

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE DOUGLAS DABB,

Defendant-Appellant.

UNPUBLISHED
December 4, 2007

No. 271566
Dickinson Circuit Court
LC No. 05-003412-FH

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age). Defendant's convictions arise from allegations of sexual abuse promulgated by defendant's stepchildren, a female complainant (DOB 4/24/1994) and her half-brother, a male complainant (DOB 6/21/1991), allegedly committed while the complainants attended daycare run by defendant's wife. Because the trial court abused its discretion when it improperly excluded evidence pursuant to the "rape-shield" statute, we reverse and remand for a new trial.

Defendant argues that the trial court erred when it excluded evidence that: the male complainant first accused defendant of abuse after the male complainant's mother caught him abusing his younger cousin; that the male complainant had sexual relations with the younger female complainant (his half-sister); and, that the female complainant was previously abused. Generally, a trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But a preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.* "Questions of statutory interpretation are also reviewed de novo," *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005), as are constitutional issues, *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). Preserved constitutional error requires reversal unless the error is shown to be harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Evidence of the sexual conduct of an alleged victim of a sexual assault is strictly limited by MCL 750.520j, and provides in relevant part:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's

sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

This statute is reflected in MRE 404(a)(3), providing an exception allowing admission when “[i]n a prosecution for criminal sexual conduct, [it is] evidence of the alleged victim’s past sexual conduct with the defendant and [it is] evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.”

However, while the statute does not explicitly allow it, “in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant’s constitutional right to confrontation.” *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). “[W]here the defendant proffers evidence of a complainant’s prior sexual conduct for the narrow purpose of showing the complaining witness’ bias, this would almost always be material and should be admitted.” *Id.* “[E]vidence of a complainant’s sexual conduct may also be probative of a complainant’s ulterior motive for making a false charge.” *Id.* The decision to admit this evidence is still within the sound discretion of the trial court, which “should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant’s sexual conduct where its exclusion would not unconstitutionally abridge the defendant’s right to confrontation.” *Id.* at 349.

Defendant sought to introduce evidence of the male complainant’s prior sexual conduct for the express purpose of showing bias and an ulterior motive for making the charge. Specifically, defendant sought to introduce evidence that the male complainant was caught with his pants off while molesting his three-year-old cousin, and that it was following this incident that the male complainant first made an accusation against defendant of sexual abuse. Such evidence falls within the constitutional exception to the statute as outlined in *Hackett*. Testimony was admitted that both complainants had a tendency to try to blame others when they got into trouble. The male complainant admitted that when accused of doing something bad, he has in the past indicated that someone else was responsible. Being caught committing sexual assault on a three-year-old child provides a very strong ulterior motive for making a false charge, i.e., to deflect blame for the assault the male complainant had committed.

Given the nature of this case, any evidence relating to the bias of either complainant is significant. Moreover, the prosecutor argued in closing to the jury that “there’s been no evidence to suggest that these children avoided some kind of trouble by disclosing the sexual abuse, or that it benefited them in any way whatsoever.” Under these circumstances, reversal and remand for a new trial is required. *Carines, supra* at 774.

Further, evidence regarding the sexual activity between the complainants and the molestation of the female complainant by her biological father may also be relevant for similar

reasons. Arguably, the male complainant's testimony that he obtained knowledge about sex from defendant opened the door to evidence that he obtained this information from a different source, i.e., through sexual relations with his sister who had been the subject of her father's abuse.

However, evidence of the female complainant's prior abuse and her sexual relations with her brother first needs to be analyzed in light of *People v Morse*, 231 Mich App 424, 433-436; 586 NW2d 555 (1998), which holds that the prior sexual history of a child complainant may come in, despite the rape-shield statute, and even in absence of evidence of bias, to offer an alternative source for a child complainant's sexual knowledge that otherwise would be fairly damning evidence of a defendant's guilt. *Morse* requires that, prior to the admission of such evidence, the trial court must hold,

an in-camera hearing . . . to determine whether: (1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainants, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding. [*Id.* at 437.]

The trial court in this case did not hold any such hearing and so, on remand, we order the trial court to do so. *Id.* at 437-438.

Because our resolution of the issue requires reversal and remand for a new trial, defendant's argument regarding the trial court's exclusion of his witness list is moot since defendant will have a new trial and a second opportunity to timely file a witness list. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Finally, in light of our decision, it is unnecessary to address defendant's remaining issues on appeal including his ineffective assistance of counsel claim.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey