

No. 1-09-0746

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FIFTH DIVISION
April 22, 2011

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. 07 CR 4565
)	
MARVIN SUMLIN,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Joseph Gordon and Howse concurred in the judgment.

O R D E R

HELD: Trial court did not abuse its discretion in aggravated criminal sexual assault trial when it excluded proposed evidence offered by defendant in support of his consent defense that did not demonstrate that the victim consented to the sexual activity in question; judgment affirmed.

Following a jury trial, defendant Marvin Sumlin was found guilty of four counts of aggravated criminal sexual assault and

one count of aggravated kidnaping. Based on a previous sexual assault conviction, he was subsequently sentenced to a term of natural life imprisonment. On appeal, defendant contends that the circuit court improperly excluded evidence of his prior sexual relationship with the victim because such evidence is explicitly allowed by statute and is relevant to his defense of consent.

The facts adduced at trial showed that in the early morning hours of February 13, 2007, defendant offered to walk the victim, Felicia A., to a bus stop after she visited with defendant's family. Defendant suggested that they take a shortcut through an alley, where he pulled her into a garage and sexually assaulted her. The victim admitted that she had previously dated defendant, but she denied being sexually involved with him.

Prior to trial, defendant filed a motion to introduce proof of consensual activity with the victim in support of his consent defense. In that motion, defendant requested leave to cross-examine the victim about this activity, and to introduce testimony from his cousin, Antoine Carson, and his sister, Nicole Sumlin, to impeach the victim's testimony.

Defendant made an offer of proof that, if called, Carson would testify that during the late summer and fall of 2006, defendant and the victim visited Carson's house on a number of occasions. During one of these visits, defendant, accompanied by

the victim, asked Carson if he could use a room in his house in order to have sexual relations with the victim. Carson told him that he did not have an available room.

As a second offer of proof, defendant stated that if Nicole Sumlin were called, she would testify that she is defendant's sister and that the victim had a dating relationship with defendant. During a prior visit to their family home, the victim knocked on Nicole's door and asked whether Nicole had a condom; she responded that she did not.

The court held an *in camera* conference to hear Nicole's proposed testimony regarding a second incident. Nicole stated that she would testify that in the late summer and autumn of 2006, defendant and the victim had been dating. She and defendant lived in the family home with six other family members and defendant did not have his own bedroom in the house. On one occasion, Nicole heard defendant and the victim having sexual relations in the bathroom. The door to the bathroom was closed and she heard the victim moaning. She recognized the victim's voice, even though the victim did not say anything at the time. Nicole did not hear any other voices coming from the bathroom, and she did not open the door or see who entered or walked out of this room.

The court found that the proposed testimony of Carson only asserted sexual conduct, it did not lead to the witnessing of

actual sexual conduct. The court also found that Nicole's proposed testimony about the condom did not meet the standard to allow it into evidence. The court then denied the motion as to Nicole's proposed testimony about the bathroom incident, noting that eight people lived in the house, there was no proof that defendant was in the bathroom, and she did not witness any sexual activity taking place.

At trial, the victim testified that she met defendant and his family through a church where she had been working at the time. During the fall of 2006, she dated defendant a few times but they stopped dating around Thanksgiving, and that they never had sexual intercourse. During this time, however, she developed a close friendship with defendant's mother and Nicole.

On the night before the assault, she had been working near the neighborhood of the family home and decided to visit the family, whom she had not seen in several months. After midnight, she left the family home to walk to the bus stop and defendant offered to accompany her there. She allowed him to do so as he had in the past.

As they walked, defendant suggested a shortcut through an alley, and later told her that some friends were waiting to see her in a shed near a garage off the alley. He pushed her into the shed and struck her twice on the cheek, then pushed her to the ground, removed her boots and socks, tied her hands with one

of the socks, and gagged her mouth with the other. Defendant also pressed something sharp against her throat and threatened her.

Because of the cold weather, the victim had been wearing multiple layers of pants and sweaters. Defendant removed her pants and engaged in two separate acts of penetration. The victim then rushed to get out of the garage, but defendant grabbed her again and they encountered a stranger looking to buy drugs. The stranger refused to help her because defendant told him he was her husband.

On cross-examination, the victim stated that she regularly visited the Sumlin family home in the late summer and fall of 2006. She would, on occasion, spend the night there because she lived on the south side of the city, but never had sexual relations with defendant. She denied consenting to sexual relations with defendant on the night in question, in part because she was menstruating at the time and that was "nasty."

Investigating officers took statements from the victim and defendant and collected evidence from the shed, including DNA evidence later matched to the victim and defendant. Defendant initially denied having sex with the victim that night, but admitted it after an officer confronted him with the DNA evidence. Defendant then claimed that the sex was consensual.

At the close of the State's case, defendant requested the trial court to reconsider his motion to present the testimony of Nicole and Carson. The court denied the request, finding that it had not heard any evidence that would change the ruling and that even if the proposed testimony showed that the victim consented to a prior sexual act, it did not show that there was consent to the sexual act at issue. The defense rested after presenting the testimony of defendant's mother.

The jury found defendant guilty of aggravated criminal sexual assault and kidnaping. In this appeal, defendant contends that the exclusion of the evidence of his prior sexual relationship with the victim deprived him of a fair trial because such evidence is explicitly allowed by statute and was relevant to his defense of consent.

The rape-shield statute absolutely bars evidence of the alleged victim's prior sexual activity or reputation, subject to two exceptions: past sexual activities with the accused, offered as evidence of consent; and where the admission of such evidence is constitutionally required (725 ILCS 5/115-7(a) (West 2006)). *People v. Santos*, 211 Ill. 2d 395, 401-02 (2004). The statute provides that no evidence admissible under the exceptions to the rape-shield shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held in *camera* in order to determine whether the defense has

evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. 725 ILCS 5/115-7(b) (West 2006).

Here, the trial court denied defendant's motion after an *in camera* proceeding. We review this evidentiary ruling for an abuse of discretion. *Santos*, 211 Ill. 2d at 401. A trial court abuses its discretion only when its ruling is "arbitrary, fanciful or unreasonable" or "where no reasonable man would take the view adopted by the court [citations]" (Internal quotations marks omitted.) *Santos*, 211 Ill. 2d at 401.

The first exception under the rape-shield relates only to prior sexual activity between the victim and the accused, offered for purposes of establishing a defense of consent. *Santos*, 211 Ill. 2d at 403. Here, the victim denied any prior sexual activity with defendant. The offers of proof set forth in his motion suggested that, several months prior to the morning of the sexual activity in question, defendant and the victim took steps toward sexual activity by either looking for a condom or a private room. During the *in camera* hearing, the offer of proof presented by defendant's sister established that she heard the victim moaning in a bathroom shared by eight other individuals, but did not actually see that the victim was in that room. As this court stated in *People v. Grano*, 286 Ill. App. 3d 278, 288 (1996), "[l]anguage or conversation does not constitute sexual

activity," and, here, the proposed evidence amounted to nothing more than that. Accordingly, we find that defendant did not meet the statutory criteria, and that the court did not abuse its discretion in not allowing the proposed evidence.

Under the second exception, evidence would be allowed when constitutionally required. *Santos*, 211 Ill. 2d at 403. In order to be admissible as constitutionally required, the other sexual activity evidence must be more than simply relevant, it must be germane to defendant'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). Defendant's right to cross-examine is not defeated by the statute where the evidence of the victim's past sexual conduct is relevant and tends to reveal motive, prejudice, or bias. *People v. Sandoval*, 135 Ill. 2d 159, 174-75 (1990).

Here, defendant attempted to put forth a defense that he and the victim engaged in consensual sexual activity in the shed that morning. The proposed evidence in support of this defense does not reveal motive, prejudice, or bias on the part of the victim nor does it support defendant's theory of defense. Moreover, defendant was allowed to question the victim regarding her relationship with the family, her acquaintance with defendant, and their prior relationship. Defendant was, therefore, not precluded from presenting his theory of the case (*Sandoval*, 135

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Ill. 2d at 180-81), and under these circumstances, we conclude that defendant's proposed evidence was not constitutionally required (*Darby*, 302 Ill. App. 3d at 874-75).

Accordingly, we find that the circuit court did not abuse its discretion when it excluded the proposed testimony and we affirm the judgment of the circuit court of Cook County.

Affirmed.