

2011 IL App (2d) 100838-U
Nos. 2-10-0838 & 10-0839 cons.
Order filed November 15, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)
OF ILLINOIS,) Appeal from the Circuit Court
) of Du Page County.
)
Plaintiff-Appellant,)
v.) No. 09-CF-2125
)
PETER BORZELLO,)
) Honorable
) Blanche Hill Fawell,
Defendant-Appellee.) Judge, Presiding.

THE PEOPLE OF THE STATE)
OF ILLINOIS,) Appeal from the Circuit Court
) of Du Page County.
)
Plaintiff-Appellant,)
v.) No. 09-CF-521
)
PETER BORZELLO,)
) Honorable
) Blanche Hill Fawell,
Defendant-Appellee.) Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court properly excluded defendant's statement under the marital communication privilege: the statute contained no exception applicable when the parties were engaged in dissolution proceedings; the exception applicable when the interests of the parties' child were directly involved did not apply, as the child was

defendant's emancipated stepson and the statement did not directly involve his interests, as he was not a victim of defendant's offenses; likewise, the exception applicable when the defendant's spouse was a victim did not apply either.

¶ 1 Defendant, Peter Borzello, was indicted on charges of identity theft (720 ILCS 5/16G-15(d)(1)(A) (West 2008)), forgery (720 ILCS 5/17-3(a)(4) (West 2008)), and unlawful use of a credit card (720 ILCS 250/8 (West 2008)). In a separate case, he was charged with obstruction of justice (720 ILCS 5/31-4(a) (West 2008)). Defendant moved *in limine* to bar statements he allegedly made to Toni Borzello, his former wife, while they were married. The trial court granted the motion. The State appeals, arguing that the marital communication privilege should not apply where the parties were in the process of having their marriage dissolved. Alternatively, it contends that statutory exceptions apply. We affirm.

¶ 2 The identity theft, forgery, and credit card charges alleged that defendant attempted to use a credit card belonging to Kevin Castellano to purchase merchandise from Menard's. Castellano is defendant's stepson, who was then in San Diego serving with the Marines. The obstruction-of-justice charge alleged that defendant used Castellano's cell phone to call a State's Attorney's investigator. Defendant, purporting to be Castellano, said that he wanted the charges dropped.

¶ 3 Defendant later told Toni Borzello that he had called the State's Attorney's investigator and lied to him. Toni reported this statement to the State's Attorney's office.

¶ 4 Defendant moved to prevent Toni from testifying about his statement to her, asserting that it was barred by the marital communication privilege. The State responded that the privilege did not apply because, when defendant made the statement, he and Toni were involved in dissolution proceedings, although the prosecutor did not know whether the dissolution had been finalized. The State also argued that the statement should be admitted under a statutory exception allowing for the

admission of statements where the interests of the parties' child were at stake. The trial court granted the motion, and the State appeals.

¶ 5 Preliminarily, we agree with the State that we have jurisdiction of the appeal. The State may appeal an *in limine* order that has the effect of barring evidence that the prosecution deems necessary to prove its case. *People v. Drum*, 194 Ill. 2d 485, 491 (2000). Such is the case here, with the State filing a certificate of impairment and timely notice of appeal.

¶ 6 Turning to the merits, the State contends that the trial court improperly applied the marital privilege here. The State first argues that the purpose of the privilege is to promote marital harmony so that, where the marriage is already irretrievably broken, applying the privilege frustrates the court's truth-seeking function with no corresponding benefit to anyone. The State concedes that the relatively sparse authority in Illinois does not recognize such an exception to the privilege. However, the State contends that these cases are not factually apposite and urges us to follow the lead of other jurisdictions that have refused to apply the privilege where the parties are separated or undergoing a divorce.

¶ 7 Defendant responds that the statute recognizes several carefully crafted exceptions to the privilege, but not the one the State advocates. Defendant thus contends that the State's argument is better addressed to the legislature, not this court.

¶ 8 The marital communication privilege is found in section 115-16 of the Code of Criminal Procedure of 1963, which provides as follows:

“In criminal cases, husband and wife may testify for or against each other. Neither, however, may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage, except in cases in which either is charged with an offense against the person or property of the other, in case of spouse

abandonment, when the interests of their child or children or of any child or children in either spouse's care, custody, or control are directly involved, when either is charged under [various sections of the Criminal Code of 1961] and the victim is a minor under 18 years of age in either spouse's care, custody, or control at the time of the offense, or as to matters in which either has acted as agent of the other." 725 ILCS 5/115-16 (West 2008).

¶ 9 "The marital privilege does not result from a policy of safeguarding the quality of evidence presented at trial as does, for example, the bar against the admission of polygraph evidence. Indeed, evidence withheld under the marital privilege is relevant and often highly reliable. Rather, the marital privilege stems from a policy of promoting family harmony." *People v. Hall*, 194 Ill. 2d 305, 336 (2000). The State thus contends that, in a case like this, the privilege deprives the factfinder of "relevant" and "highly reliable" evidence, but the underlying purpose of the privilege is not advanced.

¶ 10 The State's argument requires us to construe section 115-16. In construing a statute, the court must ascertain and give effect to the legislature's intent in enacting the statute. *In re J.W.*, 204 Ill. 2d 50, 62 (2003). "The statute's language is the most reliable indicator of the legislature's intent, and where the language is clear and unambiguous, the court must give effect to the statute as written without reading into it exceptions, limitations, or conditions that the legislature did not express." *People v. Olsson*, 2011 IL App (2d) 091351, ¶ 6. The construction of a statute is a question of law that we review *de novo*. *People v. Nash*, 409 Ill. App. 3d 342, 349 (2011).

¶ 11 The statute provides that neither party may testify to a statement made "during marriage." 725 ILCS 5/115-16 (West 2008). Giving the words their plain and ordinary meaning, any statement made "during marriage," *i.e.*, until a final dissolution judgment is entered, is subject to the privilege.

¶ 12 As the State concedes, the relatively few Illinois cases on point appear to reflect this understanding. In *People v. Dubanowski*, 75 Ill. App. 3d 809 (1979), the court upheld the privilege,

holding that it remains in effect while the parties are separated, as long as they are not divorced. *Id.* at 811. In *People v. Simpson*, 68 Ill. 2d 276, 278 (1977), the court held that the privilege did not apply to a statement the defendant made to his “estranged wife,” because it was found in the presentence report and the wife did not actually testify. The court did not discuss whether the estrangement would have rendered the privilege inapplicable. In *People v. Krankel*, 105 Ill. App. 3d 988 (1982), the court held that the trial court improperly permitted the defendant’s ex-wife to testify about conversations that occurred during the marriage. *Id.* at 991-92.

¶ 13 The State contends, however, that the “modern trend” is to construe the privilege narrowly. It urges us to follow cases from other jurisdictions that have refused to apply the privilege where the spouses were separated. Even these cases, however, do not uniformly support creating the exception the State advocates.

¶ 14 Although *Glover v. State*, 836 N.E.2d 414 (Ind. 2005), contains an interesting discussion of the historical development and current contours of the marital communication privilege, the court ultimately held only that one spouse could testify against another if he or she chose to do so. The court declined to hold that the status of the parties’ marriage could be a basis for automatically disregarding the privilege. The court saw “little benefit, and some mischief, in inquiring into the quality of a marriage.” *Id.* at 419. In *People v. Fisher*, 442 Mich. 560, 503 N.W.2d 50 (1993), the court refused to apply the privilege to the defendant’s wife’s statements that were included in the presentence report. The court held that the trial court could consider the statements because the wife would not actually be called to testify.

¶ 15 *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. 2004), is most nearly on point. The court there declined to apply the privilege where the defendant and his wife were permanently separated, the wife was living with another man, and she testified that she had not divorced the defendant only because

she could not afford it. *Id.* at 160-61. However, the case contains little discussion of the issue, merely relying on federal cases. The State cites several of those cases holding that the privilege did not apply where the parties were separated or undergoing a divorce. See, *e.g.*, *United States v. Jackson*, 939 F.2d 625 (8th Cir. 1991). However, these cases, too, contain minimal discussion.

¶ 16 In any event, we do not find these cases persuasive because they did not analyze the particular statute that we consider here. The Illinois statute contains several carefully delineated exceptions, but not the one for which the State advocates. Had the legislature intended to create an exception for communications made while the parties were engaged in dissolution proceedings, it could easily have done so.

¶ 17 Moreover, we agree with *Glover* that it could set a mischievous precedent to require a court to inquire into the status of the parties' marriage before deciding whether the privilege applies in a given case. As a practical matter, parties often separate or begin dissolution proceedings only to reconcile later. To require a court to decide whether the parties were still in a committed relationship when the allegedly privileged statement was made could result in a minitrial on that issue and might actually promote marital disharmony.

¶ 18 The State alternatively contends that the statement was admissible under one or more of the statutory exceptions. The State urges us to apply the exception for statements made "when the interests of their child or children or of any child or children in either spouse's care, custody, or control are directly involved." 725 ILCS 5/115-16 (West 2008). The State argues that the statute creates two distinct exceptions: one for "[the parties'] children" and one for "any [other] child or children in either spouse's care, custody, or control." The State maintains that the requirement that the child be in either spouse's care, custody, or control applies only to "other" children and not to the parties' own children, so that the exception applies to defendant's emancipated stepson. The State

further contends that defendant's stepson should be considered the parties' child although he is the biological child of only one of them. The State cites *People v. Eveans*, 277 Ill. App. 3d 36 (1996), for the proposition that the marital privilege should be construed narrowly and, thus, the exception construed broadly. *Id.* at 45. There, the defendant confessed to her husband that she had murdered their children. She argued on appeal that her confession to her husband should not have been admitted. The children's interests were not involved, she contended, because they were dead. The reviewing court held that the State succeeded to the children's interests and that the State had a strong interest in protecting children from violence. *Id.*

¶ 19 We disagree with the State for several reasons. First, by its plain language, the exception applies only to "their child or children" (725 ILCS 115-16 (West 2008)), *i.e.*, the children of both parties to the marriage. Castellano is defendant's stepson, and therefore is the child of only one party. See Black's Law Dictionary 255 (8th ed. 2004). The State cites *People v. Burton*, 102 Ill. App. 3d 148 (1981), for the proposition that a stepchild should be treated the same as a child for purposes of the exception, but that case is distinguishable. There, the defendant argued on appeal that his wife should not have been allowed to testify that he had confessed to sexually abusing his eight- and nine-year-old stepdaughters. At that time, the exception applied only to "the interests of their child or children." Ill. Rev. Stat. 1979, ch. 38, ¶ 155-1. The reviewing court, noting that the exception "was obviously intended to benefit and protect children within a family relationship," held that it should apply to the defendant's stepchildren. *Burton*, 102 Ill. App. 3d at 152. Clearly, the eight- and nine-year-old victims were living with the defendant and his wife in a "family relationship." Here, even if he could be deemed defendant's child, defendant's emancipated stepson was not living with defendant and his wife when the statement took place. We note that the legislature has since amended the statute to include "any child or children" but has expressly limited its reach to such children "in

either spouse's care, custody, or control." 725 ILCS 5/115-16 (West 2008). This further evidences the legislature's intent to limit the reach of the statute to children in the parties' custody.

¶ 20 Both *Eveans* and *Burton* noted that the primary purpose of the exception is to protect children from abuse. This presupposes that the children are still living in the custody of their parents or stepparents, further militating against applying the exception to defendant's emancipated stepson.

¶ 21 Finally, even if we assume that the statutory exception applies to Castellano, we agree with defendant that Castellano's interests were not "directly involved." Defendant's statement that he had lied to the State's Attorney's investigator is directly relevant only to the obstruction-of-justice charge, of which Castellano clearly was not a victim. It might be relevant to the identity theft, forgery, and credit card charges, but only circumstantially, perhaps as evidence of defendant's knowledge of guilt. However, even those charges did not directly involve Castellano's interests. It is clear from the language of the indictment that the victim was Menard's, not Castellano. That defendant used Castellano's credit card was merely fortuitous. Nothing in the record indicates that Castellano will be responsible for defendant's conduct.

¶ 22 We similarly reject the State's contention that the exception for "cases in which either is charged with an offense against the person or property of the other" (725 ILCS 5/115-16 (West 2008)) applies here. In no way can defendant's wife be considered a victim of the offenses.

¶ 23 The trial court correctly applied the privilege. Accordingly, we affirm its order and remand the cause.

¶ 24 Affirmed and remanded.