

FIRST DIVISION
January 26, 2015

No. 1-13-0196

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 5122
)	
MAURICE WILLIAMS,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

Held: We hold that defendant's failure to put forth an adequate offer of proof after the circuit court denied defendant's motion to ask the victim whether she had prior sexual activity with a third party, renders the circuit court order within its discretion when it barred defendant pursuant to the Illinois rape shield statute. 725 ILCS 5/115-7 (West 2012). We vacate the \$200 DNA analysis fee the circuit court imposed on defendant because defendant previously submitted a DNA sample in another criminal matter and is registered in the DNA database.

¶ 1 The circuit court convicted defendant after a bench trial of three counts of criminal sexual assault and one count of kidnapping. Prior to trial, both defendant and the State filed motions pursuant to the Illinois rape shield statute. 725 ILCS 5/115-7(a) (West 2012). Defendant sought admission of evidence showing an unidentified third party male's DNA was found in the victim's vagina and testimony regarding the victim's prior sexual activity. The State filed a motion *in limine* seeking to bar any evidence, DNA or testimonial, regarding the victim's prior sexual activity. The circuit court ruled that the DNA evidence showing the presence of another man's DNA in the victim's vagina would be admitted but prohibited defendant from asking the victim whether she had prior sexual conduct with another person.

¶ 2 Defendant raises the following issues for our review: (1) whether the circuit court improperly denied him his right to confront his accuser when the circuit court barred him from asking the victim whether she had prior sexual conduct with someone else; and (2) whether the circuit court improperly assessed a \$200 DNA analysis fee against him. We hold the circuit court did not abuse its discretion when it barred defendant from asking the victim whether she had prior sexual activity with another person because defendant failed to put forth an adequate offer of proof after the circuit court issued its ruling on defendant's motion. We vacate the \$200 DNA analysis fee the circuit court assessed against defendant because defendant previously submitted a DNA sample in another criminal matter and is registered in the DNA database.

¶ 3 JURISDICTION

¶ 4 The circuit court sentenced defendant on December 13, 2012. Defendant timely filed his notice of appeal on the same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing

appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. Feb. 6, 2013).

¶ 5

BACKGROUND

¶ 6 Defendant was charged by indictment with multiple counts of aggravated criminal sexual assault and criminal sexual assault, two counts of kidnapping, one count of robbery, and one count of unlawful restraint.

¶ 7 Prior to trial, defendant filed a motion seeking to admit evidence of the victim's, E.C.'s, prior sexual activity under the Illinois rape shield statute (725 ILCS 5/115-7 (West 2012)) arguing the evidence was constitutionally required. According to defendant, E.C. gave conflicting accounts of the incident to the police and hospital personnel and was under the influence of drugs, including heroin, near the time of the alleged assault. DNA analysis performed on a vaginal swab taken from E.C. on August 2, 2010, showed the presence of semen and a mixture of DNA from two people. E.C. matched the female DNA while defendant was excluded from being the contributor of the male DNA. Accordingly, defendant argued that the "DNA evidence and testimony regarding sexual activity prior to the incident is relevant and central" to his defense as it was necessary to argue mistaken identity. Defendant further argued that due to E.C.'s "state of mind, [he] must be able to show proof that [E.C.] is mistaken as to the identity of the person who allegedly assaulted her" and that "[p]art of the proof is that another person had vaginal intercourse with her within 72 hours of the alleged incident." Defendant argued the evidence was necessary to argue that another unknown person was the actual offender.

¶ 8 The State subsequently filed a motion *in limine* seeking to preclude the admission of any evidence of E.C.'s prior sexual activity under the rape shield statute. 725 ILCS 5/115-7 (West

2012). The State argued that defendant failed to mention in his motion that he cannot be excluded from the DNA profile found in the anal swab from the sexual assault kit and that E.C. identified defendant by his unique tattoo. The State argued that defendant failed to provide any specific details of when the third party allegedly assaulted E.C. including date, time, or place. Accordingly, the State asked that defendant be barred from inquiring into E.C.'s prior sexual history and be barred from using any DNA evidence or testimony regarding E.C.'s prior sexual activity.

¶ 9 At the hearing on the parties' motions, defendant argued that his defense would consist of arguing that E.C. consented to sexual activity with him and that another unidentified person committed the assault. Specifically, defendant argued that evidence of E.C.'s intoxicated state, combined with the presence of another man's DNA in E.C.'s vagina, would show that another person committed the assault. Defense counsel stated that DNA evidence could only be collected within 72 hours of a sexual occurrence, which would allow him to argue that the actual perpetrator committed the assault within that time frame. Defense counsel stressed that "[w]e are not offering this evidence to say that [E.C.] is a bad person or any reputation evidence, it [is] only to show that there was another person that she was having intercourse with and that perhaps given her condition that she was confused and it was this other person." Accordingly, defense counsel explained that he would argue that unlike the actual perpetrator, defendant and E.C. had consensual anal sex.

¶ 10 The State argued that defendant failed to provide specific details of another sexual relationship and that the evidence of prior sexual activity in this case is not constitutionally required. The State further pointed out that E.C. identified defendant by his unique tattoo and that exclusion of the evidence did not prevent defendant from effectively cross-examining E.C.

regarding her credibility. The State argued defendant failed to provide a constitutional reason for the evidence and characterized defendant's motion as an attempt to harass and humiliate the victim. Accordingly, the State asked that the DNA evidence not be admitted at trial.

¶ 11 In reply, defense counsel noted that he "may not even ask [E.C.] any questions about whether or not she had intercourse with anybody else." Rather, defense counsel explained, he sought "to introduce it through scientific evidence that there was DNA in [E.C.'s] vagina at that time, which means there was another person." Defense counsel explained that E.C. "may have had intercourse with another person that was not consensual but it was not [defendant], there was another person. But I can't say that there was another person because that's complete speculation."

¶ 12 The circuit court allowed defendant to present the evidence that another male's DNA was found in E.C.'s vagina. The court, however, did not allow defense counsel to specifically ask E.C. "whether or not she had any prior sexual conduct with someone else, either before or after this occurrence" because it found such evidence to be irrelevant to determining whether E.C. consented to sexual activity with defendant. After the circuit court ruled, the State renewed its objection to the DNA evidence of another male being introduced at trial. Defendant did not object.

¶ 13 Also prior to trial, the State filed a motion seeking to introduce proof of other crimes evidence consisting of testimony from three women who would testify that defendant sexually assaulted them. The circuit court permitted the State to introduce testimony from only one of the three women for purposes of propensity, intent, motive, knowledge, absence of mistake, and to prove identity.

¶ 14 The State proceeded to trial on three counts of aggravated criminal sexual assault, three counts of criminal sexual assault, one count of kidnapping, and one count of robbery. The State nol-prossed the remaining counts.

¶ 15 At trial, E.C. testified that on August 2, 2010, between 5:30 and 6:00 a.m., she was walking alone on West Madison Street in Chicago, Illinois. She had \$3 on her person. At around the 2400 block of West Madison Street, she saw a male, but did not see his face. As she walked past him, the male hit her on her jaw on the right side of her face. He grabbed her around her neck and made her go through a gate. As he walked behind her, he told her not to look at him. They proceeded through the gangway to a garage where the male told E.C. to take off her clothes. She removed her clothing because she "was scared." She also did not look at the male due to being scared. E.C. then got on her knees and performed oral sex on the male. He then told her to lean over a car that was in the garage. He then penetrated E.C. both vaginally and anally. E.C. testified that when the male finished, "[h]e raised the garage door up and told me don't come out until he was gone, and if I did come out, that he would hurt me." The man used a condom, which he eventually dropped on the garage floor. E.C. testified that she did not consent to any of the above sexual conduct.

¶ 16 After the man exited the garage, E.C. waited a few minutes before leaving the garage and calling the police. She told the police that she could not identify the perpetrator by his face but saw a tattoo on his chest, which she described as "[a] set of lips with a tongue." She underwent a sexual assault examination at the hospital. She remembered a conversation with a detective at the hospital, but testified she was tired and was "sleeping on and off." She subsequently met with the detective on August 15, 2010, and February 21, 2011. On February 21, 2011, she viewed a photo array but was not able to identify her assailant. She did identify a photograph

of a tattoo showing "[a] set of lips and a tongue." She also was unable to identify her assailant out of a physical lineup. E.C. admitted that she had a history of drug abuse and two convictions for possession of a controlled substance. She denied that she was under the influence of drugs at the time of the sexual assault, but testified that she had used drugs the day before. She testified defendant took the \$3 she had on her that day.

¶ 17 On cross-examination, E.C. testified that she had used heroin the morning before the assault. She denied making several inconsistent statements to the police and hospital personnel after the attack, including that she had used heroin a few hours prior to the incident, and that her assailant hit her multiple times. She also denied that she ever lost consciousness during the attack, told anyone that she refused to perform oral sex on the male, or that she was hit in the face repeatedly. On redirect examination, E.C. clarified that she felt "dazed" after being punched and that when she first saw her assailant, he was talking on his phone.

¶ 18 Officer Jennifer Jelks of the Chicago police department testified that she responded to the scene of the crime where she spoke with E.C. for approximately "20, 30 minutes." She described E.C.'s demeanor as "really upset, crying, kind of like in a slight state of shock." E.C. described the perpetrator as "between 5'7", 5' 9", maybe 180 pounds 20 years old" and told her that the perpetrator had a specific tattoo on his chest of lips with a tongue hanging out. On cross-examination, Officer Jelks testified that E.C. told her that the perpetrator repeatedly hit her on her left side of her face, she lost consciousness, and that he took \$27 from her.

¶ 19 Officer Dominic Sarlo, an evidence technician with the Chicago police department, testified that he processed evidence from the crime scene. He observed a condom and a condom wrapper on the floor. He also recovered 11 finger prints from the hood of the car in the garage. Officer Sarlo also collected the sexual assault kit and E.C.'s clothing from the hospital.

¶ 20 Detective David Kupczyk of the Chicago police department testified he interviewed E.C. at the hospital after the incident. He initially spoke with E.C. for 10 or 15 minutes. E.C. appeared to be under the influence of narcotics or other drugs and she kept falling asleep. He spoke with E.C. again on August 15, 2010, at the police station. E.C. described her assailant as an African-American male, "23 to 27 years old, 5' 8" to 5' 9" with tattoos." She described one of the tattoos as having lips and a tongue. On February 21, 2011, Detective Kupczyk spoke with E.C. and showed her a photo array, but she could not identify her assailant. He then showed E.C. a photograph of a tattoo on a man's chest of a tongue and lips, which E.C. identified as belonging to her assailant. Detective Kupczyk identified defendant as having the tongue and lips tattoo. Around the tattoo were the words "Pussy Monster." E.C. was unable to identify anyone from the physical lineup. On cross-examination, Detective Kupczyk testified that E.C. told him that she had used heroin a few hours before the incident and that she only had \$3 on her person at the time. E.C. did not tell him that the assailant took \$3 from her. The assailant also asked her if she was dating before hitting her. She also told him that the assailant knocked her down and then dragged her through the gate.

¶ 21 The parties stipulated that semen was identified on the anal swab taken from E.C., and that a mixture of defendant's and E.C.'s DNA was present. The parties stipulated that 11 latent fingerprint impressions from the hood of the car in the garage revealed that four of the prints matched E.C.; and that four of the prints, including one palm print, matched defendant. The parties stipulated that Dr. Lukasek would testify that she observed no abnormalities to E.C.'s genitals or anus, but that she did notice tenderness to the area under E.C.'s left eye.

¶ 22 B.F. testified to a prior incident with defendant that occurred on August 4, 2008, at 6:15 in the morning. At the time, she was 48 years old and walking on the street in Chicago when

defendant hit her in the face. Defendant dragged her into a garage and instructed her to get on her knees and perform oral sex on him. She told him to use a condom, which he agreed to do. She attempted to grab mace from her purse, but defendant stopped her from doing so. He told her to turn around and then penetrated her vaginally while he was behind her. After removing his penis, defendant took off the condom and threw it on the floor. He told her to turn around and count to 100. Defendant ran away. She recovered the condom and called the police. At the hospital, a sexual assault kit was performed on her. On March 7, 2011, she identified defendant from a photo array. On cross-examination, B.F. testified she was intoxicated from drugs and alcohol at the time of the assault.

¶ 23 Defendant moved for a directed finding, which the circuit court denied.

¶ 24 The parties stipulated that the two paramedics who responded to the scene would have testified that they observed no obvious injuries to E.C. and that she was incontinent. The parties stipulated that Dr. Lukasek would testify that E.C. told her that a stranger followed her, asked her if she was dating, hit her in the face, and that she was unconscious. E.C. also told her that she woke up in a parking garage and that her assailant hit her in the face repeatedly. Her assailant asked her to perform oral sex but she refused.

¶ 25 The State renewed their objection to the DNA analysis showing that a male third party's DNA was found in E.C.'s vagina, which the circuit court denied. The parties then stipulated that male DNA from an unknown person, not defendant, was found after analyzing the vaginal swab. The parties further stipulated that there was insufficient human male DNA for analysis from the oral swab.

¶ 26 Defendant testified that at the time of the incident, E.C. stopped him on the street and asked him if he was trying to date. At first he said no, but then they agreed to have anal sex for

§20. They then walked through a gangway and went to a garage. E.C. bent over a car, pulled her pants down, and defendant penetrated her anally. Defendant denied using a condom. After five or ten minutes, defendant stopped and left. He did not pay her. Defendant testified that he saw E.C. on the street multiple times after their sexual encounter because she sold cigarettes in the area. She never confronted him or demanded payment. He denied hitting E.C., or forcing her to have oral, vaginal, or anal sex with him. On cross-examination, defendant testified that he understood a "date" to mean that E.C. was soliciting sex. Defendant admitted that he has a tattoo of lips with a tongue sticking out.

¶ 27 The circuit court found defendant guilty of criminal sexual assault and kidnapping but not guilty of aggravated criminal sexual assault and robbery. The circuit court found it compelling that E.C. immediately called the police after the assault and that she identified defendant's specific tattoo. The court found defendant's theory that another offender committed the assault to be speculative and found his testimony to be incredible. Accordingly, the court found the incident to be a nonconsensual act.

¶ 28 Defendant filed a motion for a new trial, which the circuit court denied. Relevant here, he did not argue that the circuit court's ruling pertaining to the rape shield statute was improper. Prior to sentencing, defendant pled guilty to the aggravated criminal sexual assault of B.F., the State's other crimes evidence witness in this case. Following his plea, defendant was ordered to submit a DNA sample.

¶ 29 On December 13, 2012, the circuit court sentenced defendant to a total of 18 years' imprisonment. Defendant timely appealed.

¶ 30

ANALYSIS

¶ 31 Defendant argues that the circuit court denied him his right to confront his accuser and present a defense when the circuit court barred him from specifically asking E.C. whether or not she had any prior sexual conduct with someone else. According to defendant, this improperly limited his right to cross-examination. The State argues the circuit court properly exercised its discretion in allowing defendant to introduce evidence of E.C.'s sexual history by means other than directly questioning her. Specifically, the State points out that the circuit court admitted evidence showing DNA from another male was found in E.C.'s vagina.

¶ 32 The Illinois rape shield statute "absolutely bars evidence of the alleged victim's prior sexual activity or reputation, subject to two exceptions: (1) evidence of past sexual activities with the accused, offered as evidence of consent; and (2) where the admission of such evidence is constitutionally required." *People v. Santos*, 211 Ill. 2d 395, 401-02 (2004); 725 ILCS 5/115-7(a) (West 2012); *People v. Patterson*, 2014 IL 115102, ¶ 114 (describing the statutory exceptions as "narrow."). It is a criminal defendant's fundamental constitutional right to conduct a reasonable cross-examination and confront the witnesses against him. *People v. Davis*, 185 Ill. 2d 317, 337 (1998). When relevant evidence is based on a showing of motive, bias, or prejudice, a defendant's confrontation rights will supersede the protections of the rape shield statute. *People v. Grant*, 232 Ill. App. 3d 93, 103 (1992). The trial judge, however, "retains wide latitude insofar as the confrontation clause is concerned to impose reasonable limits on *** cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or of little relevance." *People v. Harris*, 123 Ill. 2d 113, 144 (1988), *People v. Price*, 404 Ill. App. 3d 324, 330 (2010) ("The right

to cross-examination is not absolute, and the trial court is given broad discretion to determine the extent of cross-examination at trial.").

¶ 33 In situations such as the case at bar, where the circuit court denies a defendant's attempt to introduce evidence under the rape shield statute, the defendant has the burden of providing an adequate offer of proof to the trial court. *Patterson*, 2014 IL 115102, ¶¶ 118, 123; *Grant*, 232 Ill. App. 3d at 103. Our supreme court has explained that "[t]o preserve a claim on appeal, a party is required to make 'considerably detailed and specific' offers of proof *after* a denial of a request to admit evidence if the substance of the witness's answer is unclear." (Emphasis added.) *Patterson*, 2014 IL 115102, ¶ 118 (quoting *People v. Peebles*, 155 Ill. 2d 422, 457 (1993)). This court has also held that a specific offer of proof is required in similar circumstances where a defendant alleges the victim engaged in sexual contact with a third party. *Grant*, 232 Ill. App. 3d at 103-05 (defendant sought to introduce evidence that victim had prior sexual relations with a boyfriend but did not put forth an adequate offer of proof with specific information regarding the date, time, or location of alleged sexual contact); *People v. Maxwell*, 2011 IL App (4th) 100434, ¶¶ 75-87.

¶ 34 We review the circuit court's rulings on evidentiary matters for an abuse of discretion. *Patterson*, 2014 IL 115102, ¶ 114. Accordingly, defendant must establish that the trial court's decision "was 'arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court.' " *Id.* (quoting *Santos*, 211 Ill. 2d at 401). Furthermore, "[w]hen reviewing an evidentiary ruling for an abuse of discretion, common sense dictates that we evaluate the exercise of that discretion in light of the evidence actually before the trial judge." *Id.* ¶ 123.

¶ 35 A review of the record shows that the parties both filed motions under the rape shield statute. Defendant sought admission of DNA evidence showing that a third party's DNA was found in E.C.'s vagina and testimony regarding E.C.'s prior sexual activity. The State filed a motion *in limine* seeking to bar any evidence, DNA or testimonial, regarding E.C.'s prior sexual activity. The circuit court ruled that the DNA evidence showing the presence of another man's DNA in E.C.'s vagina would be admitted but prohibited defendant from specifically asking E.C. "whether or not she had any prior sexual conduct with someone else, either before or after this occurrence." Accordingly, the circuit court effectively granted both parties' motions in part, and denied both parties' motions in part. After the circuit court issued its ruling, however, only the State objected. Defendant did not object or submit an offer of proof. Defendant did not provide the circuit court with any details of what E.C. would have answered if she had been asked if she had sexual contact with a third person. Rather, defense counsel stated to the court that "I can't say that there was another person because that's complete speculation." The necessary facts explaining why an unidentified third party's DNA was found in E.C.'s vagina are not in the record. Therefore, it is unclear what E.C.'s answer would have been had she been asked about prior sexual conduct on cross-examination. Specifically, it is not clear who the third party is, where the prior conduct occurred, and at what time. Where the substance of a witness's answer is unclear, a party must make a specific and detailed offer of proof after the denial of a request to admit evidence. *Patterson*, 2014 IL 115102, ¶ 118 (quoting *Peeples*, 155 Ill. 2d at 457). Defendant, however, failed to do so here. Accordingly, we hold the circuit court did not abuse its discretion in ruling on the parties' motions regarding the admission of evidence under the rape shield law.

¶ 36 We note that even if we consider the facts alleged by defendant in his motion and at the hearing on the motion as his offer of proof, we still believe the circuit court properly barred defendant from specifically asking E.C. about her prior sexual history because those facts alleged by defendant were not detailed or specific. All the circuit court knew at the time of the hearing was that DNA from another man, not defendant, was found in E.C.'s vagina. According to defense counsel, the alleged sexual conduct of E.C. and the third party had to have occurred within a 72 hour time frame of the collection of the DNA. Defense counsel, however, failed to provide the circuit court with any specific details regarding the circumstances of E.C.'s alleged sexual encounter with the third-party. Defense counsel did not identify the third party, the location, or specific time of the encounter. As stated above, defense counsel admitted that facts regarding E.C.'s sexual encounter with a third party were "complete speculation." Based on the unspecific and speculative nature of the facts defendant supplied to the circuit court regarding E.C.'s alleged sexual encounter with a third party, we cannot say that the circuit court abused its discretion when it barred defense counsel from specifically asking E.C. about prior sexual encounters.

¶ 37 We further note that the circuit court's ruling still allowed defendant to present his theory of the case. See *People v. Sandoval*, 135 Ill. 2d 159, 181 (1990); *Patterson*, 2014 IL 115102, ¶ 122. The circuit court barred defense counsel from asking E.C. specific questions regarding her prior sexual conduct, but it allowed the parties to stipulate that DNA from a third party was found in E.C.'s vagina. Defense counsel cross-examined E.C. about her drug use and various inconsistent statements she made to the police and hospital personnel. Accordingly, defense counsel was able to argue that E.C. was unable to distinguish between her sexual encounters due to her mental state.

¶ 38 Next, defendant argues that the DNA analysis fee the circuit court ordered must be vacated because defendant previously submitted a DNA sample in another criminal matter. See 730 ILCS 5/5-4-3(j) (West 2012). The State agrees and notes that defendant is currently registered in the DNA database. See *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). We agree with the parties and order that the \$200 DNA analysis fee assessed against defendant be vacated.

¶ 39 CONCLUSION

¶ 40 We affirm defendant's conviction and sentence. We order that the \$200 DNA analysis fine assessed against defendant be vacated.

¶ 41 Affirmed in part and vacated in part.