

NOTICE
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2017 IL App (5th) 130509-U

NO. 5-13-0509

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.)	Todd D. Lambert,
)	Judges, presiding.

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

ORDER

¶ 1 *Held:* The trial court erred in denying defendant's request that the court conduct *in camera* reviews of relevant evidence.

¶ 2 Defendant, Jacob E. Austin, was convicted of two counts of aggravated criminal sexual abuse following a jury trial and was subsequently sentenced to 36 months' probation. 720 ILCS 5/11-1.60(d) (West 2012). Defendant was also ordered to register

*Justice Schwarm was originally assigned to participate in this case. Justice Overstreet was substituted on the panel subsequent to Justice Schwarm's retirement and has read the briefs and listened to the recording of oral argument.

as a sex offender and pay certain fees. Numerous issues are raised by defendant on appeal, one of which alleges the trial court deprived him of his constitutional right to present a defense when it denied his request for *in camera* reviews of certain evidence. Other issues raised by defendant allege (1) the State failed to prove him guilty of aggravated criminal sexual abuse beyond a reasonable doubt; (2) the State and trial court violated defendant's rights to due process and a fair trial; (3) the trial court violated defendant's constitutional right to present a defense when it prevented defendant's counsel from engaging in certain cross-examination; and (4) the State committed misconduct in closing argument. We remand this cause with directions for the trial court to conduct the appropriate *in camera* reviews requested by defendant.

¶ 3

BACKGROUND

¶ 4 Although the record in this case is lengthy and numerous issues are raised, we limit our discussion to those facts necessary to reach our decision.

¶ 5 Defendant was charged by information with three counts of aggravated criminal sexual abuse of M.W., a minor, on August 2, 2012. 720 ILCS 5/11-1.60(d) (West 2010). The first count alleged defendant placed his penis in M.W.'s vagina during March 2012. The second and third counts alleged defendant placed his penis and finger in M.W.'s vagina between March 1, 2012, and May 22, 2012. Defendant was 22 years old at the time of the alleged offenses. M.W. was 13 years old when the alleged offenses occurred.

¶ 6 On September 11, 2012, the State filed a motion *in limine* pursuant to the rape shield statute requesting that the court prohibit any introduction of evidence regarding

M.W.'s reputation or prior sexual history on grounds that such evidence is inadmissible and no exception applies which would allow it to be introduced. 725 ILCS 5/115-7 (West 2010). Thereafter, defendant filed a response to the State's motion *in limine* asserting the constitutionally required exception to the rape shield statute applies to this case, and, therefore, questions regarding M.W.'s reputation or prior sexual history should be permitted at trial. In his response, defendant indicated M.W. had previously been the victim of a sexual encounter with a juvenile offender, L.F., which occurred within the last three years and consisted of similar conduct to that alleged in the instant case. Specifically, defendant argued:

"[The] specific prior sexual conduct of [M.W.] is relevant and probative and is therefore constitutionally admissible, as the exclusion of the same would prevent the defendant from presenting to the Court his theory of the case and deprive him of his constitutional right to confront his accuser and fully cross[-] examine her."

Defendant's response further asserted that despite having previously been the victim of a sexual encounter with L.F., M.W. stated in a recorded interview with the State's Attorney's office that she had not engaged in sexual contact with any person before the alleged conduct with defendant.

¶ 7 The parties subsequently filed memorandums of law regarding the State's motion *in limine*. The State asserted M.W.'s prior sexual conduct should be precluded because it did not involve the same sexual acts as those alleged in the instant case. In an affidavit

attached to his response, defendant testified M.W. advised him that "no one will ever know what L.F. did to her because it was so despicable."

¶ 8 At a hearing on the State's motion *in limine* held on November 20, 2012, defendant requested that the court review the facts of the L.F. case *in camera*. Regarding the L.F. case, defendant's counsel stated:

"I can't just go look at a juvenile file. It's closed. I'm asking for the court to look at it, see if the conduct is similar, and if it is, I think I am entitled to explore that at this trial. *** If [M.W.] learned about sex as a result of abuse at [the] hand of L.F. and not at the hand of my client, then I think the jury needs to know about that. [Defendant's] rights are Constitutionally protected in that regard."

In response, the State asserted M.W.'s prior sexual conduct with L.F. did not involve the same type of conduct alleged in the instant case. Near the closing of the hearing, the court stated it may need to look at the L.F. file "to determine what the allegations were."

¶ 9 At a subsequent hearing on the State's motion *in limine* held on December 5, 2012, the court stated it had not reviewed records of the L.F. case *in camera*. Defendant's counsel then requested that the court conduct an *in camera* review of the L.F. case and an *in camera* interview with M.W. Defendant's counsel advised the court that the only way he could properly represent defendant is to know whether the L.F. case consisted of similar conduct. Defendant's counsel further apprised the court defendant "was told by [M.W.] that no one knows the extent of what [M.W.] suffered at the hands of L.F. The only way to find out would be an in-camera interview."

¶ 10 After conducting the hearings, the court granted the State's motion *in limine* on December 7, 2012. Specifically, the court found defendant failed to show any of M.W.'s prior sexual conduct was directly relevant to the issues raised in the instant case. At no time did the court review the records of the L.F. case *in camera*. The court also denied a motion for a bill of particulars defendant had filed on November 8, 2012, which requested he be given a more specific date and time of the alleged events so counsel could properly formulate a defense. The court found the State did not possess knowledge of a more specific time or date of the alleged events.

¶ 11 A jury trial was held in April 2013 in which the court heard testimony from several witnesses, including E.J. Foster, who is M.W.'s father, S.J., who is M.W.'s best friend, and M.W. herself. These three witnesses all testified regarding M.W.'s sexual relationship with defendant. Specifically, M.W. testified she engaged in sexual intercourse with defendant on several occasions. Dr. Kathy Swafford, a pediatrician who specializes in the medical examination of children and young adults and who reports incidents of sexual abuse, testified she conducted a medical examination of M.W. on July 26, 2012, and found evidence of penetrating trauma that was consistent with the sexual intercourse act of penile penetration. Defendant denied ever engaging in sexual intercourse with M.W.

¶ 12 Following the jury trial, defendant was convicted of two counts of aggravated criminal sexual abuse. 720 ILCS 5/11-1.60(d) (West 2012). Both counts involved penis to vagina penetration. Defendant was found not guilty of the count alleging finger to

vagina penetration. Defendant was subsequently sentenced to 36 months' probation and was ordered to register as a sex offender and pay fees.

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 As previously stated, one of the issues raised by defendant on appeal alleges the trial court erred in failing to conduct *in camera* reviews of certain evidence. Specifically, defendant alleges the trial court denied him his constitutional right to present a defense by failing to review the L.F. juvenile case file *in camera* and question M.W. about that incident to determine whether it was relevant evidence.

¶ 16 In this case, the State filed a motion *in limine* pursuant to the rape shield statute seeking an order prohibiting the introduction of evidence at trial regarding M.W.'s prior sexual activity on grounds that such evidence is inadmissible and no exception applies that would allow it to be introduced. 725 ILCS 5/115-7 (West 2010). Defendant objected to the State's motion, asserting M.W.'s prior sexual conduct is constitutionally admissible because it is relevant and probative. The trial court granted the State's motion without conducting the *in camera* review of the L.F. case made at defendant's request.

¶ 17 The rape shield statute provides, in relevant part:

"In prosecutions for *** criminal sexual assault, [and] aggravated criminal sexual abuse, *** the prior sexual activity or the reputation of the alleged victim or corroborating witness *** is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim or corroborating witness *** with the accused when this evidence is offered by the accused upon the issue of whether

the alleged victim or corroborating witness *** consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted." 725 ILCS 5/115-7(a) (West 2010).

¶ 18 The objective 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 defendant." *People v. Summers*, 353 Ill. App. 3d 367, 373, 818 N.E.2d 907, 912 (2004). However, as this district has noted, the rape shield statute's preclusion of prior sexual conduct is not absolute and should never be mechanically applied to obscure relevant evidence that bears directly on guilt or innocence. *People v. Hill*, 289 Ill. App. 3d 859, 862, 683 N.E.2d 188, 191 (1997). A question of relevancy arises whenever the rape shield statute's preclusion of prior sexual conduct is invoked. *Hill*, 289 Ill. App. 3d at 863, 683 N.E.2d at 191. Where the evidence is probative, the statute's protection yields to constitutional rights that ensure a full and fair defense. *Hill*, 289 Ill. App. 3d at 863, 683 N.E.2d at 191.

¶ 19 With regard to defendant's request for an *in camera* review of the L.F. case, Illinois courts have repeatedly held that the matter of *in camera* reviews is within the trial court's discretion. *In re Marriage of Johnson*, 245 Ill. App. 3d 545, 554, 614 N.E.2d 1302, 1308 (1993). A reviewing court will not disturb the trial court's judgment if the trial court finds good reason to not conduct an *in camera* review. *In re Marriage of Wanstreet*, 364 Ill. App. 3d 729, 733, 847 N.E.2d 716, 719 (2006).

¶ 20 It is well settled that the State is obligated to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. *People v. Escareno*, 2013 IL App (3d) 110152, ¶ 16, 982 N.E.2d 277. Thus, 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. *Escareno*, 2013 IL App (3d) 110152, ¶ 16, 982 N.E.2d 277. However, a defendant's right to discover exculpatory evidence does not include the unsupervised authority to examine the State's files. *Escareno*, 2013 IL App (3d) 110152, ¶ 16, 982 N.E.2d 277.

¶ 21 After careful review, we find the instant case is analogous to *People v. Escareno*, 2013 IL App (3d) 110152, 982 N.E.2d 277. In *Escareno*, the defendant was charged with two counts of aggravated criminal sexual abuse. 720 ILCS 5/12-16(d) (West 2008). During pretrial discovery, the defendant issued a subpoena for all records and statements made by witnesses relating to the DCFS investigation against him. DCFS's response to the subpoena stated it could not release the information because it was contained in an unfounded report and such information was privileged. The State subsequently filed a motion to quash the defendant's subpoena, and the trial court granted the motion without reviewing the DCFS records *in camera*.

¶ 22 On appeal, the defendant argued he was denied his constitutional right to present a defense when the trial court quashed his subpoena to DCFS without first conducting an *in camera* review of the privileged material. *Escareno*, 2013 IL App (3d) 110152, ¶ 16, 982 N.E.2d 277. After considering the defendant's argument, the *Escareno* court found "[d]ue process demands that a trial court determine if information contained within

privileged records is material before ruling on a motion to quash a request for records." *Escareno*, 2013 IL App (3d) 110152, ¶ 18, 982 N.E.2d 277.

¶ 23 Similar to the court's finding in *Escareno*, we conclude defendant's request for an *in camera* review of privileged records concerning a prior incident in which M.W. was the victim of a sexual encounter triggers the court's duty to review those records to determine whether they are relevant to this case before ruling on a motion *in limine* seeking preclusion of evidence regarding M.W.'s reputation or prior sexual history. *Escareno*, 2013 IL App (3d) 110152, ¶ 18, 982 N.E.2d 277. Although the records of the L.F. case are privileged, defendant has a constitutional right to all material information contained within those records. Material information would give defendant his constitutional right to confront M.W. and could lead to legitimate cross-examination. However, we stress that this right does not include the ability for defendant to examine those records alone. *Escareno*, 2013 IL App (3d) 110152, ¶ 20, 982 N.E.2d 277.

¶ 24 The State argues the fact that M.W. had previously been the victim of a sexual encounter is not relevant to the instant case or probative of anything. The State further asserts the L.F. case is remote in time and place and contains no factual resemblance to the instant case. After careful consideration, we find the State's argument is misplaced.

¶ 25 Without the trial court's conducting an *in camera* review of the L.F. case, there is no way to discern whether information from those records is material and relevant to the instant case. Further, although the State asserts the L.F. case did not involve the same sexual conduct as this case, defendant testified M.W. advised him that "no one will ever know what L.F. did to her because it was so despicable." An *in camera* review of the

L.F. records would address concerns regarding whether the sexual conduct of the two cases is similar. For these reasons, we reject the State's argument.

¶ 26 In sum, we conclude the trial court should have reviewed the records requested by defendant *in camera* and then disclosed any material information. Since the trial court failed to review the records *in camera*, we remand this cause to the trial court to conduct the appropriate *in camera* reviews requested by defendant. If the court then determines there is material information that would have likely changed the outcome of the trial if disclosed to the defense, defendant should be granted a new trial. *Escareno*, 2013 IL App (3d) 110152, ¶ 21, 982 N.E.2d 277. However, if the records do not contain any information that would have likely altered the outcome of the trial, the court's judgment should not be disturbed.

¶ 27 CONCLUSION

¶ 28 In light of the foregoing, we need not address the remaining contentions raised by defendant on appeal. Accordingly, we remand this cause to the trial court with directions to conduct the appropriate *in camera* reviews requested by defendant.

¶ 29 Remanded with directions.