2018 IL App (5th) 170289-U

NO. 5-17-0289

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 12-CF-247
	)	
JACOB E. AUSTIN,	)	Honorable
	)	Walden E. Morris,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Cates and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The trial judge erred when he did not conduct an *in camera* review of all of the notes taken by an assistant State's Attorney from her interview(s) of the victim in this case. We remand with directions to conduct an appropriate *in camera* review of all of the notes, in accordance with this order.

¶ 2 The defendant, Jacob E. Austin, appeals his conviction of two counts of aggravated criminal sexual abuse following a jury trial in the circuit court of Saline County. For the following reasons, we remand with directions.

¶ 3 FACTS

¶ 4 On August 3, 2012, the defendant was charged, by information filed in the circuit court of Saline County, with three counts of aggravated criminal sexual abuse. 720 ILCS

5/11-1.60(d) (West 2012). The first count alleged that the defendant placed his penis in the victim's vagina "during March 2012." The second and third counts alleged the defendant placed his penis (count II) and finger (count III) in the victim's vagina "between March 1, 2012, and May 22, 2012." The record established that the defendant was 22 years old at the time of the alleged offenses, and that the victim was 13 years old when the alleged offenses occurred. Thereafter, the trial judge denied a motion for a bill of particulars that the defendant had filed on November 8, 2012, in which the defendant requested he be given a more specific date and time of the alleged events so counsel could properly formulate a defense. The trial judge found the State did not possess knowledge of a more specific time or date of the alleged events.

¶ 5 Jury selection for the defendant's trial occurred on April 24, 2013. On the following day, April 25, 2013, opening statements were given and testimony began. The first witness to testify was E.J. Foster, the stepfather of the victim. The next witness to testify was the victim. A lunch recess followed, during which the jury was excused and the attorneys for the parties remained. One of the defendant's two attorneys[1] then moved for a mistrial, contending there had been "an egregious violation of the [c]ourt's pre-trial order with respect to discovery under the Supreme Court Rule 412." Defense counsel stated that "there was an excessive amount of verbatim or identical statements between [Walker's] opening statement and [the victim's] testimony," which was problematic

[1]In the remainder of this order, we refer to the two defense attorneys individually and collectively as "defense counsel" because each participated in the discussions detailed below, and we do not believe it is significant, for purposes of the dispositive issue raised on appeal, to indicate which defense attorney made which particular statement.

because he believed both the victim's testimony and Walker's opening statement to the jury included information that was "not contained in the videotaped interview we were provided, not contained in any memorandum, any report, any summary of statements," or anything else provided to the defendant's counsel during discovery. Defense counsel stated that he "absolutely refuse[d] to believe that [Walker] delivered an opening statement to the jurors containing virtually verbatim statements out of [the victim's] testimony without some form of notes." He contended that the "excessive number of identical statements," along with the victim's "own testimony that she subsequently met with [Walker] and discussed the facts of the case with her," demonstrated that Walker "was obviously aware of more details than was disclosed to the defense in pre-trial discovery."

¶ 6 When asked to comment, Walker denied the allegations, stating that she had "talked to [the victim] before she testified," but claiming that the "bulk" of the victim's "testimony was the same as what she said in the interview" with state police investigator Rick White, and that White's interview was disclosed to the defense on a DVD. Walker added, "Granted, she gave more details, but it was not an egregious violation of any discovery rules." Defense counsel countered that Walker's explanation was not "all of the story," and "[t]he fact that she left out is that she knew about it before [the victim] testified to it." He agreed with Walker that "witnesses often offer more detail at trial than they did in an interview," then added: "The problem I have with that is that [Walker] knew about it before opening statement, and we sure didn't." He contended that this meant that Walker must have had information she did not turn over to the defense in

discovery. He alleged prejudice because the defense "now [had] insufficient time to prepare any sort of defense for the evidence that's been presented in a detailed format that was not presented previously." He concluded that Walker's "own admission that she spoke with the witness subsequently verifies that she had a subsequent conversation and didn't turn over any notes to us or to the [c]ourt for review" as required by the court's pretrial discovery order.

¶ 7 The trial judge queried the defense as to the exact nature of the alleged violation, and defense counsel replied that the victim "testified of events that occurred in November of 2011 and February of 2012." He then asserted the following:

> "The entirety of the information we received in discovery and the entirety of the information that my client was charged on alleged events from March the 1st to May the 22nd. She offered detailed testimony of events, two events she claims occurred before anything [that] was previously disclosed to us. That obviously would be prejudicial to my client because she's trying to testify about events that she just either made up today, or made up when she talked to [Walker] at her office. [Walker] knew about it before because she made reference to the details in a verbatim opening statement mimicking the very phrases that [the victim] used in her testimony. That's the—the problem is not just an expansion of detail, Judge. The problem here is the inclusion of brand new reports and details that we don't have any disclosure of before she testified to it, and the State was obviously in possession of it."

¶ 8 Subsequently, the trial judge stated that he did not believe there were grounds for a mistrial and that the defense would "be able to bring that out sufficiently whenever you have that opportunity." Defense counsel reminded the judge that the defense had filed a bill of particulars, and that none had been provided. He requested that the judge find that "a violation of that request for bill of particulars should be grounds for a mistrial." The judge again denied the motion for a mistrial.

¶ 9 As the attorneys returned from the lunch recess, still outside the presence of the jury, defense counsel asked the judge "to direct the State to turn over notes from that interview, as well as any other notes that would have been in compliance with the pre-trial order at this time before another witness is called." The trial judge then asked Walker, "do you have any notes that you haven't provided to the defense counsel?" Walker answered, "No, none that—the only notes I have are attorney work product notes. Absolutely not. There have not been any that are discoverable that I have." Defense counsel responded, "Your Honor, the pretrial order covers memoranda from an oral interview. If she's asserting it's not verbatim, that's for the [c]ourt to determine, and they're supposed to be submitted and reviewed in chambers." Walker replied, "I do not—I do not have any oral interview paperwork to turn over to the defense."

¶ 10 The trial judge then asked if the parties were ready to proceed, and added, "If they said they don't exist, they don't exist, all right. They say they don't exist. Do you have some reason to believe that they do?" Defense counsel responded, "Well, after the last incident, yes, Judge." He noted his concern that Walker might have "had similar conversations subsequent to discovery" with S.F., a witness who was about to testify for

the State. The trial judge asked Walker if she had "any notes at all as to [her] interviews with [S.F.]?" Walker answered, "No, I don't have any notes from [S.F.]. I mean, I talked to her before, but I don't have any discoverable notes, no." Subsequently, Walker stated, "I do not have any notes on [S.F.] of anything that was not disclosed in discovery in police reports." After further discussion among the parties, the trial judge asked Walker if she had "any notes of interviews with witnesses that you have not disclosed to the defense regarding [S.F.]?" Walker replied, "No." The trial judge responded, "All right. Now, what else is it that you want, if those don't exist?" Defense counsel stated, "I would like the notes that she has from a conversation she obviously alluded to with [the victim]." The trial judge stated that Walker had indicated there were no notes with S.F., then asked Walker, "Now, what about the notes of this alleged victim?" Walker did not directly answer the trial judge, instead stating, "As I said, Your Honor, she gave details that she said—gave today in court. And they are not any different than what she said in the pre-trial discovery." Defense counsel disagreed, and further discussion between the parties ensued.

¶ 11 Defense counsel subsequently stated that there should "be a turnover of those notes." Walker answered, "Attorney work product is not discoverable," to which defense counsel replied, "That's for the [c]ourt's determination, not yours." The trial judge then asked Walker, again, "Do you have notes of your conversation with the alleged victim?" Walker replied, "With the alleged victim, I do have notes. And they are—and my position is that they are not discoverable. They are attorney work product." When the trial judge asked where the notes were, Walker replied, "I'm not sure if I have them or not."

As the discussion continued, the trial judge asked if the State was required to make notes of any interview with a witness, to which defense counsel responded, "I'm saying if they make a memorandum, they are required to provide it. That's what the pre-trial order provides. If one is generated, it's discoverable." Walker then stated, "Generated by an attorney is work product in interviewing a witness prior to trial." The trial judge then asked Walker, "do you have the notes that you made?" Walker replied, "The only notes I see right here are notes that I made from Rick White's interview of [the victim] *** that's what I have there." After further discussion between the trial judge and the parties, the trial judge stated, "Once again, Ms. Walker, do you have notes of an interview that you had with the alleged victim *** that have not been disclosed to the defense?" Walker replied:

> "I have my handwritten notes, and I can't lay my hands on them right now. I can look in this box, you know. I don't know if I have them with me or not. I made some notes. I certainly made some notes. And I'm not—I can't lay my hands on them right now. I will continue to look."

¶ 12 As defense counsel asserted the defense's position that Walker had violated the pretrial order, the trial judge asked the bailiff, "Have you told the jury to sit down?" The bailiff responded, "Yes, sir." Walker then stated, "Your Honor, I don't have any notes of what I said in opening this morning. It's just what I said in opening. I don't have them. I don't have them." The following colloquy then occurred:

> "THE COURT: All right. Ms. Walker, you do not have any memorandums of the substance of conversations between you and [the victim] or [S.F.] that have not

been disclosed to the defense? Is that what I'm hearing you represent to the [c]ourt?

MS. WALKER: That is correct, Your Honor. What I said in closing [*sic*] this morning, I typed in and added to my closing, and that's what I have. And so that's it, what they heard in closing [*sic*]—I mean, I'm sorry, my opening. I apologize.

DEFENSE COUNSEL: Your Honor, can I at least ask the question when she says she doesn't have it, she doesn't have it with her or doesn't have it in her office?

THE COURT: I will ask that question.

DEFENSE COUNSEL: I'm sorry.

THE COURT: Do you have them—have you generated them? Have you lost them? Have you ever generated any such memorandums, Ms. Walker?

MS. WALKER: No. Other than what I prepared in my notes for opening, what I just said I had to look at, I did not generate anything."

¶ 13 Subsequently, the trial judge stated, "I'm not going to make the [State] give you a copy of their opening statement notes *** [Walker] has just told the [c]ourt that she did not prepare any memorandums of conversations with the alleged victim *** or [S.F.] that haven't been disclosed to the *** defendant." When defense counsel noted that "nothing" had been disclosed by Walker, and that "[t]he only thing we received regarding either of those is from the state police," the trial judge stated, "She just told me that she didn't create any memorandums of that." When defense counsel asked if any notes "taken at the time that she interviewed either [S.F.] or [the victim]" were discoverable, the trial judge

replied, "They may be. I don't know. I haven't seen them. They may be work product." He added that Walker "said she didn't make notes or memorandum. She's said that twice now in direct response to questions. I can't make her say yes if she says no." The trial judge then told the bailiff to bring in the jury.

¶ 14 Following the jury trial, the defendant was convicted of two counts of aggravated criminal sexual abuse. 720 ILCS 5/11-1.60(d) (West 2012). Both counts of which he was convicted involved penis to vagina penetration. The defendant was found not guilty of the third count of aggravated criminal sexual abuse, which involved finger to vagina penetration. The defendant was sentenced to 36 months' probation[2] and was ordered to register as a sex offender, and to pay fees. A timely appeal followed, which was resolved by our unpublished order in *People v. Austin*, 2017 IL App (5th) 130509-U, in which we ordered a limited remand for the trial judge to conduct an *in camera* review of a juvenile case file to determine if the juvenile's alleged sexual abuse of the victim in this case might be relevant to the defense in this case. This second timely appeal followed the proceedings on limited remand, which are not relevant to the dispositive issue in this appeal. Additional relevant facts will be provided as necessary below.

¶ 15 ANALYSIS

¶ 16 On appeal, the defendant raises five contentions of error regarding his jury trial. He contends, *inter alia*, that he was deprived "of his constitutional right to present a

[2]The defendant has completed his sentence. However, his appeal is not moot because the defendant challenges his conviction, rather than only his sentence, and in such circumstances, "the probability that a criminal defendant may suffer collateral legal consequences from a sentence already served precludes a finding of mootness." *People v. Jones*, 215 Ill. 2d 261, 267 (2005).

defense" by the trial judge's refusal "to perform an *in camera* review of the State's notes taken during interviews with the complainant." Specifically, the defendant claims the trial judge "erred in not reviewing *in camera* [Walker's] notes, which were claimed to be work-product, from her interviews with" the victim. The State responds that Walker "explicitly and unequivocally stated that [she] did not generate any notes of [the victim's] oral statements while interviewing her." In the alternative, the State contends that even if there was a discovery violation by Walker, "[a] new trial should only be granted if the defendant is prejudiced by the discovery violation and the prejudice is not eliminated." The State points out that the defendant has not argued that he was prejudiced by the purported discovery violation, nor shown how. The State posits that "the purported violation could not have changed the outcome of the trial or prejudiced [the] defendant," and contends that the defendant "successfully impeached" the victim on a number of points, including the date of the first sexual contact, notwithstanding any claimed discovery violation. The State also contends the evidence against the defendant "was corroborated by strong testimony of other witnesses," and that, accordingly, "the State's case hardly rested exclusively on the credibility of" the victim. In reply, the defendant contends Walker's testimony about her notes was far from clear and unequivocal, and that the trial judge had a duty to look at Walker's notes to determine whether they were work product and whether a discovery violation had occurred. With regard to prejudice, the defendant contends such an analysis is premature, because in the absence of knowing what the notes of the interview with the victim contained, it is not yet possible to determine if a discovery violation occurred and if so, the degree of prejudice that

withholding the notes from the defendant caused to his defense. The defendant asks this court to remand this case to the trial court so that it can conduct an *in camera* review of the notes Walker admitted she made during her interview with the victim, and can determine to what extent the notes were discoverable and should have been given to the defendant prior to trial.

¶ 17 Many of the legal principles relevant to this appeal were discussed in our previous disposition in this case, albeit in a slightly different context. As we noted therein, *People v. Escareno*, 2013 IL App (3d) 110152, is instructive. As the *Escareno* court noted, and as the parties to this case agree on appeal, "the government is obligated to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Id*. ¶ 16. From this fundamental and well-settled precept, "it follows that a defendant has a limited right to examine otherwise statutorily privileged information if the evidence is relevant and material, and if its relevance is not outweighed by other factors." *Id*. This right, however, "does not include the unsupervised authority to search through the State's files." *Id*. The defendant's right to a fair trial, and the State's interest in confidentiality, are better protected by a process by which the material in question is submitted to the trial court for an *in camera* review. *Id*. ¶ 17. "If, after its review, the trial court determines that information contained within the file is material, the court must turn over that information to the defendant." *Id*. The failure by a trial court "to determine whether material information is contained within statutorily privileged records" raises due process concerns for the defendant. *Id*. ¶ 20. Accordingly, if this court determines that a trial court should have conducted a requested *in camera* review of materials, but

did not, this court may remand the case to the trial court for such a review. *Id*. ¶ 21. If, as a result of the review, the trial court determines that the material in question contains discoverable statements that should have been disclosed to the defense and would have likely changed the outcome of the trial if so disclosed, the court must grant the defendant a new trial. *Id.* However, if the material does not contain any discoverable information that would have likely altered the outcome of the trial, the court's judgment should not be disturbed. *Id*.

¶ 18 There are a number of reasons why an *in camera* review is important in a case such as this one. First, as the Illinois Supreme Court noted in *People v. Szabo*, 94 Ill. 2d 327, 343 (1983), Illinois Supreme Court Rule 412(a) (eff. Mar. 1, 2001) explicitly states that upon request from defense counsel, "memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel." Second, as the *Szabo* court also noted, the "import" of Rule 412(a) "is that the determination whether memoranda summarizing a witness' oral statements consist of or contain privileged material is to be made by the court, not the prosecutor." *Id*. at 344. Third, a complete *in camera* review of the materials in question prevents both the trial court and reviewing courts from being in exactly the situation this court is currently in: urged by the State to find that the failure to disclose the materials could not have prejudiced the defendant, at a time when neither the trial court nor this court has any idea what the nondisclosed materials contain. Under such circumstances, it is not logically possible to determine

whether prejudice has occurred. As the *Szabo* court put it, with regard to notes that were deliberately destroyed by the State before they could be seen by the court[3]:

> "We are unable, on the record before us, to determine whether [the] defendant was prejudiced by the nondisclosure of the interview notes. It may be that they contained summaries of pre-trial statements by [Leatherman, the accomplice witness in question] that were entirely consistent with his trial testimony and of no value for impeachment. Or it may be that they consisted mainly of the assistant State's Attorney's mental impressions and opinions, which would be privileged from disclosure. Or it may be that they contained prior statements flatly contradicting Leatherman's trial testimony on one or more points, or possibly revealing an unsuspected motive for Leatherman's testifying as he did, or giving such varying accounts as would have greatly discredited his testimony. We simply cannot tell what opportunities for cross-examination, if any, were denied [the defendant] by the nondisclosure of the notes. Consequently, we cannot say either that the nondisclosure resulted in prejudicial error, or that any error that occurred was harmless beyond a reasonable doubt." *Id*. at 349-50.

The same is true in this case, in which neither we, nor the trial court, have any idea what kind of information is contained in Walker's notes. For that reason, we agree with the defendant that a prejudice analysis is premature at this time.

[3]Ultimately, the *Szabo* court ruled that on remand the State was to reconstruct the destroyed notes and present them to the trial court for an *in camera* review. *Id.* at 350.

¶ 19 We further agree with the defendant that the decision of the Illinois Supreme Court in *People v. Young*, 128 Ill. 2d 1 (1989), does not change the result we reach in this case. In *Young*, the court departed from the *Szabo* rules because, whereas in *Szabo* the testimony of the witness in question was "central to the State's case," in *Young*, the witness in question "was not an occurrence witness" and "effective cross-examination of [the witness in question] was not critical to" the defense. *Id*. at 44-45. Thus, the court concluded that regardless of how damaging to the State, and helpful to the defense, the interview notes that were not disclosed in *Young* might have been, the denial of the opportunity for the defense to use them did not "affect[ ] the reliability of the fact-finding process at trial." *Id*. at 45. Given the fact that in this case Walker's notes were of her interview with the victim—a witness central to the State's case, as the only occurrence witness other than the defendant to the penis to vagina sexual contact of which the defendant was convicted—we cannot reach the same result, and instead hold that *Szabo* controls our decision.

¶ 20 We also agree with the defendant that the State is incorrect in its assertion that Walker "explicitly and unequivocally stated that [she] did not generate any notes of [the victim's] oral statements while interviewing her." To the contrary, we find quite troubling the dizzying array of responses that Walker gave to what should have been simple questions for her to answer. As detailed above, the trial judge's first direct question to Walker about Walker's notes from her interview of the victim was: "[D]o you have any notes that you haven't provided to the defense counsel?" Walker answered, "No, none that—the only notes I have are attorney work product notes. Absolutely not. There have

not been any that are discoverable that I have." It is clear from this answer that Walker had notes, but was asserting to the trial judge that she believed the notes were privileged. Defense counsel immediately noted, correctly, that the question of whether the notes were privileged was for the court, not the State, to decide. Walker then stated, "I do not—I do not have any oral interview paperwork to turn over to the defense." This statement was far from clear. Walker did not indicate whether she was retracting her earlier statement that she had notes, or was simply reasserting her claim of privilege. It would have greatly simplified the proceedings that followed if the trial judge had forced Walker to clarify her statement, so that he could adequately respond to the defendant's request for an *in camera* review of any notes that existed—a request the defense was absolutely entitled to make.

¶ 21 Walker subsequently denied having any notes from her interview with witness S.F.[4] The trial judge then returned to the question of notes of her interview with the victim, stating, "Now, what about the notes of this alleged victim?" Walker did not directly answer the trial judge, instead stating, "As I said, Your Honor, she gave details that she said—gave today in court. And they are not any different than what she said in the pre-trial discovery." This led defense counsel subsequently to state that there should "be a turnover of those notes." Walker answered, "Attorney work product is not discoverable," to which defense counsel replied, "That's for the [c]ourt's determination,

[4]We note that although for the most part Walker denied the existence of notes with S.F., Walker at one point stated she did not have any "discoverable notes," another ambiguous statement that did not make the trial judge's job any easier and adds to this court's concern that Walker was not as clear and forthright as she could have been about all of the notes in question.

not yours." The trial judge then asked Walker, again, "Do you have notes of your conversation with the alleged victim?" Walker replied, "With the alleged victim, I do have notes. And they are—and my position is that they are not discoverable. They are attorney work product." Thus, Walker again clearly and unequivocally stated that she had notes from her interview with the victim but asserted that the notes were privileged. We note that Walker did not claim that the notes were privileged solely because they were her notes to be used in her opening statement—to the contrary, she stated, "Generated by an attorney is work product *in interviewing a witness prior to trial*." (Emphasis added.) In any event, regardless of the scope of the privilege she was invoking, at this point in the proceedings, Walker had twice made it clear that she had notes from her interview with the victim, and that she had not turned over the notes to the defense because she believed they were privileged. Defense counsel was correct that given that posture, the proper thing for the trial judge to do was to halt the proceedings and conduct an *in camera* review of the notes as requested by the defendant.

¶ 22 Perhaps planning to do so, the trial judge then asked where the various notes were. Walker first indicated that the only notes she had with her at the time were her notes from the victim's interview with Rick White (as noted earlier, the full interview with White had been disclosed to the defense on a DVD). After further discussion between the trial judge and the parties, the trial judge stated, "Once again, Ms. Walker, do you have notes of an interview that you had with the alleged victim *** that have not been disclosed to the defense?" Walker this time replied:

"I have my handwritten notes, and I can't lay my hands on them right now. I can look in this box, you know. I don't know if I have them with me or not. I made some notes. I certainly made some notes. And I'm not—I can't lay my hands on them right now. I will continue to look."

¶ 23 Walker subsequently stated, "Your Honor, I don't have any notes of what I said in opening this morning. It's just what I said in opening. I don't have them. I don't have them." The following colloquy then occurred:

"THE COURT: All right. Ms. Walker, you do not have any memorandums of the substance of conversations between you and [the victim] or [S.F.] that have not been disclosed to the defense? Is that what I'm hearing you represent to the [c]ourt?

MS. WALKER: That is correct, Your Honor. What I said in closing [*sic*] this morning, I typed in and added to my closing, and that's what I have. And so that's it, what they heard in closing [*sic*]—I mean, I'm sorry, my opening. I apologize.

DEFENSE COUNSEL: Your Honor, can I at least ask the question when she says she doesn't have it, she doesn't have it with her or doesn't have it in her office?

THE COURT: I will ask that question.

DEFENSE COUNSEL: I'm sorry.

THE COURT: Do you have them—have you generated them? Have you lost them? Have you ever generated any such memorandums, Ms. Walker?

MS. WALKER: No. Other than what I prepared in my notes for opening, what I just said I had to look at, I did not generate anything."

¶ 24 This statement, of course, directly contradicted her statement, made just moments before, that *she had no notes of what she said in opening*, and also contradicted her *multiple* statements that she took notes of her interview with the victim but refused to provide them to the defendant because notes "[g]enerated by an attorney is work product *in interviewing a witness prior to trial*." (Emphasis added.) Nevertheless, the trial judge subsequently stated, "I'm not going to make the [State] give you a copy of their opening statement notes[5] *** [Walker] has just told the [c]ourt that she did not prepare any memorandums of conversations with the alleged victim *** or [S.F.] that haven't been disclosed to the *** defendant." When defense counsel noted that "nothing" had been disclosed by Walker, and that "[t]he only thing we received regarding either of those is from the state police," the trial judge stated, "She just told me that she didn't create any memorandums of that." When defense counsel asked if any notes "taken at the time that she interviewed either [S.F.] or [the victim]" were discoverable, the trial judge replied, "They may be. I don't know. I haven't seen them. They may be work product." He added that Walker "said she didn't make notes or memorandum. She's said that twice now in direct response to questions. I can't make her say yes if she says no."

[5]The defense did not request that opening statement notes—or any notes for that matter—be given directly to them; the defense requested that, pursuant to Illinois Supreme Court Rule 412(a) (eff. Mar. 1, 2001), the *trial judge* conduct a review, *in camera*, of the notes to determine if they should have been given to the defense prior to trial.

¶ 25 In fact, Walker said yes at least as many times as she said no, which in itself is quite troubling to this court. The fact that Walker did not directly answer some of the trial judge's questions (despite the fact that the questions were straightforward and unambiguous), did not make certain that the answers she did give were clear and unequivocal, and went from saying she "certainly" took notes to saying she did not "generate" anything, made the proceedings much more convoluted and confusing than they needed to be. This is especially troubling in light of the serious nature of the allegation the defense was making: that the State was—or at one point had been[6]—privy to notes of an interview with the victim that were not turned over to the defense. Although we recognize that it is difficult to question someone who is being as unclear and varied in her answers as was Walker, we do not believe it was proper for the trial judge to simply accept Walker's final answer that she had "generated" no notes—not when that answer directly contradicted her earlier position, stated multiple times, that she had taken notes but they were privileged. At that point, an *in camera* review of all of Walker's notes from her interview(s) with the victim was the only reliable way to determine if a discovery violation had occurred.

¶ 26 Because the trial judge should have conducted an *in camera* review of all of Walker's notes of her interview(s) with the victim, but did not, we remand so that such a review may occur. If, as a result of the review, the trial judge determines that Walker's notes contain discoverable statements that should have been disclosed to the defense and

[6]To the extent the notes—which Walker clearly stated existed at some point—no longer existed, the proper remedy would have been to order the State to reconstruct them. See *People v. Szabo*, 94 Ill. 2d 327, 350 (1983). If necessary, that should occur on remand in this case.

would have likely changed the outcome of the trial if so disclosed, the trial judge must grant the defendant a new trial. See *Escareno*, 2013 IL App (3d) 110152, ¶ 21. However, if the notes do not contain any discoverable information that would have likely altered the outcome of the trial, the court's judgment should not be disturbed. See *id*.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we need not address the remaining contentions of the defendant. We remand this cause to the trial court with directions to conduct an appropriate *in camera* review of all of Walker's notes of her interview(s) with the victim, in accordance with this order.

¶ 29 Remanded with directions.