

motion, the defendant stated that "in hopes of securing a favorable plea offer," he had asked Dr. Schneller to write a letter to an assistant State's Attorney on the defendant's behalf. The defendant claimed that the letter was only to reference "his positive personality characteristics generally and not disclose specific information discussed in confidential counseling sessions." The defendant alleged that he never executed "a written waiver of his right to have communication between himself and his [therapist] kept confidential." Nevertheless, Dr. Schneller sent the assistant State's Attorney a letter that "disclosed confidential information discussed in the course of Dr. Schneller counseling the [d]efendant." The defendant also claimed in the motion that he "was not afforded the opportunity to read the letter prior to it being sent to" the assistant State's Attorney. Specifically, the defendant objected to the portions of the letter—which was admitted at trial, is included in the record on appeal, and is addressed by name to the assistant State's Attorney in question—in which Dr. Schneller stated that the defendant told her that he had awakened from a nap to find that F.V.W. had placed the defendant's hand "down her pants" and that the defendant had told Dr. Schneller that F.V.W. "had asked him to put his hand in her pants and proceeded to take his hand and put it down there." In the letter, Dr. Schneller then stated that the defendant told her he scolded F.V.W. and removed his hand from her pants, at the same time F.V.W.'s mother entered the room. Dr. Schneller concluded the letter by noting that the defendant denied to her that he ever molested F.V.W., that the defendant's "story has not changed," that she believed the defendant was telling the truth, and that she did "not believe [the defendant] ever touched [F.V.W.] in any way that was inappropriate."

¶ 5 At a hearing on the defendant's motion, Dr. Schneller testified that the defendant asked her to write a letter on his behalf, but that with regard to what the defendant specifically wanted her to write, the defendant "never asked me to put anything in there. Only what I thought would be right." She also testified that she agreed to write the letter

because she believed "him to be innocent." She testified that she was not trying to impact plea negotiations or influence the assistant State's Attorney in any way, and that she did not at any time ask the defendant to execute a written waiver of confidentiality. On cross-examination, Dr. Schneller testified that she was not asked by the assistant State's Attorney to write the letter, that everything she wrote in the letter was true, including her recounting of what the defendant had told her about the incident, and that the defendant "never specifically limited" what she could put in the letter. Dr. Schneller was not asked, and did not testify, as to whether the defendant was given the opportunity to read the letter prior to her sending it. Neither the defendant nor any additional witnesses testified at the hearing on the defendant's motion.

¶ 6 At the conclusion of the hearing, the defendant argued that Dr. Schneller's testimony should be barred because section 5 of the Mental Health and Developmental Disabilities Confidentiality Act (the Act) (740 ILCS 110/5 (West 2010)) requires the written consent of a patient before privileged information may be disclosed. The State countered that even if the defendant did not execute a written consent to disclosure, his intent to waive the protections afforded his privileged communications was clear from his request that Dr. Schneller write a letter on his behalf and send it to an assistant State's Attorney. The trial judge took the defendant's motion *in limine* under advisement, and ultimately denied it, finding that: (1) the defendant's conversations with Dr. Schneller about the alleged fondling of F.V.W. were not privileged because under Illinois law, Dr. Schneller was a mandated reporter of sexual abuse; and (2) even if privilege did exist, the defendant waived that privilege when he asked Dr. Schneller to write a letter to the assistant State's Attorney on the defendant's behalf. Accordingly, the judge ruled that Dr. Schneller would be allowed to testify, but only about the contents of the letter she wrote on the defendant's behalf.

¶ 7 At trial, F.V.W., who was then seven years old, testified that on the night in question,

the defendant touched her "private," under her clothes. She testified that this had happened many times before. F.V.W.'s mother testified that on the night in question, she entered the living room of her parents' home to find that her father, the defendant, had his left hand in F.V.W.'s pants and was trying to remove it. A therapist who had counseled F.V.W. and her family testified that F.V.W. told her that on the night in question, the defendant placed his hand in F.V.W.'s pants and touched her privates, and that he had touched her in that way various other times in the past. Dr. Schneller also testified, reiterating the version of events the defendant had described to her, and describing the letter she sent to the assistant State's Attorney at the defendant's request. The jury was also shown a video of an interview conducted with F.V.W. at the Madison County Child Advocacy Center by forensic investigator Kim Mangiaracino. The jury found the defendant guilty of one count of aggravated criminal sexual abuse. He was sentenced to a four-year term of probation. This timely appeal followed.

¶ 8

ANALYSIS

¶ 9 On appeal, the defendant contends that: (1) the trial court erred in "admitting Dr. Schneller's testimony regarding confidential communications," and (2) the defendant received ineffective assistance of counsel. With regard to the first allegation, we note that when we review a trial court's ruling on a motion *in limine*, our standard of review is generally abuse of discretion. *People v. Oliver*, 387 Ill. App. 3d 1162, 1166-67 (2009). However, when the issue on appeal is a question of law, our review is *de novo*. *Id.* at 1167. A motion *in limine* seeks to exclude evidence on the basis of admissibility, rather than to suppress evidence that was obtained illegally. *People v. Smith*, 248 Ill. App. 3d 351, 356 (1993). With regard to the burden of proof on a motion *in limine*, "[t]he general rule is that, during the progress of an action, the movant bears the burden of sustaining the grounds of [the movant's] motion and the other party is put to the necessity of producing evidence to

meet and outweigh or counterbalance that of the moving party." *Id.* at 358. Accordingly, the burden of going forward with a motion *in limine* is initially on the moving party, who must "show why the evidence should not be admitted." *Id.* at 359. Moreover, "the burden of showing that a privilege bars the introduction of relevant evidence is on the party objecting to the evidence." *Id.*

¶ 10 In the case at bar, the defendant contends the information he sought to exclude was protected by a statutory privilege, that he did not waive the privilege, and that therefore the evidence was inadmissible and his motion *in limine* should have been granted. The State counters that, *inter alia*, the defendant did in fact waive his privilege, and that therefore the trial court did not err in denying the defendant's motion *in limine*. We agree with the State that substantial and unrebutted evidence supports the conclusion that the defendant waived his therapist-patient privilege, and did so either carelessly or in a calculated attempt to gain favor for himself with the State. We begin our analysis of this issue by noting that it has long been the law in Illinois that a statutory privilege such as the therapist-patient privilege at issue in the case at bar is waived if the person benefitting from the privilege causes "the once-secret content of [the person's] communications with [his or her therapist] to become a matter of public record," as happened in the case at bar. *People v. Phillips*, 128 Ill. App. 3d 457, 459 (1984). Moreover, once a party has waived his or her therapist-patient privilege and a disclosure has occurred, "the privilege cannot be reasserted, for the confidentiality sought to be protected has been destroyed." *People v. Bates*, 169 Ill. App. 3d 218, 224 (1988).

¶ 11 As explained above, the burden of proof at the hearing on the defendant's motion *in limine* was on the defendant; that included the burden to "show why the evidence should not be admitted," and the burden to show "that a privilege [barred] the introduction" of the evidence. See *People v. Smith*, 248 Ill. App. 3d 351, 359 (1993). Although the defendant

claimed in his motion *in limine* that Dr. Schneller's letter was only to reference "his positive personality characteristics generally and not disclose specific information discussed in confidential counseling sessions," he presented no evidence to that effect at the hearing. In fact, the un rebutted evidence with regard to what the defendant specifically wanted Dr. Schneller to write is Dr. Schneller's testimony that the defendant "never asked me to put anything in there. Only what I thought would be right" and that the defendant "never specifically limited" what she could put in the letter. Although he had every opportunity to do so, the defendant did not adduce testimony from Dr. Schneller as to whether the defendant was given the opportunity to read the letter prior to her sending it. As noted above, neither the defendant nor any additional witnesses testified at the hearing. The defendant failed woefully at the hearing on his motion *in limine* to prove "that a privilege [barred] the introduction" of the evidence in question, because the defendant failed to present any evidence to negate Dr. Schneller's testimony that the defendant asked her to write the letter to the assistant State's Attorney, thereby waiving his privilege to keep secret any information Dr. Schneller might choose to include in her letter.

¶ 12 In addition, although the defendant makes much of Dr. Schneller's admission that she did not ask the defendant to execute a written waiver of confidentiality before she complied with his request to write and send the letter to the assistant State's Attorney, we agree with the State that although Dr. Schneller's violation of the Act could perhaps be actionable in a proceeding by the defendant against Dr. Schneller, there is no case law that stands for the proposition that, when a defendant's intent to waive his or her statutory privilege is as patently clear as it is in this case, the failure of a therapist to abide by the requirement of the Act that the therapist first get the written permission of the defendant somehow prevents the State from using evidence it obtained through the voluntary actions of the defendant. As the State aptly notes, the written waiver requirement of the Act "exists not between the State and

the defendant, because the State was not seeking, nor did it have any access to confidential information, but between the defendant and his therapist, who would be the one that would ultimately disclose the confidential information." Likewise, although the defendant now claims he could not have waived his privilege because the Act provides that a consent to disclosure may be revoked at any time (see 740 ILCS 110/5(a), (b)(7) (West 2010)), this section of the Act also is between the defendant and his therapist, not between the defendant and the State. Moreover, as the State points out, section 5(c) explicitly states that revocation of consent "shall have no effect on disclosures made prior thereto" (740 ILCS 110/5(c) (West 2010)), and section 5(b) requires that "[a]ny revocation of consent shall be in writing, signed by the person who gave the consent and the signature shall be witnessed by a person who can attest to the identity of the person so entitled." 740 ILCS 110/5(b) (West 2010). For all of these reasons, we conclude that the trial court did not err when it denied the defendant's motion *in limine* on the grounds that the defendant had waived any statutory therapist-patient privilege that might have existed.

¶ 13 The defendant next contends he received ineffective assistance of counsel, claiming that his trial counsel "failed to direct and contain the disclosure of confidential, privileged communications" between the defendant and Dr. Schneller. However, as the State correctly points out, the record is devoid of any facts showing that the defendant's trial counsel had anything to do with soliciting the letter from Dr. Schneller, nor even was aware, prior to the letter being sent, that the defendant had asked Dr. Schneller to write the letter. The letter, as noted above, was addressed directly to the assistant State's Attorney, and Dr. Schneller did not "cc" or "carbon copy" the defendant's trial counsel or anyone else on the letter. Moreover, as the State points out, the defendant's trial counsel filed the motion *in limine* in an effort to exclude the letter, an action that would seem to be inconsistent with counsel having any knowledge of the letter prior to it being sent. The defendant has not presented

any factual evidence in support of his claim of ineffective assistance of counsel. Accordingly, we decline to consider his claim at this time.

¶ 14 CONCLUSION

¶ 15 For the foregoing reasons, we affirm.

¶ 16 Affirmed.