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No. 1-09-0996

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06CR17926
)	
KENNETH WEATHERSPOON,)	Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

HELD: Defendant's conviction reversed where: the trial court improperly excluded evidence under the Illinois rape shield statute.

¶ 1 Following a jury trial, defendant, Kenneth Weatherspoon, was convicted of criminal sexual assault and sentenced to 12 years' imprisonment. Defendant appeals his conviction, arguing: (1) the trial court improperly excluded evidence surrounding the circumstances of the victim's initial outcry, thereby violating his right to present a defense and confront the evidence

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against him; (2) the trial court erred when it permitted the victim's teacher to discuss the victim's demeanor at the time of the victim's subsequent outcry; (3) the trial court erred in allowing the victim's treating physician to testify about statements the victim made at the time of treatment; (4) the trial court erred when it allowed a detective to bolster his credibility with prior statements made by his partner; (5) the prosecutor made improper statements during the closing argument; and (6) the trial court deprived him of his constitutional right to a fair and impartial jury when it failed to comply with the mandates of Illinois Supreme Court Rule 431(b) as amended in 2007, and inquire whether the jury members understood and accepted each of the principles of law enumerated therein. For the reasons set forth herein, we reverse the judgment of the trial court and remand for proceedings consistent with this disposition.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)), seven counts of criminal sexual assault (720 ILCS 5/12-13(a)(1), (a)(2), (a)(3), (a)(4) (West 2006)), and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)) based on allegations that he engaged in repeated acts of sexual intercourse with K.A., the minor daughter of his girlfriend, from the time that she was 9 years old until the time when she was 14 years of age.

¶ 4 Defendant elected to proceed by way of a jury trial. Prior to trial, defendant filed a motion seeking to admit evidence pertaining to the circumstances of K.A.'s initial outcry to her neighbor, Lucy Covington, arguing that the evidence fell within an exception to the rape shield statute (725 ILCS 5/115-7(a) (West 2006)). Specifically, defendant argued: "The complaining

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witness, [K.A.], first accused the Defendant of having sexual intercourse with her after she was found naked in bed with her 18-year old neighbor. It was at this time that she accused the Defendant of having sex with her. Circumstances which led to the accusation are relevant and thus an exception to the rape shield statute.” In response, the State argued that the rape shield statute prohibited the defense from questioning the victim about sexual acts she had with any person other than defendant. After hearing the arguments, the court denied defendant’s motion, concluding that the constitution did not require the introduction of evidence pertaining to a relationship that K.A. had with someone other than defendant.

¶ 5 Immediately prior to trial, the State filed a motion *in limine* seeking to bar the defense from discussing the circumstances of K.A.’s initial outcry to her neighbor, Lucy Covington. The court ruled that the defense could establish that K.A. made her initial outcry to Covington, but would not be able to admit any of the circumstances surrounding the outcry, namely that Covington found K.A. in bed with her 18-year-old grandson. The State also sought to bar evidence that K.A. was the mother of a young child and that she had a genital wart. Defense counsel did not object to the State’s request to bar evidence of K.A.’s status as a parent, but argued that information pertaining to K.A.’s genital wart was relevant because defendant did not have a wart. Accordingly, the defense argued that K.A.’s wart was circumstantial evidence of defendant’s innocence. The court disagreed and granted the State’s motion.

¶ 6 The trial court presided over the jury selection process and commenced the *voir dire* process by advising the potential jurors of the rules of law applicable to the trial, including the four *Zehr* principles (*People v. Zehr*, 103 Ill. 2d 472 (1984)) enumerated in Illinois Supreme

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Court Rule 431(b) as amended in 2007 (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007). Specifically, in accordance with Rule 431(b), the trial court informed the entire group of prospective jurors that: every criminal defendant is presumed innocent of the charges against him; the State bears the burden of proving the defendant guilty of the charged offenses beyond a reasonable doubt; the defendant is not required to prove his innocence and is not required to testify or present evidence on his behalf; and a defendant's decision not to testify may not be considered evidence against him.

¶ 7 Thereafter, the trial judge addressed the first panel of potential jurors by questioning them about their acceptance of binding legal principles, including the four *Zehr* principles. With respect to first two principles, the presumption of innocence and the State's burden of proof, the court inquired whether the jurors could "remember" and "follow" those principles. When addressing the principles pertaining to a defendant's right not to present evidence or have his decision not to testify to be used against him, the court inquired whether the jurors could "understand" and "follow" those rules of law. After the jury was selected, the State proceeded with its case.

¶ 8 At trial, K.A. testified that when she was 9 years old, she lived in an apartment located at 1946 South State Street with her mother, Patrice, her brother, Carlos, and her sister, Zakia. Defendant was her mother's boyfriend and lived with them as well. During that time, K.A.'s grandmother and cousins would also live there on occasion. One afternoon, K.A. was watching television in her mother's bedroom while her brother and cousin played a video game in her bedroom. Her mother was not present. Defendant came into the bedroom, pulled K.A.'s

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pants down, put his penis in her vagina and began “humping on her.” He then “spermed” into his hands, cleaned his hands and the blood on the bed, and directed K.A. not to tell anybody about what had happened.

¶ 9 Defendant did not have sex with K.A. again until she turned 10 years old. At that time, she lived at an apartment located at 6405 South Seeley with her mother, brother and defendant. K.A. had her own bedroom, which was located in the rear of the apartment near the room that her mother and defendant shared. Defendant began having sex with her more frequently. When K.A.’s mother was not around, defendant would come into her room and ask her if she wanted to “freak.” K.A. indicated that she would often consent to defendant’s request for sex because he would hit her with a belt and would not permit her to leave the house if she refused. K.A. never told her mother about defendant having sex with her because defendant and her mother often fought and she did not want defendant to hit her mother. K.A. acknowledged that her mother asked her on several occasions if anything ever happened between K.A. and defendant, but K.A. always denied that anything occurred.

¶ 10 When K.A. was 13 years old, her family moved to another apartment located at 53rd Street and Damen Avenue. Her bedroom was next door to the room that her mother and defendant shared. Defendant continued to have sex with her, but it occurred more often in her mother’s bedroom than in K.A.’s bedroom. Defendant had sex with her almost every day until she was nearly 15 years old. Defendant would hit K.A. with a belt or confine her to the house if she refused to have sex with him.

¶ 11 K.A. indicated that the last time that defendant had sex with her was in May 2006,

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when she was 14 years old. After he came into K.A.'s room, had sex with her, and ejaculated into his hand, he told her that she could see her friends who lived next door. The following day, she was at her neighbor, Lucy Covington's, house and "everything [about defendant] came out." K.A. told Covington that defendant had been having sex with her. K.A. then spoke to her mother about what had occurred. Several weeks later, K.A. spoke to Karen Clark, a teacher's assistant, at her school, about defendant and then to some detectives and a doctor. Defendant moved out of their residence sometime in May 2006.

¶ 12 Karen Clark, a teaching assistant at the Buckingham Special Education Center, testified that K.A. was one of her students and that she had known K.A. for years. K.A. referred to Clark as her godmother. Clark indicated that she initiated a conversation with K.A. on June 16, 2006. During their conversation, K.A. was initially "shocked" that Clark knew about the subject matter and responded with a joking smile. When K.A. began talking about the situation, she started crying. After speaking to K.A., Clark called K.A.'s mother, the school principal, and the Department of Child and Family Services (DCFS).

¶ 13 Doctor Emily Sifferman, a physician at the Chicago Children's Advocacy Center, and an expert in the area of sexual abuse, testified that she examined K.A. on July 17, 2006. Prior to conducting a physical exam, Doctor Sifferman spoke individually with K.A. and her mother. During their conversation, K.A. told Doctor Sifferman that she "got molested" from the time she was 9 years old until May 2006, when she was 14 years old. K.A. told Doctor Sifferman that her molester would come into her room when she was watching television, take off her clothes and have sex with her. Sometimes the molester would use a condom and other

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times he would ejaculate into his hand or onto the floor. After their discussion, Doctor Sifferman conducted a full physical examination of K.A., including a genitourinary examination. She concluded that K.A.'s results were "normal" for someone who had engaged in sexual intercourse and were consistent with the statement K.A. had made to her. Doctor Sifferman, however, acknowledged that the results of her examination could neither confirm nor refute K.A.'s statement as the elastic nature of vaginal tissue can mask previous injuries.

¶ 14 Detective Charles Morris testified that he and Detective Helen Barrett met with defendant on July 17, 2006, and transported him to the police station. After advising defendant of his *Miranda* rights, defendant spoke to them. Detective Morris then took defendant to speak with his colleague, Detective Tina Figueroa-Mitchell. At approximately 3:30 p.m., Detective Morris conversed with defendant in the presence of Detectives Barrett and Figueroa-Mitchell. Defendant admitted that he had sexual intercourse with K.A., but indicated that he had only done so on one occasion. Defendant stated that the incident occurred around 2 a.m. sometime in March 2006, when K.A.'s mother was not present. Defendant was in his bedroom drinking beer and smoking marijuana. He had been crying. K.A. came into the room and asked him why he was upset. She put her arms around defendant and asked him if he wanted to "freak." K.A. then removed her clothes, got into bed with defendant, and they had sexual intercourse. Defendant did not use a condom and ejaculated into his hand. K.A. then left the room. She did not bleed when the two had intercourse. Defendant also indicated that sometime in April 2006, K.A. came into his bedroom and took off her clothes. Defendant instructed K.A. to get dressed and pushed her out of the bedroom. He did not have sex with her at that time.

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¶ 15 Detective Morris acknowledged that he did not prepare a police report or memorialize defendant's statement in any manner.

¶ 16 Assistant State's Attorney (ASA) Jason Poje, testified that he met with defendant on July 17, 2006, after speaking to Detectives Morris and Barrett. ASA Poje advised defendant of his *Miranda* rights and interviewed him in the presence of Detective Morris. After indicating that he understood his rights, defendant provided ASA Poje with a statement that was consistent with the one he had provided to Detective Morris earlier that day. Specifically, defendant acknowledged that he had been dating K.A.'s mother for approximately 5 or 6 years and began living with her when K.A. was 8 years old. Defendant admitted that he had sex with K.A. in May 2006. At that time, defendant was in his room drinking and smoking marijuana. He was crying and K.A. asked him if he wanted to "freak" because he was upset. Defendant stated that he did not use a condom and ejaculated into his hand.

¶ 17 Defendant elected to exercise his right to testify. At trial, defendant denied that he ever had sexual intercourse with K.A. He testified that he began dating K.A.'s mother, Patrice Massenberg, in January 2001 and indicated that they lived together from March 2001 until May 2006. During the time they lived together, defendant played the role of stepfather to Massenberg's children and disciplined them. Defendant admitted that he hit K.A. once in the summer of 2005 when she was disrespectful. He indicated, however, that he and K.A. had a good relationship. Defendant helped K.A. with her homework, took her shopping, and accompanied her to the park. Defendant acknowledged that he moved out of the apartment that he shared with Massenberg on May 28, 2006, after he was confronted with allegations that he

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sexually assaulted K.A. Defendant further acknowledged that he met with police officers on July 17, 2006, but denied that he confessed to an act of sexual intercourse with K.A. Although defendant met with Detective Morris, Detective Figueroa-Mitchell, and ASA Poje, he never informed them that he had engaged in a sexual act with K.A.

¶ 18 Detective Tina Figueroa-Mitchell was called as a rebuttal witness. She testified that she met with defendant in her office on July 17, 2006. During their conversation, defendant informed Figueroa-Mitchell that he had engaged in sexual intercourse with K.A.. After hearing defendant's statement, Figueroa-Mitchell conversed with Detectives Morris and Barrett and informed them that defendant would speak to them. When all three of the officers were present, defendant apologized for not admitting that he had sex with K.A. earlier, but acknowledged that he had sex with her on one occasion and indicated that there had almost been a second instance where they engaged in sexual intercourse.

¶ 19 Thereafter, the parties delivered closing arguments and the trial court read the relevant jury instructions. The jury then commenced deliberations. They deliberated for approximately 4 hours and were sent home for the evening. Deliberations continued the following morning for approximately 5 more hours. The foreman informed the court that the jury had reached a verdict on one of the charges but were deadlocked on the other. Both parties agreed to accept the verdict and the trial court ended deliberations. The jury returned with a verdict finding defendant guilty of criminal sexual assault and the trial court declared a mistrial on the predatory criminal sexual assault charge. Defendant filed a posttrial motion, which was denied. Thereafter, following a sentencing hearing, defendant was sentenced to 12 years'

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imprisonment. This appeal followed.

¶ 20 ANALYSIS

¶ 21 I. Exclusion of Evidence Pursuant to the Rape Shield Statute

¶ 22 On appeal, defendant first argues that the trial court erred in excluding evidence about the details surrounding K.A.'s initial outcry, namely that she made the initial outcry to her neighbor, Lucy Covington after Covington found K.A. naked in bed with her eighteen-year-old grandson. Defendant argues that the circumstances surrounding K.A.'s initial outcry were highly probative of K.A.'s credibility because they provided her with a motive to fabricate her allegations against defendant. Moreover, defendant argues that Doctor Sifferman should have been permitted to testify that she discovered a genital wart during her physical examination of K.A. Defendant contends that the evidence was necessary to rebut the inference that defendant was solely responsible for K.A.'s sexual history. Accordingly, defendant maintains that the trial court improperly violated his constitutional right to present a defense and confront the evidence against him when it excluded the circumstances surrounding K.A.'s initial outcry to Covington and the evidence uncovered during K.A.'s physical examination under the Illinois rape shield statute (725 ILCS 5/115-7 (West 2006)).

¶ 23 The State responds that the trial court properly excluded the circumstances surrounding K.A.'s initial outcry under the rape shield statute. The State argues that K.A.'s sexual history with anyone other than defendant was not relevant to the issue of whether defendant engaged in sexual intercourse with her. Accordingly, the trial court correctly ruled that the circumstances of K.A.'s initial outcry were inadmissible under the rape shield statute.

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Moreover, the State further argues that the circumstances surrounding K.A.'s outcry were not constitutionally required to be admitted as an exception under the rape shield statute. The State also maintains that evidence of K.A.'s genital wart was also properly excluded.

¶ 24 Initially, we must determine the proper standard of review. Defendant suggests we review this issue *de novo*. However, it is well established that evidentiary rulings, including the admissibility of evidence pursuant to the rape shield statute, are reviewed for an abuse of discretion. *People v. Santos*, 211 Ill. 2d 395, 401 (2004). A trial court abuses its discretion only where its ruling is “arbitrary, fanciful or unreasonable” or where “no reasonable person would agree with the position adopted by the trial court.” *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 25 Section 115-7 of the Code of Criminal Procedure of 1963 (Criminal Code), commonly referred to as the rape shield statute, prohibits the introduction of evidence concerning the alleged victim's prior sexual history or reputation subject to two limited exceptions: (1) the evidence of the victim's prior sexual past is offered by the accused as evidence of the victim's consent; or (2) the admission of such evidence is constitutionally required. 725 ILCS 5/115-7 (West 2006); *Santos*, 211 Ill. 2d at 401-02. Specifically, the statute, in pertinent part, provides:

“In prosecutions for predatory sexual assault of a child, aggravated criminal sexual assault, [and] *** aggravated criminal sexual abuse *** the prior sexual activity or the reputation of the alleged victim *** is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim *** when this evidence is offered by the accused upon

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the issue of whether the alleged victim *** consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted.” 725 ILCS 5/115-7 (West 2006).

¶ 26 The rape shield statute serves to prevent a defendant from harassing and embarrassing a witness by questioning her about specific acts of sexual conduct she engaged in with persons other than defendant because such evidence has no relevance as to whether she consented to, and engaged in, sexual relations with the defendant. *People v. Freeman*, 404 Ill. App. 3d 978, 989-90 (2010); *People v. Summers*, 353 Ill. App. 3d 367, 373 (2004). Accordingly, the “exclusion of such evidence keeps the jury’s attention focused on issues relevant to the controversy at hand and promotes effective law enforcement because victims can report crimes of rape and deviate sexual assault without fear of having the intimate details of their sexual history brought before the public. *People v. Weatherspoon*, 265 Ill. App. 3d 386, 392 (1994).

¶ 27 Nonetheless, because every criminal defendant has a constitutional right to present a defense and confront the witnesses against him (Ill. Const. 1970, art. I, §8; U.S. Const., amend. VI), the rape shield statute cannot be used to infringe upon his constitutional rights. *People v. Sandoval*, 135 Ill. 2d 159, 175 (1990) (“[N]ot even a statute can be used to shelter a witness whose motive, prejudice or bias may affect testimony before the court”). “To be ‘constitutionally required’ the evidence of other sexual activity has to be more than simply relevant, it must be germane to the accused’s right to confront witnesses against him or to present his theory of the case.” *People v. Darby*, 302 Ill. App. 3d 866, 874 (1999). In general, courts have recognized that a victim’s sexual history is relevant and admissible where it explains

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a victim's bias or motive to lie (*Sandoval*, 135 Ill. 2d at 175), explains physical evidence such as semen, pregnancy or physical indications of intercourse (*Sandoval*, 135 Ill 2d at 185; *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 186 (2001)), or where it can explain a young victim's unique sexual knowledge (*Summers*, 353 Ill. App. 3d at 373; *People v. Hill*, 289 Ill. App. 3d 859 (1997)). However, our supreme court has recognized that "precluding a defendant in a sexual assault trial from impeaching a complaining witness on a collateral matter does not contravene the constitution." *Santos*, 211 Ill. 2d at 407. Ultimately, the exception should be fairly, but narrowly construed. *Santos*, 211 Ill. 2d at 416-17; *Summers*, 353 Ill. App. 3d at 374.

¶ 28 Before we engage in our analysis regarding the application of the rape shield statute to the case at bar, we wish to point out that the State has taken conflicting positions regarding the circumstances of K.A.'s initial outcry. Prior to trial, the State adopted the position that the circumstances of the initial outcry—that the victim was found in bed with an 18-year-old boy—was barred from introduction into evidence pursuant to the rape shield statute. The trial court concurred with the State's position and barred the evidence on this basis. On appeal and during the oral argument that this court held on the case, the State subsequently contended that no sexual activity occurred between K.A. and the 18-year-old. As we have already noted above, the rape shield statute operates to bar evidence of a victim's prior sexual activity with persons other than the accused. If we were to adopt the State's most recent argument that no sexual activity occurred between K.A. and the 18-year-old, then the rape shield statute would not apply and the evidence would come in as relevant to the circumstances of the initial outcry, which would be the opposite result the State seeks to achieve by advancing this new argument. Nonetheless,

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even under the State's original argument that there was sexual activity between the victim and the 18-year-old, and that the rape shield statute applies, we conclude that the evidence of the circumstances of the initial outcry is admissible under the constitutionally required exception to the rape shield statute.

¶ 29 Here, the record reflects that K.A. made her initial outcry to her neighbor Lucy Covington after Covington observed K.A. naked in bed with Covington's grandson. It was when Covington questioned K.A. about the absence of blood on the bed sheets, that K.A. informed Covington that defendant had sexually assaulted her. Defendant argues that this evidence should have been admitted under the "constitutionally required" exception to the rape shield statute because the timing and circumstances of her outcry undermined the reliability of K.A.'s allegations and the exclusion of such evidence violated his right to present a complete defense and confront K.A.. We agree.

¶ 30 Illinois courts have recognized the significance and probative nature of a child's initial outcry of sexual abuse. See, e.g., *People v. Bowen*, 183 Ill. 2d 103, 116 (1998), quoting *State v. Robinson*, 153 Ariz. 191, 202 (1987) (recognizing that the circumstances of the outcry is important given that "child's initial complaint of sexual abuse has been characterized as 'often striking in its clarity and ring of truth' "). Here, we find that the timing and circumstances of K.A.'s outcry were particularly notable. Although the purported abuse had been happening for 5 years, K.A., when asked by her mother, repeatedly denied that defendant had engaged in any untoward behavior toward her. It was not until K.A. was 14 and was found naked in bed with Lucy Covington's 18-year-old grandson and questioned about her virginity, that K.A. made her

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initial outcry.

¶ 31 By precluding defendant from introducing the circumstances of K.A.'s outcry and from exploring her potential motive to fabricate the charges against him in order to deflect attention from Covington's grandson, defendant was denied his right to confront witnesses and fully develop his defense theory. See *Sandoval*, 135 Ill. 2d at 175 ("[N]ot even a statute can be used to shelter a witness whose motive, prejudice or bias may affect testimony before the court"); see also *Darby*, 302 Ill. App. 3d at 874. We find that the circumstances of the outcry should have been presented to the jury and that it should have been within the province of the jury, as the finder of fact, to hear the evidence and draw conclusions as to its significance or lack thereof.

¶ 32 The trial court's ruling precluding defendant from eliciting testimony about the circumstances of the outcry as well as evidence that K.A. possessed a genital wart, was particularly damaging given K.A.'s tender age. Courts have recognized that "[t]he natural presumption with children is that they are sexually innocent." *Anthony Roy*, 324 Ill. App. 3d at 16; see also *Hill*, 289 Ill. App. 3d 864. Here, based on Doctor Sifferman's testimony that K.A.'s physical examination was consistent with a history of prior sexual intercourse, it would have been natural for the jury to presume that K.A., a 14-year-old child, would not have engaged in sexual intercourse unless defendant had sexually assaulted her. Due process mandates that defendant should have been able to offer this evidence to rebut this presumption and provide an alternative explanation for the physical evidence of K.A.'s prior sexual activity. See *Anthony Roy*, 324 Ill. App. 3d at 186-87 (evidence that a juvenile had sexual intercourse with the minor

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victim before she made sexual assault allegations against the defendant provided a plausible alternative explanation for the State's physical evidence and should have been admitted under the constitutional exception to the rape shield statute).

¶ 33 We further find that the preclusion of the aforementioned evidence was not harmless. Although the State argues that the evidence against defendant was not closely balanced, we disagree. While defendant purportedly provided oral statements to Detectives Morris and Figueroa-Mitchell and ASA Poje, none of these statements were memorialized by any of them, except ASA Poje testified that he did write a "summary" of defendant's oral statement. However, defendant did not sign this writing, or otherwise acknowledge it as his statement. Moreover, during defendant's testimony he denied that he ever had sexual intercourse with K.A. and denied that he ever confessed such conduct to authorities. Given that defendant was not able to fully present his defense and offer evidence of the circumstances surrounding K.A.'s initial outcry and provide an alternative explanation for the physical evidence of K.A.'s sexual activity, we find that the error was substantial. See, e.g., *Anthony Roy*, 324 Ill. App 3d at 186-87. Additionally, the jury's difficulty in reaching a verdict on all of the charges after two days of lengthy deliberations is illustrated by its ultimate verdict of guilty to the charge of criminal sexual assault, and its failure to reach a verdict on the remaining charge of predatory criminal sexual assault of a child, and provides further support that the evidence against defendant was closely balanced and that the trial court's exclusion of evidence was not harmless. See, e.g., *People v. Gray*, 405 Ill. App. 3d 466, 474 (2010) (recognizing that a difficult jury deliberation can be indicative that the evidence against the defendant was closely balanced.)

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¶ 34 Moreover, K.A. testified that she was "between eight and nine" years of age when she first had sexual intercourse with defendant and that it evolved into nearly a daily event. The single act of sexual intercourse with K.A. that defendant is alleged to have admitted to authorities relates to a day in March 2006 when K.A. was 14 years of age. The central distinction between the two charges pending against defendant at trial is K.A.'s age at the time an act of sexual penetration was allegedly committed. To sustain the charge of criminal sexual assault the state is required to prove, *inter alia*, that K.A. was *under 18 years of age* when the act was committed, or K.A. was *at least 13 years of age but under 18 years of age* when the act was committed. Conversely, to sustain the charge of predatory criminal sexual assault of a child the state is required to prove, *inter alia*, that K.A. was *under 13 years of age* when the act was committed. Thus, the jury seemingly could not unanimously agree that sexual penetration occurred between K.A. and defendant while K.A. was *under 13 years of age*. This calls into question the jury's credibility determination concerning K.A. and her claim that sexual intercourse with defendant started when she was "between eight and nine" years of age. This further supports our determination that the evidence was closely balanced. Accordingly, we conclude that defendant is entitled to a new trial. Given that we find that the rape shield statute was improperly used to prevent defendant from exercising his constitutional rights and remand the cause for a new trial on this basis, we need not address the remaining arguments that defendant advances on appeal.

¶ 35 CONCLUSION

¶ 36 For the reasons stated herein, we reverse the judgment of the circuit court and

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remand for a new trial consistent with this disposition.

¶ 37 Reversed.