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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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DRANGINIS, J., concurring in part and dissenting in part. I agree with part III of the majority opinion, which concluded that the state properly called the defendant's former counsel as its witness, and hence concur in affirming the conviction of the defendant, Carleton Smith, for failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1). I respectfully dissent, however, from part II of the majority's opinion and thus would affirm the defendant's conviction on the sexual assault and risk of injury charges.

In part II of its opinion, the majority concludes that the trial court abused its discretion by not permitting the defendant to put into evidence the fact that semen was the genetic material that was determined not to belong either to the defendant or to the two purported assailants who allegedly acted with him. I disagree with the majority's conclusion that the defendant's claim as to the evidence of semen was of constitutional magnitude. I regard this claim as an evidentiary one to which the defendant has attached a constitutional tag. See, e.g., *State* v. *Wargo*, 53 Conn. App. 747, 753, 731 A.2d 768 (1999), aff'd, 255 Conn. 113, 763 A.2d 1 (2000). I also disagree that it was an abuse of discretion for the court to deny the defendant an evidentiary hearing under subdivisions (1) or (4) of the rape shield statute, General Statutes § 54-86f.

To defend against the charges against him, the defendant made a predictable, wholesale attack on the credibility of the alleged victim, T. The defendant asserted this defense in two parts: one, that T had made a prior, false allegation of sexual assault and, two, that the presence of semen from an unknown person was relevant to the issue of misidentification. I agree with the majority's conclusion that the defense theories of a prior false accusation and misidentification are unrelated. I agree also with the majority's disposition of the first prong of the defense, i.e., the prior false accusation, and that the court properly refused to disclose the contents of T's records from the department of children and families.

With respect to the issue of semen found on T's person and clothing, I believe that it is important to recognize that the defendant first claimed, as he did with respect to the claimed false accusation, that the presence of semen was relevant to T's credibility. Although the defendant made a colorable due process claim, the transcript reveals the true nature of the proffer of evidence. The court questioned defense counsel as to the relevance of the evidence and alluded to its earlier rulings that precluded the use of evidence of prior sexual activity to test T's credibility, which would, of course, violate the rape shield statute.[1]

Moreover, the state claimed that because no evidence of semen was offered, the question of whose semen was on T's person and clothing was not before the jury, and therefore evidence of semen was irrelevant. The court opined that the issue was ''clear.'' The case law cited by the majority supports this conclusion. See *State* v. *Rinaldi*, 220 Conn. 345, 599 A.2d 1 (1991); *Demers* v. *State*, 209 Conn. 143, 547 A.2d 28 (1988); *State* v. *Cuesta*, 68 Conn. App. 470, 791 A.2d 686, cert. denied, 260 Conn. 914, 796 A.2d 559 (2002). In those cases, the state had offered physical evidence of sexual contact that was in the nature of biological substances, creating an inference that the defendant in those cases was the source of the semen. If such evidence is before the jury and the jury is asked to infer that the defendant was the source of the semen, then evidence that the defendant was genetically excluded as the source of the semen is relevant and admissible.

In this case, however, the state offered no evidence regarding semen. The defendant's expert witness was unable to identify the source of the DNA that he had analyzed, but he was able to conclude that it did not belong to the defendant or to his alleged accomplices. The court determined that the prejudicial effect of the substance, i.e., sperm heads, of the genetic material outweighed its probative force, as it pertained to T's credibility. The court, however, recognized that as to the defense of misidentification, the expert should be permitted to testify that the genetic material that was analyzed excluded the defendant. As a result of the court's ruling, evidence related to the DNA composition of the genetic material that pertained to the defendant's theory of misidentification was before the jury. What was not before the jury was the fact that the genetic material that had been analyzed was semen. The court had admitted evidence that was probative of the defense of misidentification while adhering to the mandate of the rape shield statute.

The only thing to be gained by identifying the genetic material that had been analyzed by the defendant's expert as *semen* was to degrade T by introducing evidence of the thirteen year old girl's sexual conduct with others. It appears that the court properly balanced the defendant's interest in presenting a defense of misidentification and protecting T's privacy, but ultimately provided all of the evidence necessary for the jury to evaluate the defense of misidentification.

The defendant's attempt to put the loaded word *semen* before the jury was not essential to his claim of misidentification, but an attempt to thwart the prior rulings of the court and to subvert the policy of the rape shield statute. Neither subdivision (1) or (4) of § 54-86f is implicated. At best, the court's ruling was harmless error.[2] The evidence relevant to the defense of misidentification was admitted, so the court's ruling

did not rise to the level of a constitutional violation that the defendant was unable to present a defense.

Furthermore, the state had a strong case, including the defendant's admission that he had had sex with a young woman whom he did not know. The jury disregarded the defendant's theory of misidentification and understandably so. The defendant asked the jury to believe that it was some other young woman whom he and his friends had picked up at the same place, partied with and had sexual relations with in the very same inn identified by T. The jury would have had to believe a perverse coincidence to credit his defense of misidentification. It would not be a stretch to consider such a claim to be an insult to common sense.

Because I have dissented from a portion of part II of the majority opinion and would affirm the defendant's conviction on all counts, I will address the last issue claimed by the defendant, that is, prosecutorial misconduct during closing argument. The state has argued that there was nothing improper about the closing argument. I have reviewed the prosecutor's closing and rebuttal argument and have considered it in view of the standard enunciated in *State* v. *Stevenson*, 269 Conn. 563, 572–73, 849 A.2d 626 (2004), and *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). On the basis of my review of the facts and understanding of the law, I conclude that the defendant's claim of prosecutorial misconduct is without merit.

For these reasons, I would affirm the judgment of the trial court.

[1] The court stated: "But when I ask you what's relevant and now you immediately are pointing to something that has already been ruled not to be relevant earlier on[ly] in a slightly different context. And so it seems to me that what you're trying to do is get this evidence in front of the jury so as to permit you to argue something that's not in the case, namely, that she was engaged in some kind of other, prior sexual conduct. I see no other purpose that would cause you to want to get that into the record in front of the jury."

[2] The absence of the defendant's DNA in the semen samples examined by the defense expert would appear to be consistent with the defendant's testimony that he had used a condom during his sexual encounter on the night in question.