

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICK ALAN BROWNRIGG,

Defendant-Appellant.

UNPUBLISHED

November 20, 2007

No. 270303

Saginaw Circuit Court

LC No. 05-026641-FH

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

FITZGERALD, J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusion that the trial court erred by excluding defendant from an in camera hearing to determine the admissibility of evidence that could potentially be excluded under the rape shield statute. See, e.g., *People v Mallory*, 412 Mich 229, 247; 365 NW2d 673 (1984) (a defendant has the right to be "present during . . . any [] stage of trial where the defendant's substantial rights might be adversely affected"); *Coleman v. Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1990) ("A critical stage [of the proceedings] is one where potential substantial prejudice to defendant's rights inheres in the particular confrontation . . ."). I disagree, however, with the majority's conclusion that the trial court's erroneous denial of defendant's right to be present at the in camera hearing was harmless error.

There is no doubt that what was said during the in camera hearing might have adversely affected defendant's substantial rights, depending on what was said. Defendant's presence at the in camera hearing would have afforded him the opportunity to listen to the witness's testimony and make observations that could have been passed on and discussed with defense counsel and directly aid the defense. Because defendant was denied the right to be present at the in camera hearing and to aid in his defense, it cannot be determined by this Court that defendant's substantial rights could not have been affected or that actual prejudice did not occur. I would reverse.

/s/ E. Thomas Fitzgerald