2)(B) (West Supp. 2016).[2] On appeal, Criswell argues that the evidence was insufficient to support his conviction because conflicting testimony failed to establish a date of the offense, conflicting testimony by the outcry witness made the outcry witness's testimony unreliable, the child and the State's witnesses had motives to fabricate the allegations, and no medical evidence or testimony regarding injury to the child was presented.

[2] We cite to the current version of the statutes because subsequent amendments do not affect the issue on appeal.

The jury heard R.H.'s, M.P.'s, and B.H.'s specific testimony regarding what happened on the night on which R.H. claimed to have been sexually assaulted. The jury heard R.H.'s and M.P.'s testimony about his outcry years later and M.P.'s reasons for not immediately going to law enforcement. B.H. explained to the jury that R.H. told her the next morning that Criswell had raped him, but that R.H. asked her not to tell anyone. M.P. testified what events led to her decision years later to go with R.H. to the police station to make a statement regarding the sexual assault. Jamie Haynes, a forensic interviewer at Children's Haven, explained to the jury possible reasons for a child's delayed outcry.

Criswell asserts that the evidence is insufficient to support his conviction because the indictment alleged the offense occurred "on or about June 1, 2002[,]" but R.H.'s mother, M.P., testified that the offense occurred in 2001. Unless expressly made so, time is not a material element of an offense. *See Garcia v. State*, 981 S.W.2d 683, 686 (Tex. Crim. App. 1998). The primary purpose of specifying a date in the indictment is to show that the prosecution is not barred by the statute of limitations. *Id.* However, aggravated sexual assault of a child has no period of limitations. *See* Tex. Code Crim. Proc. Ann. art. 12.01(1)(B) (West Supp. 2016); Tex. Penal Code Ann. § 22.021(a)(1)(B).

Criswell argues that R.H.'s mother's testimony presented "four different versions" of what occurred the night of the alleged sexual assault, and that R.H.'s version contradicted his mother's version of events. According to Criswell, R.H.'s testimony was "rife with inconsistencies[]" and therefore unreliable. Criswell also maintains that "[w]hat makes the inconsistencies and clearly fabricated testimony all the more unreliable and the jury's finding irrational is that there is also evidence of motive for [R.H.], his mother, and his sister to make false allegations against Mr. Criswell[]" because of evidence presented at trial that R.H.'s family had a "clear history of a very contentious relationship" with Criswell.

The weight to be given contradictory testimonial evidence is within the sole province of the jury because it turns on an evaluation of credibility and demeanor. *See Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997); *see also, e.g.*, *Reed v. State*, 991 S.W.2d 354, 360 (Tex. App.—Corpus Christi 1999, pet. ref'd) (evidence sufficient to support aggravated sexual assault of a child conviction based on victim's testimony even though the testimony was contradictory). As the fact-finder, the jury is entitled to judge the credibility of each witness, and the jury may accept some portions of a witness's testimony and reject other portions. *See Hughes v. State*, 897 S.W.2d 285, 289 (Tex. Crim. App. 1994). The testimony of a child complainant, standing alone and without corroboration, may be sufficient to support

a conviction for aggravated sexual assault. *See* Tex. Code Crim. Proc. Ann. art. § 38.07 (West Supp. 2016).

As for Criswell's argument that the evidence is insufficient to support his conviction because no medical evidence or testimony regarding injury to R.H. was presented, there is no requirement that physical, medical, or other evidence be proffered to corroborate the victim's testimony. *See Sandoval v. State*, 52 S.W.3d 851, 854-55 & n.1 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (medical evidence and corroborating testimony were not necessary to support conviction for aggravated sexual assault of a child.). "The lack of physical or forensic evidence is a factor for the jury to consider in weighing the evidence." *Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006).

Viewing all the evidence in the light most favorable to the verdict, we conclude that a rational fact-finder could have found, beyond a reasonable doubt, that Criswell committed the offense of aggravated sexual assault of a child. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Hooper*, 214 S.W.3d at 13. We overrule issue one.

BATSON CHALLENGE

In his second issue, Criswell argues that "[t]he State's use of a peremptory challenge to strike a black juror violated [] Criswell's right to equal protection[]" under the United States Constitution and Article 35.261 of the Texas Code of Criminal Procedure.

The Texas Code of Criminal Procedure prohibits the use of peremptory challenges to exclude prospective jurors on the basis of race. Tex. Code Crim. Proc. Ann. art. 35.261 (West 2006). Additionally, striking a prospective juror on the basis of race violates the equal protection guarantees of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). In *Batson*, the United States Supreme Court held that a prosecutor is forbidden from exercising peremptory strikes based solely on the race of the potential juror. *Id.* at 89. To succeed on a *Batson* challenge, the defendant must demonstrate by a preponderance of the evidence that the prosecutor indulged in purposeful discrimination against a member of a constitutionally-protected class in exercising his peremptory challenges. *Watkins v. State*, 245 S.W.3d 444, 447 (Tex. Crim. App. 2008).

There is a three-step process for evaluating claims that a prosecutor has impermissibly exercised its peremptory challenges on the basis of race. *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008); *Watkins*, 245 S.W.3d at 447.

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race.

> Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (citations omitted) (citing Batson, 476 U.S. at 96-98); *see also Snyder*, 552 U.S. at 476-77; *Watkins*, 245 S.W.3d at 447.

The United States Supreme Court has explained that the issue in step two is the facial validity of the prosecutor's explanation, and "'[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (quoting *Hernandez*, 500 U.S. at 360)); *see also Williams v. State*, 301 S.W.3d 675, 689 (Tex. Crim. App. 2009). The ultimate plausibility of that race-neutral explanation is to be considered as part of the third step of the analysis, in which the trial court determines whether the defendant has satisfied his burden of persuasion to prove that the strike was indeed the product of the State's purposeful discrimination. *Purkett*, 514 U.S. at 768; *Ford v. State*, 1 S.W.3d 691, 693 (Tex. Crim. App. 1999). The defendant must prove by a preponderance of the evidence that the allegations of purposeful discrimination were true in fact and that the prosecutor's reasons were merely a sham or pretext. *See Watkins*, 245 S.W.3d at 451-52.

"We review the record of a *Batson* hearing and the voir dire examination in the light most favorable to the trial court's ruling." *Young v. State*, 283 S.W.3d 854, 866 (Tex. Crim. App. 2009). We must give great deference to credibility and demeanor determinations made by the trial court in connection with a *Batson* inquiry. *Hernandez*, 500 U.S. at 365 (observing that "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge"). We may not substitute our opinion for the trial court's factual assessment of the neutrality of the prosecutor's explanation for exercising strikes. *Moore v. State*, 265 S.W.3d 73, 78 (Tex. App.—Houston [1st Dist.] 2008, pet. dism'd) (citing *Gibson v. State*, 144 S.W.3d 530, 534 n.5 (Tex. Crim. App. 2004)); *see Snyder*, 552 U.S. at 477-79. The trial court's ruling must be sustained unless it is clearly erroneous. *Snyder*, 552 U.S. at 477; *Watkins*, 245 S.W.3d at 447-48.

> Regarding Juror Number 1, the following exchange took place:
>
> [Defense counsel]: . . . The State has exercised one of their peremptory challenges. [Juror Number 1] is an African American, and we challenge it under Batson as a discriminatory strike.
>
> [Prosecutor]: And, Your Honor, we do not believe the defense at this point has met his burden to show there is a systematic execution of peremptory challenges based on race --
>
> [Defense counsel]: I would like the record to reflect she would have been seated --

> [Prosecutor]: -- and so the defense has not met their burden. And I don't believe Batson requires a systematic finding based on race is sufficient under Batson. I will give you my reasons, even though I don't believe he has met his burden.
>
> [Juror Number 1] is a nurse. We are trying to avoid having nurses on this type of jury. We also struck [Juror Number 6], who is a nurse, and there were no other nurses that we did not strike.
>
> THE COURT: And the other nurse that you struck was [Juror Number 6]?
>
> [Prosecutor]: She was not African American.
>
> THE COURT: Any other reasons for the strike?
>
> [Prosecutor]: No. Your Honor . . . .
>
> . . . .
>
> THE COURT: The Batson challenge is denied.

Criswell argues that the only evidence offered by the State to support its race-neutral explanation was the fact that the State struck another nurse who was not African American. According to Criswell, "[t]he trial court erred in accepting this race neutral basis on its face without exploring whether or not it was genuine or merely pretextual." When the State has offered a race-neutral explanation for the strike, the burden of persuasion shifts to the defendant to prove that the prosecutor's reasons were merely a sham or pretext. *See Watkins*, 245 S.W.3d at 447. "Whether the opponent satisfies his burden of persuasion to show that the proponent's facially

race-neutral explanation for his strike is pre-textual, not genuine, is a question of fact for the trial court to resolve in the first instance." *Id.*

Assuming without deciding that Criswell made a prima facie case of discrimination, the State responded with a race-neutral explanation for the strike—that the juror was a nurse. As further support of that race-neutral explanation, the State identified another prospective juror of another race that the State had struck for the same reason. Because the record supports the State's race-neutral explanation, and because the trial court could have reasonably determined that Criswell failed to meet his burden to show that the facially neutral reason was a pretext or sham, we conclude that the trial court's ruling denying Criswell's *Batson* challenge was not clearly erroneous. Issue two is overruled.

ALTERNATIVE PERPETRATOR EVIDENCE

In his third issue, Criswell argues that the trial court's exclusion of evidence that R.H. had a sexual relationship with his stepfather, J.P., who was in R.H.'s life at the time of the alleged assault, violated Criswell's right to present a complete defense and his right to confrontation.

Persons accused of crimes are guaranteed a meaningful opportunity to present a complete defense by the Sixth and Fourteenth Amendments to the United States Constitution. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Erroneous evidentiary

rulings rarely rise to the level of denying the fundamental constitutional right to present a meaningful defense. *Potier v. State*, 68 S.W.3d 657, 663 (Tex. Crim. App. 2002). A trial court's ruling excluding evidence may rise to the level of a constitutional violation if the ruling is clearly erroneous and excludes otherwise relevant and reliable evidence that "'forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense.'" *Wiley v. State*, 74 S.W.3d 399, 405 (Tex. Crim. App. 2002) (quoting *Potier*, 68 S.W.3d at 665). Regarding "alternative perpetrator evidence," although a defendant has the right to attempt to establish his innocence by showing that someone else committed the crime, he still must show that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the alleged "alternative perpetrator." *Id.* at 406. A trial court's ruling on an evidentiary matter is generally reviewed under an abuse of discretion standard. *See Salazar v. State*, 38 S.W.3d 141, 153-54 (Tex. Crim. App. 2001). However, a constitutional legal ruling is reviewed de novo. *See Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

Criswell maintains that, because J.P. came into R.H.'s life just before the alleged sexual assault by Criswell, and J.P. and Criswell were at that time and at the time of the outcry both father figures to R.H., there is a nexus between the crime

charged and J.P. On cross-examination, M.P. testified that Criswell's assault on R.H. was around 2001, and she was not in a relationship with Criswell at that time. She agreed that, at the time of the assault, she was in a relationship with J.P. and that J.P. "was already in [R.H.]'s life to some degree[.]" The following discussion at the bench occurred:

> [Defense counsel]: At this time I think I'm entitled to go into the issue about [J.P.] and [R.H.] having such an interest in each other, that there was oral sex between the two of them later.
>
> [Prosecutor]: That happened when [R.H.] was 19 years old, which is legally inadmissible in this case.
>
> [Defense counsel]: But it shows somebody else could have done this to him, and he's blaming it on somebody else. It could have been he was being molested by [J.P.] I mean, he was around the child, and he was involved in sex with him, Your Honor, and I'm entitled to go into that.
>
> [Prosecutor]: He can go into the identity all he wants, but the fact the complainant had a sexual relationship with his stepfather 11 years later is not admissible.
>
> THE COURT: He's not there yet.

The defense continued to cross-examine M.P., and when she testified that she would no longer trust J.P. or Criswell with her children, the following discussion at the bench occurred:

> [Defense counsel]: She witnessed this victim having a sex act with [J.P.] She testified she never witnessed them doing anything, and I think I'm entitled to explore it.

[Prosecutor]: It's irrelevant and inadmissible. Any prior sex acts that are related are not admissible in court.

THE COURT: Objection sustained.

Criswell's counsel questioned M.P. on voir dire about R.H.'s relationship with J.P.:

Q. And you were married to [J.P.]; is that correct?

A. Yes, sir.

Q. And you all were married sometime in 2004.

A. Yes, sir.

Q. You divorced when?

A. I got divorced sometime, like, last year.

. . . .

Q. It's my understanding that [J.P.] had a sexual relationship with [R.H.]; is that correct?

A. Yes, sir.

Q. When did you first become aware of that?

A. I had talked -- sometime, like, in 2013. I had a feeling that something was going on, like had been -- like in the wintertime, like.

. . . .

Q. . . . Did you ever confront [R.H.] about -- well, what did you think was going on, or what were you worried about?

A. I actually caught them both, and I confronted both of them.

. . . .

Q. But before you caught them, I took it to understand that you had some type of suspicion. Once you caught them, the suspicion was no longer suspicion.

A. Right.

. . . .

Q. . . . Before you actually caught them, did you ever confront [R.H.] about anything, with any type of activity or relationship with [J.P.]?

A. No, sir.

. . . .

Q. . . . After you caught them, you asked [R.H.] about it?

A. I asked both of them together.

. . . .

Q. . . . What did [J.P.] say to you?

A. He did not say much of nothing. I just say, "I want my divorce."
Q. Okay. And did you ask [R.H.] how long this had been going on?

A. Yes, sir. I asked both of them how long has it been going on.

Q. And what was [R.H.]'s response?

A. [R.H.]'s response was . . . it's been going on for about three months or so.

We cannot conclude that Criswell has satisfied the requirement of a nexus between J.P. and the offense at issue. There was no evidence that J.P. was with R.H. on the night in question. In fact, M.P., R.H., and B.H. all testified that Criswell was with R.H. on the bottom bunk on the night of the sexual assault. Any suggestion that J.P. was an alternative perpetrator is "both meager and speculative." *See Wiley*, 74 S.W.3d at 406. "It is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime. Such speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice." *Michaelwicz v. State*, 186 S.W.3d 601, 617 (Tex. App.—Austin 2006, pet. ref'd) (quoting *United States v. McVeigh*, 153 F.3d 1166, 1191 (10th Cir. 1998)). Criswell also had the opportunity to cross-examine R.H. regarding his identity of Criswell as the person who assaulted R.H., or whether someone else may have committed the sexual assault. Based on this record, we conclude that the trial court's exclusion of this evidence did not violate Criswell's right to present a complete defense.

Criswell also argues that the trial court erred in excluding this evidence because R.H. "could have had many motives or biases in relation to this relationship with his stepfather and his family" that Criswell should have been able to present to the jury, and that the exclusion of the evidence violated his right to confrontation.

The Confrontation Clause of the U.S. Constitution guarantees a defendant the right to cross-examine witnesses against him. *Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Carroll v. State*, 916 S.W.2d 494, 496-97 (Tex. Crim. App. 1996). A defendant may cross-examine a witness on any subject "reasonably calculated to expose a motive, bias[,] or interest for the witness to testify." *Carroll*, 916 S.W.2d at 497. However, "'the trial court has considerable discretion in determining how and when bias may be proved, and what collateral evidence is material for that purpose.'" *Dinh Tan Ho v. State*, 171 S.W.3d 295, 304 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (quoting *Recer v. State*, 821 S.W.2d 715, 717 (Tex. App.—Houston [14th Dist.] 1991, no pet.)). A trial court may limit the scope of cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative or collateral evidence. *Id*. (citing to *Van Arsdall*, 475 U.S. at 679; *Stults v. State*, 23 S.W.3d 198, 204 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd)). Courts must examine each case on an individual basis to determine whether the Confrontation Clause demands the admissibility of certain evidence. *Lopez v. State*, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000). In making this determination, the court should balance the probative value of the evidence sought to be introduced against the risk its admission may entail. *Id.* at 222. Because we have already concluded that Criswell

failed to present a nexus between J.P. and the offense alleged, we also conclude the trial court could have reasonably concluded that the evidence regarding any consensual sexual relationship between the victim and R.H. that occurred many years after the alleged offense and when R.H. was an adult was not probative of any issue relevant to the case or alternatively that any probative value was substantially outweighed by the possible prejudice and confusion such information would interject into the trial.[3] We conclude that the exclusion of the evidence did not violate Criswell's right to confrontation or the right to present a complete defense. We overrule Criswell's third issue.

[3] We further note that under Rule 412 of the Texas Rules of Evidence, in a prosecution for aggravated sexual assault, evidence of specific instances of a victim's past sexual behavior is generally not admissible. *See* Tex. R. Evid. 412.

Having overruled all of Criswell's issues on appeal, we affirm the trial court's judgment.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on August 30, 2016
Opinion Delivered March 29, 2017
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.