2016 IL App (2d) 140874-U
No. 2-14-0874
Order filed November 28, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-1254
JOE H. ALVAREZ,	)	Honorable Susan Clancy Boles,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by preventing defendant from introducing evidence of his alleged sexual-abuse victim's stepsister's sexual abuse: without a record of what the stepsister reported about her abuse, we could not say that her report was sufficiently similar to permit an inference that the victim was merely making the same report about defendant; in any event, defendant's proffer did not establish that the victim knew the specifics of the stepsister's report so as to permit that inference.

¶ 2 Following a jury trial, defendant, Joe H. Alvarez, was convicted of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)), and he was sentenced to 42 months of probation. On appeal, he claims that he was denied his constitutional right to present a defense

when he was precluded from offering evidence that the basis of the victim's, S.D.'s, knowledge of sexual activity came from her stepsister, J.R., rather than from the sexual abuse defendant allegedly committed against the victim. Defendant contends that such evidence would have rebutted the presumption that the victim could have learned about sexual matters only from defendant's alleged acts. We affirm.

¶ 3 Before trial, the State filed notice of its intent to present statements the victim made to various people. The State asked the court to hold a hearing on whether those statements were made under circumstances that would ensure their reliability. One of those statements concerned a conversation the victim had with her stepsister.

¶ 4 At the hearing, the stepsister, who was 12 years old, testified that she had a conversation with the victim in the beginning of September 2010. The victim was 10 years old at that time. The victim told her stepsister about a time when she was playing ball with a friend, she went into the garage to retrieve the ball, and defendant abused her.

¶ 5 On cross-examination, the stepsister was asked whether she told the victim about a "problem" she had with J.D., the victim's brother. The State objected, arguing that that evidence, of which it had only recently learned, was barred by the rape-shield statute (see 725 ILCS 5/115-7 (West 2010)). The State explained that the stepsister had accused the victim's brother of sexual abuse, and the record indicates that these allegations of abuse were unfounded. The court overruled the objection. The stepsister stated that, although she told the victim about the incident with the victim's brother, she did not tell the victim about it the day the victim was describing what defendant did to her.

¶ 6 At the end of the hearing, the court found unreliable the statements the victim made to her stepsister. Accordingly, the court determined that, if the victim testified at trial, the State would not be able to introduce any statements the victim made to her stepsister.

¶ 7 Thereafter, defendant filed a motion to compel discovery. In this motion, he asked the State to produce all evidence relating to the stepsister's allegation of abuse. The court reviewed the victim sensitive interview (VSI) of the stepsister in chambers and granted defendant's motion to compel.

¶ 8 The State then sought to bar evidence of the stepsister's alleged abuse, arguing that it was irrelevant. Before the hearing on that motion, the judge reviewed the VSI of the victim and compared it to the VSI of the stepsister. Although the record on appeal contains a video recording and a transcription of that recording of the victim's interview with the DCFS investigator, the stepsister's VSI is not included in the record. In fact, at the hearing on the State's motion, the court indicated that, after reviewing the VSIs of both the victim and her stepsister, the court "tendered those back to [defense counsel] this morning."

¶ 9 According to the victim's interview with the DCFS investigator, defendant called the victim into the garage to help him retrieve something that was out of his reach. Once the victim was in the garage, defendant grabbed her, covered the victim's mouth, sat down in a rocking chair, set the victim on his lap facing away from him, pulled the victim's pants down, and unzipped his own pants. The victim stated that she could feel defendant's "thing" touch her "butt" and her "pee pee." The victim pushed herself away from defendant and pulled up her pants. As she was leaving the garage, defendant told her not to tell anyone. The next day, the victim noticed that she was bleeding a little bit after she went to the bathroom.

¶ 10 Following arguments, the court granted the State's motion to bar evidence of the stepsister's alleged abuse. In doing so, the court made the following statement:

> "First of all, whether the conduct, the sexual conduct must be sufficiently similar to the Defendant's alleged conduct to provide a relevant basis for admission.
>
> I don't think these are identically similar. [The victim] reported, as the State alluded to, that she had some bleeding, that she was sitting in a chair with the Defendant, she was on top of the Defendant, sitting in a chair as he attempted to place his penis in her butt. She also said that the Defendant, while he took her pants off, never took her underwear off, that her underwear simply fell off. She also alleged that the Defendant tried to enter her from the front, different from [the stepsister], who indicated that she was standing at the time, that she was told to bend over and felt penetration at that time, as well as that he—the defendant in that case, or, excuse me, the alleged perpetrator in that case took both her jeans and her underwear off. So I don't think we have identical situations. There is some similarity.
>
> But going on to the second phase of the test, the prior sexual conduct cannot—if the prior sexual conduct cannot fully rebut the knowledge displayed, if it fails to account for certain sexual details unique to the charged conduct, its admission should not—it should be precluded, excuse me.
>
> And I don't think at this point that this knowledge is unique enough, and as [the assistant State's Attorney] indicated, the probative value here has simply not been sufficiently demonstrated. No one knows exactly what [the victim] was told by [her stepsister]. So what that knowledge consists of, we don't know what that is, and at this

point that's the Defense's burden to show and sufficiently demonstrate to establish the probative value here.

So the connection has not been made, the prejudicial effect to the State outweighs the probative value. As I indicated, I have not seen a sufficiently demonstrated probative value of what that knowledge is[.]"

¶ 11 Although the court granted the State's motion to bar the stepsister's statements, the court allowed defendant to ask the stepsister about her statements outside of the jury's presence.

¶ 12 At the conclusion of the trial, defendant, who spoke to the stepsister the day before the trial ended, gave the following proffer:

"Your Honor, if [the stepsister] were called to testify in this matter, I believe that she would testify that she did have a conversation with [the victim] on the same day that [the victim] told her sisters about this allegation in September of 2010.

That during that conversation she did not discuss with [the victim] specifically what had happened between herself and [the victim's brother].

***

[The stepsister] would further testify that the reason she did not get into the specifics is because [the stepsister] knew that [the victim] already knew about it. The reason that [the stepsister] knew that [the victim] knew about what had happened between [the stepsister] and [the victim's brother] is because the whole family in both houses *** knew. The famil[ies] had all talked about it."

¶ 13 After the jury found defendant guilty of aggravated criminal sexual abuse, he filed a posttrial motion, arguing, among other things, that the court erred in barring evidence of the stepsister's alleged abuse. Defendant argued, as he had before, that such evidence should have

been admitted to rebut the inference that the victim's knowledge of the sexual acts she accused defendant of committing could have come only from defendant abusing her. The trial court denied the motion. In doing so, the court noted that the record was still unclear as to what specifically the stepsister told the victim regarding the alleged abuse the stepsister suffered. This timely appeal followed.

¶ 14 At issue in this appeal is whether defendant was denied his constitutional right to present a defense when he was precluded from presenting evidence that the victim's knowledge of sexual acts she claimed defendant committed might have come from the conversation she had with her stepsister about the stepsister's alleged abuse. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation] or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). This encompasses a defendant's right to present to the jury the defendant's version of the facts. *People v. Manion*, 67 Ill. 2d 564, 576 (1977). However, even in light of this right, a trial court may prevent a defendant from introducing irrelevant or unreliable evidence. *People v. Hayes*, 353 Ill. App. 3d 578, 583 (2004). On appeal, we will not reverse the trial court's ruling on the admissibility of evidence absent an abuse of discretion. *Id.* "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 15 In addressing the issue raised here, we first observe that the rape-shield statute is in no way implicated. That 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." *People v. Santos*, 211 Ill. 2d 395, 401-02 (2004). The rape-shield law does not apply here, because the substance of what defendant sought to introduce does not concern the victim's prior sexual conduct. Rather, defendant sought to introduce evidence of a prior conversation the victim had with her stepsister that supposedly concerned the stepsister's prior sexual conduct. Courts in this state, as well as in other jurisdictions, have found that such evidence does not fall within the purview of the rape-shield law. See, *e.g.*, *People v. Grano*, 286 Ill. App. 3d 278, 288 (1996) (this court found that, under the rape-shield law, the legislature intended to exclude admission of the alleged victim's actual sexual history, not conversations about sexual activities); *Clinebell v. Commonwealth*, 368 S.E. 2d 263, 264 (Va. 1988) (the rape-shield law did not bar victim's false statements that other men abused her or that another boy got her pregnant, as such matters did not concern the victim's sexual conduct); see also *Brown v. United States*, 840 A.2d 82, 93 (D.C. 2004) (court properly excluded evidence concerning the victim's knowledge of sexual abuse the victim's cousin suffered at the hands of a third person, as "knowledge of a sexual assault involving a third party was collateral to the case being tried and would only serve to confuse and distract the jury from the actual issues in the case").

¶ 16 Our conclusion that the rape-shield law does not apply here is important, as the parties rely heavily on a case addressing that authority. See *People v. Hill*, 289 Ill. App. 3d 859 (1997). In *Hill*, the six-year-old victim accused the defendant of forcing her to fellate him. See *id.* at 861. At trial, the defendant sought to introduce evidence that the victim's knowledge of what happens to a male's anatomy when aroused came from a source other than the defendant. *Id.* at 862, 865. The State objected, arguing that the rape-shield law barred such evidence. *Id.* at 862. The court agreed, and thus at trial the jury was left to infer that the six-year-old victim could describe in

detail the sexual abuse she allegedly suffered only because the defendant had in fact abused her. *Id.*

¶ 17 On appeal, the court held that "under proper circumstances, evidence of a child witness's prior sexual conduct is admissible to rebut the inferences that flow from a display of unique sexual knowledge." *Id.* at 864. In determining whether such evidence should be admissible, the court fashioned a two-part test. See *id.* at 864-65. Specifically, evidence of a child's prior sexual conduct is admissible if the prior sexual conduct (1) involves the same sexual acts detailed in the child's testimony and (2) rebuts all of the unique knowledge of sexual acts contained in the child's testimony. *Id.* That is, "the prior sexual conduct must account for how the child could provide the testimony's sexual detail without having suffered [the] defendant's alleged conduct." *Id.* at 865. Because, in *Hill*, the prior sexual conduct the victim experienced involved another child and not an adult, like the defendant, the appellate court found that evidence of the prior sexual conduct was properly barred. *Id.* That is, given that the victim described pubic hair and the production of ejaculate, evidence that the victim had engaged in similar sexual acts with a prepubescent boy would not fully rebut her account of the sexual acts attributed to the defendant. *Id.*

¶ 18 Although it could very well be that the test advanced in *Hill* concerning the basis of a child's knowledge of sexual activity applies outside of the rape-shield statute, neither the parties nor this court has found authority providing as much. See *People v. Mason*, 219 Ill. App. 3d 76, 78-79 (1991) (in case where the defendant was prohibited from bringing forth evidence that minor victim's knowledge of sexual activity came from watching pornography to rebut child psychologist's testimony that sexual knowledge is evidence of abuse, the court stated simply, "[w]hen knowledge of sexual activities becomes an issue, as in the present case, the rape-shield

statute does not apply, and due process precludes its application"). In any event, whether the *Hill* test applies in cases such as this is an issue for another day, as this case can be resolved on whether the stepsister's conversation with the victim was relevant.

¶ 19 " 'In all criminal cases it is important that the evidence be fairly limited to the issue on trial, as collateral or extraneous matters can only mislead or prejudice a jury.' " *People v. Gischer*, 51 Ill. App. 3d 847, 851 (1977) (quoting *People v. Pickett*, 34 Ill. App. 3d 590, 598-99 (1975)). "There is no doubt but that it is within the power and discretion of a trial court to exclude evidence offered by the defense in a criminal case on the basis of irrelevancy without infringing upon an accused's constitutional right to present a defense." *People v. Dalzotto*, 55 Ill. App. 3d 995, 998 (1977). "Relevant evidence" includes "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). However, evidence that is relevant may nevertheless be deemed inadmissible if the prejudicial effect of admitting such evidence substantially outweighs its probative value. *People v. Hanson*, 238 Ill. 2d 74, 102 (2010). "A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature." *People v. Ward*, 101 Ill. 2d 443, 455 (1984).

¶ 20 Here, we cannot appropriately weigh what, if any, value the stepsister's allegations of abuse have in this case. As noted, the parties have not cited to where in the record the stepsister's VSI can be found, and in our own review of the record, we were unable to locate it. "Where the record on appeal is incomplete, any doubts arising from that incompleteness will be construed against the defendant [citation] and every reasonable presumption will be taken in favor of the judgment below [citation]." *People v. Banks*, 378 Ill. App. 3d 856, 861 (2007). Accordingly, we

must conclude that the stepsister's allegations of abuse simply were not relevant and were properly excluded.

¶ 21 Putting aside any problems created by the fact that the incomplete record prevents us from properly assessing the value of the stepsister's allegations of abuse, we still must conclude that the probative value of the stepsister's allegations of abuse was minimal at best. Among other things, as the trial court noted, it is uncertain what exactly the stepsister said to the victim about the stepsister's sexual abuse. According to the proffer, the stepsister said nothing specifically to the victim about the abuse, as she believed that the victim was aware of what happened given that the two families talked about it. This assumes not only that the families talked about the stepsister's allegations in the victim's presence, but also that the victim paid attention to what the families were talking about and that she knew that the substance of their conversations was the stepsister's allegations of abuse. Without evidence detailing what exactly the victim knew, we, like the trial court, must conclude that evidence of the stepsister's allegations of abuse was properly excluded.

¶ 22 For these reasons, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 23 Affirmed.