FIFTH DIVISION
March 29, 2019

No. 1-15-2211

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. 12 CR 7560
	)	
THOMAS BROWN,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the judgment of the circuit court of Cook County and remand for a new trial. The trial court abused its discretion when in a criminal sexual assault prosecution it excluded evidence of defendant's and the alleged victim's past sexual relations under the rape shield statute where defendant presented a consent defense because: (1) defendant timely raised the issue; (2) with respect to each past sexual encounter, defendant presented reasonably specific information as to date and place; (3) the evidence was relevant to defendant's consent defense; and (4) the probative value of the evidence outweighed the danger of unfair prejudice.

¶ 2 I. BACKGROUND

¶ 3 The State charged, defendant Thomas Brown, with home invasion and criminal sexual assault stemming from a sexual encounter between defendant and the alleged victim, R.R. on

March 19, 2012. Defendant filed an answer in which he raised the defense of consent. Following a jury trial, the circuit court of Cook County convicted defendant and sentenced him to consecutive sentences of six years' imprisonment for home invasion and five years for criminal sexual assault. Defendant was also required to register for life under the Illinois Sex Offender Registration Act (SORA).[1]

¶ 4 A. Proceedings Prior to Opening Statements

¶ 5 On the first day of trial, prior to *voir dire*, various pretrial motions were addressed by the trial court including the State's motion *in limine*. Among other things, the State's motion *in limine* sought to prohibit defendant from eliciting testimony or argument regarding the prior sexual activities of R.R. In response, defendant argued that he should be permitted to introduce two instances of prior sexual activity between R.R. and defendant based on his assertion of an affirmative defense of consent. During argument, defendant offered that he would testify that he and R.R. engaged in sexual activity in October 2010 at JC's Hotel in Countryside and in April 2011 at the Dam Woods forest preserve.

¶ 6 The trial court reviewed section 5/115-7 of the Illinois Code of Criminal Procedure of 1963 (the Code), commonly referred to as "the rape shield statute"; and ruled that (1) defendant did not give timely notice of his intention to introduce this evidence; (2) that the date, time, and place offered by defendant was "sketchy at best"; and (3) that the two encounters were too remote in time to be relevant to the issues in defendant's case and thus were not admissible.

¶ 7 The following day, prior to opening statements, this issue was again raised. Defense counsel stated that defendant would testify that in April 2011 R.R. engaged in oral sex with

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

defendant at Hawthorn Dam Woods and in October 2010 he and R.R. had sexual intercourse at JC Motel in Countryside, Illinois.

¶ 8 The trial court stated that he "weighed the probative value and prejudicial effect" and found "that the prejudicial effect outweighs the probative value" ruling that defendant was prohibited from testifying to his prior sexual activity with R.R. on the basis that the sexual activity was too remote in time and for the other reasons set forth on the record in his ruling the previous day.

¶ 9 B. R.R.'s Trial Testimony

¶ 10 R.R. positively indentified defendant in court. She testified that she socialized with defendant and in March 2012 they were friends, acquaintances, and associates. R.R. further qualified this stating that she and defendant were not really "friends, friends" but they all just knew each other. Prior to March 19, 2012, R.R. had no problems with defendant. She testified that she was forty-four years old, four feet eleven inches tall, and weighed eighty-six pounds on March 19, 2012. At the time, R.R. was living at the 4300 block of Harlem in Stickney, Illinois with David Parthin, a roommate and friend. On March 19, 2012, at approximately 4 p.m., R.R. went grocery shopping at the Aldi near Pershing and Harlem. While there she ran into James Dolezal who told her there were people at the woods and invited her to go and have a few beers. R.R. purchased her groceries and went with Dolezal directly to the Dam Woods forest preserve (the Dam) without making any stops. When she arrived at the Dam, R.R. took her groceries out of the car. She testified that defendant, who she had known for ten years, was there along with a man and another woman both of whom she was familiar with. Everyone was drinking and laughing. She testified that she made some sandwiches with her groceries. R.R. had two beers while at the Dam. She testified that she and defendant were not hugging and kissing at the woods.

¶ 11 Sometime after 5 p.m. R.R. accepted a ride home from defendant. She testified that when leaving the woods she was not intoxicated, stumbling, or having trouble with her balance. She put her groceries into defendant's vehicle and defendant drove her directly to her apartment. She had no trouble opening her apartment door with her key. Defendant came inside R.R.'s apartment and they had a beer, her third, which she did not finish. Defendant finished his beer, used the restroom, and left R.R.'s apartment.

¶ 12 After defendant left, R.R. was in the apartment alone and locked the screen door, the deadbolt, and the bottom lock of the apartment door as she normally does. R.R. began cleaning up the kitchen and putting her groceries away. She did not expect defendant to return. A few minutes later, she heard someone screaming at the front door "[o]pen the fucking door, bitch." She did not open the door because she was scared and did not know what was going on. The screaming, yelling, and banging on the door continued and she could hear the door being pried open. At some point it stopped and R.R. thought everything was fine and continued putting her groceries away. Then she heard the door being pried open, the wood around it cracking, and saw the door fly open.

¶ 13 Defendant came into the apartment and grabbed R.R. by placing one hand over her mouth and the other on her wrist. Defendant threw R.R. into the front room. Defendant removed his hand from R.R.'s mouth and grabbed both her arms and threw her down on the couch. R.R. was on her back and defendant was on top of her. He pinned her down and forced her arms up next to her head. Defendant forced R.R.'s shorts completely off of her and pulled up her shirt exposing her chest. Defendant asked R.R. to put a condom on him. R.R. refused. R.R. did not want to have sex with defendant. Defendant put on a condom, but R.R. kept her eyes closed trying to block everything out and did not see him do this. Defendant then got completely on top of R.R. and forced his penis into her vagina. After defendant got off R.R., she jumped up,

grabbed her shorts and other stuff that was on the floor, and told defendant she had to use the bathroom. Before R.R. entered the bathroom defendant responded "thanks a fucking lot." R.R. waited in the bathroom because she was scared and did not know what to do. She heard defendant slam the door and walked out to make sure everything was okay. R.R. was upset and began throwing everything all over the kitchen table and floor in an effort to find her phone in order to call the police. Approximately 33 minutes after defendant left, R.R. found her phone and called the police, who arrived minutes later.

¶ 14 R.R. spoke to Stickney Detective Corporal Cruz Ortiz, the responding officer, about what had occurred. She went by ambulance to the MacNeal Hospital emergency room where she spoke to nurses and a doctor and underwent a physical exam which included her genitalia after which she experienced discomfort in her vagina. At 8 p.m. she met again with detective Ortiz who was accompanied by Stickney Detective Sergeant Richard Jaczak and identified defendant in a photo line-up. R.R. was released from the hospital that night and returned home to her apartment.

¶ 15 The following day, March 20, 2012, while cleaning up the mess in her apartment, she discovered a hammer inside the door of her apartment which she turned over to the police. On March 21, 2012, R.R. went to the Stickney Police Department and identified defendant in an in-person line-up and met with detectives Jaczak and Ortiz to answer some questions.

¶ 16 R.R. identified State's exhibit 6 as surveillance video depicting the victim and defendant arriving at her apartment and defendant leaving, then returning again, which was played at trial. R.R. also identified State's exhibits 7 through 15 as photographs depicting her apartment including damage to R.R.'s door, a condom in her kitchen garbage can, defendant's truck on the date of the incident, and her apartment couch stained with baby oil, which R.R. could not explain

but connected to both her encounter with defendant as well as her having used baby oil earlier that day when she got out of the shower.

¶ 17 C. Stipulated Testimony

¶ 18 The parties stipulated to the chain of custody for the video surveillance shown of R.R.'s apartment complex on March 19, 2012. It was stipulated that Doctor Sarah Johnson from MacNeal Hospital, treated R.R. at approximately 7 p.m. and collected a sexual assault kit. The doctor reported that R.R.'s chief complaint was that she was sexually assaulted. Her exam of R.R. revealed no abnormalities about her body or external genitalia and an internal exam of her genitalia revealed "scant bleeding". It was stipulated that Christine Weathers, a forensic scientist at the Illinois Police Forensic Sciences Command, would testify that no semen was indicated on R.R.'s clothing or on the vaginal swabs, blood like stains were identified on R.R.'s vaginal swabs, and it would be her opinion that semen was identified on the condom. It was also stipulated that Ryan Paulsen, a forensic scientist at the Illinois Police Forensic Sciences Command, would testify that defendant's buccal swab collected by detective Jaczak matched the DNA profile from the condom.

¶ 19 D. Defendant's Trial Testimony

¶ 20 Defendant testified that he is five feet, eight inches tall and about 165 pounds. He has known R.R. for 12 or 13 years. On March 19, 2012, defendant went to the Dam at about 1 p.m. after stopping to purchase a six pack of beer. He sometimes goes to the Dam to drink but on March 19, 2012, defendant had gone there to look for a guy named Art to discuss a side job he had bid on that day. When defendant arrived at the Dam he saw Dolezal, who he has known for ten years, R.R., and three other men. He testified that R.R., who he had not seen in five months, ran up to him, jumped in his arms, wrapped her legs around him, and said, "[o]h, there's my Tommie." R.R. sat on defendant's lap, hugged and kissed him, flirted, and told him four or five

times that "I want to fuck you." They were all drinking. Defendant drank a couple of beers. R.R. appeared intoxicated. At one point, R.R. walked over to another man, pulled her pants down and urinated in front of everyone. After being at the Dam for three hours, defendant and R.R. left together to pick up beer and returned to the Dam, but only stayed ten minutes because R.R. started fighting with a homeless man there. At around 4 p.m., R.R. started packing up her stuff. When she lifted her bag, R.R. fell and defendant picked her up at which point R.R. stated to him "let's go home and fuck. I want to get out of here."

¶ 21 R.R. and defendant left the Dam in his truck. Defendant drove and on their way to R.R.'s apartment, they stopped at White Eagle Woods where they saw some people they knew. They each had one beer and started to talk about having sex again. Defendant saw R.R. drink at least six beers and thought R.R. was pretty drunk, stumbling, and had begun to curse at people.

¶ 22 Defendant left with R.R. and drove to her apartment. When they arrived, R.R. did not have her keys and they pushed the door open which is how some wood came off the door. They began kissing and rubbing on each other and after about five minutes defendant asked if R.R. had condoms. She did not so defendant left to get some. Defendant left his two cell phones and his wallet on R.R.'s kitchen table, but had money in his pocket. When defendant returned to R.R.'s apartment, he looked through the front door window and saw R.R. asleep on the couch. He lightly knocked on the door for almost ten minutes, but was not yelling. Defendant returned to his truck and retrieved a hammer and a broken pair of scissors to attempt to open the door so he could get his wallet and cell phone. Defendant then "jimmied the lock" for about five or six seconds because the door was already broken. Defendant did not kick the door in.

¶ 23 Upon entering R.R.'s apartment, R.R. was still sleeping so he woke her up and she threw her arms around him and said "oh, my Tommy's back." They started kissing on the couch and R.R. pulled up her shirt, started rubbing on defendant and pulled her own pants down.

Defendant stood up and R.R. unzipped his pants, started rubbing his penis, and poured almost a whole bottle of baby oil onto his private part. Defendant put on a condom and he and R.R. had sexual intercourse on the couch. Defendant then took his wallet and cell phones and told R.R. he was going to get beer and cigarettes for R.R., but never returned because he had to pick up and deposit at the bank a check for the side job he referenced in earlier testimony. Defendant left the hammer and scissors at R.R.'s apartment because he intended to go back and repair the door. Defendant denied holding R.R. down and testified that she gave consent.

¶ 24 The following day, defendant met with police, signed a consent form for a buccal swab, and spoke to police after waiving his *Miranda* rights. Defendant told the detective "I fucked her." He also told the detective that the sexual intercourse was consensual and denied forcibly having sex with R.R.

¶ 25 E. Detective Cruz Ortiz's Trial Testimony

¶ 26 Detective Ortiz was dispatched to R.R.'s apartment at about 6:23 p.m. on March 19, 2012, after R.R. called the Stickney Police Department. When he arrived, he noticed the doorframe looked to have been broken out and was cracked with pieces of wood frame on the floor. R.R. was by herself, yelling, crying, and distraught. While hard to understand, detective Ortiz was able to communicate with her. R.R. told detective Ortiz that defendant had raped her and gave him the condom wrapper and box. Detective Ortiz testified that R.R. did not seem to be under the influence of alcohol based on his experience. R.R. did not seem intoxicated and he did not smell alcohol on R.R.'s breath. Detective Ortiz testified to State's exhibits 9, 10, 11 and 12 showing the damage to R.R.'s apartment door; exhibit 14 showing the condom box and wrapper R.R. had placed on the kitchen table; and exhibit 16 showing the view from the front door of R.R.'s apartment. He noticed a blanket and oil stain on the couch. Detective Ortiz testified that on March 19, 2012, R.R.'s front door window was covered with aluminum foil so

that you could not see into the apartment from outside. Detective Ortiz called for an ambulance and stayed with R.R. until they arrived and took R.R. to the hospital. He also called for an evidence technician who arrived at R.R.'s apartment to process the scene. Upon leaving R.R.'s apartment, detective Ortiz met with detective Jaczak who created a photo array. The two detectives met with R.R. at the hospital where she positively identified defendant from the photo array.

¶ 27 F. Detective Richard Jaczak's Trial Testimony

¶ 28 On March 19, 2012, after putting together a photo array, detective Jaczak and detective Ortiz went to the hospital to meet with R.R. where she positively identified defendant. While doing so, R.R. said "[t]hat's Tommy, he's the one who raped me" and then covered her face, turned away, and began crying. He received R.R.'s rape kit from the hospital and inventoried it with the Illinois State Crime Lab for testing. The following day, March 20, 2012, he retrieved and inventoried the hammer found by R.R. in her apartment. On March 21, 2012, R.R. positively identified defendant in an in-person line-up at the Stickney Police Department. After the line-up he and detective Ortiz met with defendant who signed a consent form, took a buccal swab, and read defendant his *Miranda* rights. Defendant was cooperative, did not have an attorney, and was not handcuffed. When asked about March 19, 2012, defendant first stated "[c]razy [R.R.] kicked her door in." When Jaczak informed defendant that there was a video defendant responded "I fucked her."

¶ 29 G. James Dolezal's Trial Testimony

¶ 30 Dolezal, a former Marine and defendant's friend and co-worker, testified for defendant. He had discussed this case with defendant prior to testifying. He testified that he saw R.R. at Aldi between noon and 1 p.m. on March 19, 2012, and gave her a ride home to her apartment. She brought in her groceries and returned to Dolezal's car with a small bag and mug. Dolezal

drove with R.R. to White Eagle Woods and when nobody was there, drove to the Dam. At the Dam, R.R. spilled her beer in Dolezal's car and he told her to get out. They walked to the back of the Dam to see if others where there. Defendant arrived approximately 20 minutes to a half hour later. When defendant arrived, R.R. ran up to him and said "my Tommy, my Tommy," jumped on him, and gave him a hug. Defendant and R.R. sat on a log next to each other talking. Dolezal heard R.R. ask defendant if he wanted to go to her house to have a good time, but did not remember her exact words, stating "she needed a ride home, so, whatever she had to say to get a ride home, I guess, I don't know." At one point, R.R. urinated by the side of a tree. After about a half hour, Dolezal left the Dam.

¶ 31 H. Terrance Kosteric's Trial Testimony

¶ 32 Terrance Kosteric, defendant's friend and coworker, testified that he arrived at the White Eagle Woods around 4 p.m. on March 19, 2012. He testified that R.R. and defendant arrived about 30 to 40 minutes later, had a beer, and sat together on a bench. R.R. was drinking and loud. There were other people present at the woods in addition to R.R. and defendant. Kosteric had discussed the case with both defendant and Dolezal prior to his testimony.

¶ 33 I. Jury Deliberations, Verdict, and Post-Trial Proceedings

¶ 34 Following closing arguments, jury deliberations commenced. At 8:25 p.m. the jury sent a note asking "[d]o we need to have criminal sexual assault guilty in order to have home invasion guilty per Section 4 of a home invasion?" Defense suggested the trial court tell the jury "you heard the evidence and you have the law, please continue your deliberations." After argument, the court answered the jury question as follows: "Yes. You have heard the evidence. You have all of the instructions. Continue to deliberate." At 8:50 p.m. the jury reached a verdict finding defendant guilty of home invasion and criminal sexual assault. The court sentenced defendant to six years for home invasion consecutive to five years for criminal sexual assault.

¶ 35 On August 10, 2015, defendant filed his "Motion for New Trial Pursuant to 725 ILCS 5/115-21; in Arrest of Judgment Pursuant to 725 ILCS 5/116-2; Motion for Judgment Notwithstanding the Verdict and to Reconsider the Finding of Guilt." In his motion, defendant did not address the trial court's response to the jury's question during deliberations. The trial court denied defendant's motion.

¶ 36 On August 11, 2015, defendant timely filed his notice of appeal.

¶ 37 This appeal follows.

¶ 38 II. ANALYSIS

¶ 39 Defendant raises four issues on appeal, as follows: (1) that the exclusion of evidence under the rape shield statute of a prior sexual relationship between defendant and R.R. to show consent was improper and deprived defendant of a fair trial; (2) that the trial court committed error requiring a new trial when it answered in the affirmative the jury's question concerning whether defendant has to be found guilty of criminal sexual assault if it found him guilty of home invasion; (3) that defendant could not be convicted and sentenced for criminal sexual assault where criminal sexual assault is a lesser included offense of home invasion; and (4) that the SORA statute is unconstitutional and does not comport with procedural and substantive due process.

¶ 40 We will first address defendant's argument that the trial court erred in excluding testimony under the rape shield statute concerning two prior sexual encounters between defendant and R.R.

¶ 41 A trial court's decision to bar evidence pursuant to the rape shield statute is reviewed only for abuse of discretion. *People v. Cerda,* 2014 IL App (1st) 120484, ¶ 203. Abuse of discretion occurs when a ruling is arbitrary, fanciful, or unreasonable or when no reasonable person would adopt the trial court's view. *Id.* at ¶ 183 (quoting *People v. Ward,* 2011 IL 108690,

¶ 21). An abuse of discretion also occurs when the trial court applies the wrong standard. *In re Marriage of Betsy M.*, 2015 IL App (1st) 151358, ¶ 46.

¶ 42 Section 5/115-7 of the Code addresses reputation evidence of an alleged victim and states in pertinent part as follows:

> "a. In prosecutions for *** criminal sexual assault *** 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 *** with the accused when this evidence is offered by the accused upon 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.
>
> b. No evidence admissible under this Section 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. Such offer of proof shall include reasonably specific information as to the date, time and place of the past sexual conduct between the alleged victim *** and the defendant. Unless the court finds that reasonably specific information as to date, time or place, or some combination thereof, has been offered as to prior sexual activity with the defendant, counsel for the defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim *** and the defendant. The court shall not admit evidence under this Section unless it determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. The evidence shall be admissible at trial to the extent an order made by the court specifies the evidence

> that may be admitted and areas with respect to which the alleged victim *** may be examined or cross examined." 725 ILCS 5/115-7 (West 2012).

¶ 43 The statute precludes admission of evidence of the sexual history of the victim unless it relates to sexual conduct with the defendant. *People v. Sandoval*, 135 Ill. 2d 159, 172 (1990). Even where section (a) of the statute expressly allows evidence of a victim's prior sexual activity with the defendant, section (b) of the statute further requires a preliminary showing of "reasonably specific information as to the date, time and place" before such evidence will be admissible. *People v. Grant*, 232 Ill. App. 3d 93, 104 (1992). Even then, section (b) of the statute will only allow such evidence if it is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. 725 ILCS 5/115-7 (West 2012).

¶ 44 The rape shield statute requires the defendant to make an offer of proof which includes "reasonably specific information as to the date, time or place, or some combination thereof" for the past sexual conduct between the alleged victim and the defendant. *Id*. Moreover, the court may reject evidence on the grounds of relevancy and shall not admit evidence unless "the probative value of the evidence outweighs the danger of unfair prejudice." *Id*. Whether evidence offered by the defendant is relevant is a determination within the sound discretion of the trial court. *People v. Sandifer*, 2016 IL App (1st) 133397, ¶ 29 (quoting *People v. Schuldt*, 217 Ill. App. 3d 534, 540-41 (1991)).

¶ 45 The trial court offered several reasons for barring the evidence offered by the defendant. When first raised by defendant during pretrial proceedings, the trial court ruled that (1) defendant failed to give timely notice of the evidence sought to be introduced; (2) the date, time, and place offered by defendant was "sketchy at best"; and (3) the two prior sexual encounters were too remote in time to be relevant to the issues in defendant's case. When raised a second time prior to opening statements, the trial court stated that it "weighed the probative value and prejudicial

effect" and found "that the prejudicial effect outweighs the probative value." The trial court ruled that defendant was prohibited from testifying to his prior sexual activity with R.R. on the basis that the two prior sexual encounters were too remote in time and for the other reasons set forth on the record in its ruling the previous day. For the reasons set forth below, we find the trial court's ruling was an abuse of discretion.

¶ 46 A. Timely Notice

¶ 47 As to the trial court's ruling that defendant failed to give appropriate notice pursuant to the rape shield statute, we initially observe that section 5/115-7 of the Code falls under title VI of the Code entitled "Proceedings at Trial" and not title V, "Proceedings Prior to Trial." Moreover, the only timing requirement set forth in the rape shield statute merely requires that "no evidence admissible under this Section be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing ***." 725 ILCS 5/115-7 (2012).

¶ 48 The admissibility of evidence relating to defendant's past sexual conduct with R.R. to show consent was raised by defendant prior to the commencement of trial during argument on the State's motion *in limine* seeking to prohibit, among other things, defendant from eliciting testimony or argument concerning the alleged victim's prior sexual activities. At that time, and again the following day after jury selection but before opening statements, both the State and the defense agree that offers of proof were made as to what defendant's testimony would be. The trial court then ruled that the evidence was inadmissible. Given that defendant raised the issue and obtained a ruling before introducing the evidence, we find that the trial court's ruling that defendant failed to timely raise the issue was error.

¶ 49 B. Specific Information as to Date, Time, or Place

¶ 50 We also find the trial court erred when it ruled that defendant's offer of proof concerning the two prior sexual encounters between defendant and R.R. failed to provide "reasonably

specific information as to date, time or place, or some combination thereof" as required by section 5/115-7(b) of the rape shield statute. 725 ILCS 5/115-7(b) (West 2012). Under the plain language of the statute, the offer of proof is only required to include "reasonably specific information" as to either the date of the past sexual conduct between the alleged victim and the defendant, or the time of the past sexual conduct, or the place the past sexual conduct occurred, "or some combination thereof," to meet the statute's requirement. Stated differently, a defendant is not required to recall with reasonable specificity each of the date, time and place of past sexual conduct with the alleged victim. See *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 145 (2006) (stating the word "or" is disjunctive and marks an alternative indicating the various parts of the sentence which it connects are to be taken separately). Construing the statute otherwise would serve to defeat its purpose and could lead to an unjust result. See *People v. Latona*, 184 Ill. 2d 260, 269 (1998) ("In ascertaining the legislature's intent, this court has a duty to avoid a construction of the statute that would defeat the statute's purpose or yield an absurd or unjust result.")

¶ 51 "[T]he Illinois rape shield law '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.' [Citation.]" *Sandifer*, 2016 IL App (1st) 133397, ¶ 20.

> "The constitution *** sometimes requires that a defendant be permitted to offer certain evidence which was directly relevant to matters at issue in the case, notwithstanding that it concerned the victim's prior sexual activity. [Citation.] The due-process clause of the fourteenth amendment (U.S. Const., amend. XIV) and the confrontation clauses of the federal and Illinois constitutions (U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8) guarantee

> criminal defendants a meaningful opportunity to present a complete defense. [Citation.] [A]n essential component of procedural fairness is an opportunity to be heard. [Citations.] Fairness, however, does not require the admission of evidence which is only marginally relevant or which poses an undue risk of harassment, prejudice, [or] confusion of the issues. [Citations.] The true question is always one of relevancy, and [t]he alleged victim's sexual history is not constitutionally required to be admitted unless it would make a meaningful contribution to the fact-finding enterprise. [Citations.]" *People v. Lewis*, 2017 IL App (1st) 150070, ¶ 21.

The statute "should never be mechanically applied to obscure relevant evidence that bears directly on guilt or innocence." (Internal quotation marks omitted.) *People v. Johnson*, 2014 IL App (2d) 121004, ¶ 42. To do so would threaten the defendant's right to a fair trial (see, *e.g.*, *People v. Canamore*, 88 Ill. App. 3d 639, 641 (1980) (holding erroneous exclusion of evidence deprived the defendant of a fair trial where it "significantly impaired the defendant's theory of her case")) without furthering the statute's goals.

> "The State policy underlying the rape shield statute *** is to prevent the defendant from harassing and humiliating the prosecutrix at trial with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than the defendant, since such evidence has no bearing on whether she consented to sexual relations with the defendant. Further, exclusion of such evidence keeps the jury's attention focused only on issues relevant to the controversy at hand. Last, but not necessarily least, the exclusion promotes effective law enforcement because victims can report crimes of rape and deviate sexual assault without fear of having the intimate details of their past sexual

activity brought before the public." *People v. Sandoval*, 135 Ill. 2d 159, 180 (1990).

¶ 52 "[T]he Rape Shield Act expressly states that evidence concerning the past sexual conduct of the alleged victim with the accused is admissible." (Internal quotation marks omitted.) *People v. Mangiaracina*, 98 Ill. App. 3d 606, 610 (1981). By requiring a defendant to provide reasonably specific information as to either the date or the time or the location of a past sexual encounter with the alleged victim, or some reasonable combination thereof, the statute balances the need to protect the defendant's right to offer evidence directly relevant to a matter at issue when the defendant raises the defense of consent against the goal of the shield law not to permit the admission of evidence that is "only marginally relevant or which poses an undue risk of harassment, prejudice, [or] confusion of the issues" (*Lewis*, 2017 IL App (1st) 150070, ¶ 21). The offer of proof need only be specific enough to demonstrate the encounter occurred and its relevance. See, *e.g.*, *A.I. Credit Corp. v. Legion Insurance Co.*, 265 F.3d 630, 637-38 (7th Cir. 2001) (finding sufficient "foundation," defined as "a loose term for preliminary questions designed to establish that evidence is admissible" where testimony as to date of prior conversation was inexact but "specific enough to demonstrate the conversation's occurrence and relevance"). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). This court has also held that the offer of proof requirement "merely requires that the court be satisfied that evidence of prior sexual conduct between the complainant and the defendant is actually available before any attempt to impeach the complainant on that issue will be allowed. The obvious aim of this provision is to prevent baseless and harassing cross-examination of the witness." *People v. Buford*, 110 Ill. App. 3d 46, 53-54 (1982). In this case, defendant's testimony regarding prior

sexual activity between himself and the alleged victim approximately a year and a half and approximately eleven months prior to the March 19, 2012 sexual encounter at issue is specific enough to establish that the evidence is available and the prior consensual sexual activity, if believed by the jury, may make it more probable the alleged victim consented to the sexual encounter at issue in this case.

¶ 53 Construing the offer of proof requirement in the rape shield law this way requires defendant to present in an offer of proof only reasonably recallable detail about defendant's past sexual activity with an alleged victim while, at the same time, ensuring sufficient safeguards of reliability before the evidence can be introduced at trial. To require more detail would be unreasonable and could create an insurmountable hurdle for the average person who likely will not recall excessive detail about the unremarkable experiences ordinarily occurring within their everyday life. "Trial courts routinely instruct juries *** that they should consider all the evidence in the light of your own observations and experience in life." (Internal quotation marks omitted.) *People v. Jackson*, 232 Ill. 2d 246, 271 (2009). We should act no differently. Here, for each sexual encounter, defendant provided a specific location for the alleged prior sexual activity with R.R., namely one occurrence at JC's Hotel in Countryside and a later encounter at the Dam. Dates were also provided for each incident, the first occurring in October 2010 and the second in April 2011, several months before the alleged offense in this case. While the dates provided were less specific, providing only a month and year rather than a specific day, the locations given were specific. Under our reading of the statute, the information provided by the defendant was sufficient to satisfy the "date, time or place, or some combination thereof" requirement of the rape shield statute. 725 ILCS 5/115-7(b) (West 2012).

¶ 54 C. Relevancy of Evidence

¶ 55 We also disagree that defendant's evidence was "sketchy" and too remote in time to be relevant to the issues in defendant's case. To the contrary, the evidence regarding R.R.'s alleged prior consensual sexual activities with defendant was sufficiently specific and relevant to defendant's consent defense. The express language of the rape shield statute deems evidence of prior sexual activities between an alleged victim and the defendant admissible provided defendant can identify a reasonably specific date, time, or location of the prior acts. See 725 ILCS 5/115-7 (West 2012). Such evidence must also be "relevant and the probative value of the evidence outweighs the danger of unfair prejudice." *Id.* Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Illinois Rules of Evidence 401 (eff. Jan. 1, 2011). The intent of the rape shield statute is to "prevent the defendant from harassing and humiliating the complaining witness with evidence of either her reputation for chastity or specific acts of sexual conduct with persons *other than [the] defendant*." (Emphasis added.) *People v. Summers*, 353 Ill. App. 3d 367, 373 (2004). Its purpose is not to preclude relevant evidence. *People v. Hill*, 289 Ill. App. 3d 859, 862 (1997). Thus, the rape shield statute protects assault victims and their private lives from needless public exposure without harming a defendant's right to present a full and fair defense. *Id.* Even the rape shield statute's preclusion of prior sexual conduct with persons other than defendant is not absolute and is expressly designed to yield to constitutional protections that assure a fair trial with just outcomes. *Id.* The statue should never be applied to obscure relevant evidence that bears directly on guilt or innocence. *Id.*

¶ 56 As noted above, in his answer, defendant filed a consent defense. In support of this defense, defendant sought to introduce evidence of two sexual encounters he had with R.R.

However, the trial court concluded that the evidence defendant sought to introduce was "sketchy" and too remote in time and thus its probative value did not outweighs the danger of unfair prejudice. We disagree and find that the trial court's exclusion of this evidence was in error.

¶ 57 Past sexual encounters between the defendant and an alleged victim are the only specific prior sexual acts explicitly permitted under the rape shield statute where, as in the instant case, it is introduced to show consent. See 725 ILCS 5/115-7(a) (West 2012). Defense counsel stated that defendant would testify that in October 2010 R.R. had sexual relations with defendant at JC Motel in Countryside, Illinois and in April 2011 R.R. performed oral sex on defendant at the Dam. The purpose of this evidence was to support defendant's affirmative defense that R.R. consented to the sexual activity on March 19, 2012. This evidence falls squarely in the realm of admissibility as an expressly stated exception to the rape shield's general exclusion of evidence concerning an alleged victim's prior sexual activity. See 725 ILCS 5/115-7(a) (West 2012).

¶ 58 Further, we do not agree that the two alleged sexual encounters between R.R. and defendant can be said to be too remote to be relevant. The opposite is true. The evidence sought to be introduced would support defendant's assertion that he and R.R. had a prior consensual sexual relationship in the recent past with large gaps of time, specifically several months, elapsing between each sexual encounter. While certainly not dispositive of consent, the evidence would clearly add information that is relevant to the consent defense raised by defendant. Without this information, the jury understood only that defendant and R.R. were just acquaintances and associates having known each other for a period of ten to thirteen years. This paints an entirely different picture for the jury than a relationship involving at least two sexual encounters in the year and a half preceding the March 19, 2012 sexual activity at issue and prejudiced defendant given his consent defense. We also disagree as to the characterization of

these episodes as "sketchy". For each of the two encounters, defendant specified the nature of the sexual activity, the location at which each sexual act took place, and the month and year of each sexual act. As noted *supra* the detail provided by defendant went beyond that which is specifically required by the rape shield statute. See 750 ILCS 5/115-7(b) (West 2012) (requiring defendant to offer information as to prior sexual activity with an alleged victim that is "reasonably specific as to date, time or place, or some combination thereof".)

¶ 59 We find barring the evidence offered by defendant of prior sex acts between the victim and the defendant was unreasonable. Accordingly, we find the trial court abused its discretion when it excluded testimony under the rape shield statute concerning the two specific prior sexual encounters between defendant and R.R. offered by defendant to show R.R.'s consent to the March 19, 2012 sexual encounter.

¶ 60 Defendant raises three additional points of error on appeal. Because we are reversing this matter for a new trial and those matters are not likely to recur, we decline to address the remaining arguments raised by defendant.

¶ 61 Additionally, after carefully reviewing the record, we find that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. We, therefore, find that there is no double jeopardy impediment to a new trial. By this finding, however, we reach no conclusion as to defendant's guilt that would be binding on retrial. See *People v. Piatkowski*, 225 Ill. 2d 551, 566–67 (2009); *People v. Tenney*, 205 Ill. 2d 411, 442 (2002); *People v. Nelson*, 193 Ill. 2d 216 (2000).

¶ 62 III. CONCLUSION

¶ 63 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and the cause remanded for new trial.

¶ 64 Reversed and remanded.