STATE OF CONNECTICUT *v.* RICARDO R.*
(SC 18576)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Argued March 15—officially released July 3, 2012

Lauren Weisfeld, senior assistant public defender, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, *James Bernardi*, supervisory assistant state's attorney, and *Raheem L. Mullins*, former assistant state's attorney, for the appellee (state).

Opinion

McLACHLAN, J. The defendant, Ricardo R., appeals[1] from the judgment of conviction, rendered following a jury trial, of one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2),[2] and two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and (2).[3] The defendant claims that the trial court denied his constitutional rights to present a defense and to due process by improperly precluding him from eliciting testimony from a pediatrician, Paula Couture, who had examined the victim, S, regarding a statement that S had made to her, namely, that "no adult had touched her."[4] Because we conclude that the record is unclear whether the court in fact precluded the defendant from eliciting testimony regarding this statement, and because the defendant neither sought a clarification of the court's ruling, nor sought to elicit testimony from Couture regarding the statement, we conclude that the defendant abandoned the claim and, accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. When S was approximately four months old, her mother, F, began a relationship with the defendant. In 1996, when S was five years old, the defendant and F moved into an apartment together. S grew up thinking of the defendant as her father, and called him "Papi," which means "dad" in Spanish. The defendant and F subsequently had two children together, S's two half sisters, G and M. The defendant also had fathered two children with his former girlfriend, J: a daughter, A, who was one year older than S, and a son, R. A and R lived with J, but they often stayed with S's family and the siblings saw each other at least every weekend.

When F was away or at work, the defendant watched the children. During that time, the defendant engaged in a number of behaviors that made S feel uncomfortable, such as walking around the house naked. The defendant also watched pornographic media while the children were home, and did not turn it off when they walked into the room while he was watching it. On one occasion, when S was in the third or fourth grade, the defendant showed S a homemade videotape of himself and F engaged in various sexual acts. At times, the defendant grabbed S's hand and placed it on his crotch, over his clothing. S was afraid of the defendant because he hit her, particularly when he was drunk, and sometimes with a closed fist. On occasions, S also witnessed the defendant hitting and punching F. A testified at the defendant's trial, describing the effect that the defendant's physical abuse had on the children's behavior: "[I]t seemed like we were always trying everything in our power to just do what he wanted so that we didn't have to get disciplined in that way."

One particular day, the defendant made S and A play a "modeling game." During the game, the defendant waited in the living room, while the children went into the bedroom where they had a box of costumes—dresses. They changed into the costumes, and, wearing no underwear as the defendant had instructed, walked into the living room one at a time to be "judged" by the defendant. The defendant told them that he would pay money to whoever walked best like a model. When S came into the living room, the defendant had S lie down on the couch, and he placed his hands under her dress, rubbing her vaginal area with his hands, telling her not to worry, because he had done the same thing to A. On two or three occasions after that, the defendant made S play the modeling game without A. He warned S that if she told anyone what had happened, everyone would blame her and hate her for it.

In 2001, F left the defendant and moved into her mother's home with her three daughters. The defendant moved into a studio apartment in a neighboring town, where F allowed S and her sisters to continue visiting and staying with him. During this time period, the defendant continued periodically to grab S surreptitiously. On one occasion, when S was in the fifth grade, A and S, who had been playing outside, went inside to take a shower together. While they were in the shower, the defendant walked into the bathroom, removed his clothes and got into the shower with the girls. He "bathed" them, touching their private areas with his hands and made them do the same to him. At that time, S told no one what was transpiring between her and the defendant.

In 2002, when S was approximately eleven or twelve years old, the defendant and F reconciled and moved back in together. The defendant's physical abuse of S continued, and the sexual abuse escalated significantly. The defendant continued to touch S inappropriately, sometimes using his fingers to penetrate her vaginally. The defendant also made S masturbate him with her hands and forced her to give and receive oral sex, striking her if she refused or tried to stop him. In December, 2002, S reported to a teacher at her school that the defendant had hit her. As a result, S and her two sisters were removed from the home and placed with Kids In Crisis.[5] After one month, G and M were returned to the family home, while S was placed with her grandparents. Some time thereafter, when S assured officials that everything was "okay" at home, she was returned to F and the defendant. At that point, S did not tell F that the defendant was sexually abusing her, nor did she report any sexual abuse to social workers with the department of children and families, who now visited the home. When S returned home, the defendant initially refrained from abusing her. Once the social workers ceased monitoring the home, however, he resumed his

physical and sexual abuse of S.

In February, 2004, F once again broke off her relationship with the defendant, and she and the children moved out. Soon thereafter, A filed a complaint alleging that the defendant had physically abused her, exposed the children to pornography, and made A and S shower with him and play the "modeling game." When the officials who were investigating the complaint questioned S concerning A's allegations, she confirmed that the defendant had showered with A and S, and played the modeling game with them, but she did not discuss the sexual aspects of either incident, and she denied that the defendant had touched her inappropriately in either instance. S did not tell investigators about the additional times that the defendant had played the modeling game with her alone, and when investigators asked her if the defendant had sexually assaulted her, she told them that he had not. After A filed her complaint, F did not allow the defendant to see S, and F subsequently broke off contact with him.[6]

S first told F about the sexual abuse in June, 2007, and F reported the sexual abuse to the Greenwich police the next day. The state subsequently charged the defendant in a substitute information with one count of risk of injury to a child in violation of § 53-21 (a) (2), and two counts of sexual assault in the first degree in violation of § 53a-70 (a) (1) and (2). The jury found the defendant guilty on all counts. On January 7, 2010, the trial court sentenced the defendant to twenty years incarceration on each count, with the sentences to run concurrently, followed by five years of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the defendant claims that the trial court improperly precluded him from eliciting testimony from Couture, a pediatrician, regarding a statement that S had made to her that "no adult had touched her." The state responds that the trial court permitted the defendant to elicit testimony regarding the statement, and argues in the alternative that this claim is not reviewable because the defendant failed to seek a clarification or articulation of the court's ambiguous ruling and because the defendant failed to ask Couture about the statement during his examination of her. We agree with the state's second argument and conclude that the defendant abandoned the claim by failing to seek a clarification of the trial court's ambiguous ruling and by failing to question Couture regarding the statement.

The following additional factual and procedural background is relevant to the resolution of this issue. The defendant sought to introduce testimony from Couture, who had conducted a physical examination of S in August, 2004, at the request of F, in order to determine whether S had " 'been touched.' " Initially, the state sought to preclude Couture's testimony entirely on the

bases that her testimony was irrelevant, that it potentially could violate the rape shield statute and that its prejudicial impact outweighed any probative value it might have.[7] The defendant responded that Couture's testimony was relevant both to challenge the allegations of force, on the basis that Couture's physical examination had revealed no evidence of trauma,[8] and to impeach the credibility of S, because S had made inconsistent statements to Couture.

At the instruction of the trial court, both the state and the defendant questioned Couture outside the presence of the jury before the court ruled on the defendant's offer of proof. The questioning elicited the following testimony. Couture saw S on August 2, 2004, and August 9, 2004.[9] On August 2, in response to Couture's questions, S denied having had sexual intercourse or oral sex with anyone. On August 9, S admitted to Couture that she had engaged in sexual intercourse with a fourteen year old boy and she told Couture that no adult had touched her. It is the defendant's position that the trial court improperly precluded him from questioning Couture regarding S's August 9, 2004 statement that no adult had touched her, and that the trial court's improper ruling violated his sixth amendment right to present a defense.

Our review of the transcripts reveals that it is far from clear that the trial court barred the defendant from questioning Couture regarding S's statement that no adult had touched her. After the state moved to preclude the defendant from questioning Couture, the court allowed defense counsel to make an offer of proof. Both defense counsel and the prosecutor questioned Couture in the absence of the jury. In the course of the offer of proof, Couture testified extensively regarding the physical examination, and also testified regarding all three statements that S had made to her during the two interviews.

The court repeatedly stated that S's statement that she had engaged in sexual intercourse with a boy was inadmissible because it would violate the rape shield statute. The court also stated, however, that it would hear argument from the defendant regarding the admissibility of the "prior inconsistent statement." The court then asked the defendant how he intended to lay the foundation for S's statement that no adult had touched her without eliciting any testimony regarding the precluded statement. The court's framing of the question suggests that it believed that only two statements were at issue—S's statement regarding sexual intercourse with the fourteen year old, and her statement that no adult had touched her. During the ensuing colloquy between the court and counsel, the confusion regarding the substance of the statements that S had made to Couture, and the date on which she made each statement, became more pronounced. For example, to lay

the foundation, the defendant proposed first to ask Couture whether she had interviewed S, then to ask her whether during those interviews S had made "any statements about an adult ever sexually assaulting her in any way?" When the court inquired whether that represented the extent of the defendant's proposed examination of Couture, counsel responded: "My question was just what my—this is the ninth, the specific question. You were there for an exam—she was there for an examination and that's it. And during that examination did she make any statements regarding being sexually assaulted by an adult at any time? No. Is that reflected in your records? Yes. Thank you. I'm not going anywhere about anything except that. That statement that she did not—it's yet another instance where she had an opportunity to make the allegations and didn't."

This exchange suggests that the defendant sought only to elicit a statement from Couture that S had stated on August 9, 2004, that no adult had sexually assaulted her.[10] Nothing about the exchange indicates that the defendant sought to elicit testimony from Couture regarding two separate statements made during two separate interviews, or that the court understood the defendant to be drawing a distinction between those statements. The focus of the colloquy at that point was on the August 9, 2004 interview, and the statement—at least the one that the defendant sought to have admitted—had been recast by the defendant as a denial that she had been sexually assaulted by an adult. The only other statement mentioned during this part of the colloquy was the inadmissible statement regarding the sexual intercourse with a fourteen year old, and the defendant assured the court that he would not delve into that subject and had no intention of going beyond his proposed questioning. That is, the defendant indicated that he intended to confine his questioning to whether S had been sexually assaulted by an adult.

The state then remarked and further confused the issues. It stated that it did not object to the defendant's proposed line of questioning, but then recharacterized the defendant's proposed question as referencing *both* interviews: "[You have] got a visit and you asked her whether or not [S had] ever had sexual intercourse with anyone, and she said no on that first occasion; I have—I have a strenuous objection to what she said on the second occasion which is that [she] had sex with another person. That is of—I think that first of all, the questions being asked that I'm not objecting to is of limited probative value to say the least. . . . But, the other one, the second visit where she says she had sex with that boy." Otherwise stated, the state indicated that it agreed with the defendant's proposal to question Couture regarding S's alleged August 9, 2004 statement that she had not been sexually assaulted by an adult, and then claimed that the defendant proposed to question Couture regarding S's August 2, 2004 statement that she

had not had sexual intercourse with anyone. At no point in the colloquy, with the exception of the court's initial question to the defendant, did anyone refer to S's statement that no adult had touched her. By the time that the court made its ruling, it was not clear which statement or statements were at issue, with the exception that throughout the entire exchange, the court remained clear that, whatever the scope of the defendant's proposed examination of Couture, S's statement that she had engaged in sexual intercourse with a fourteen year old was inadmissible.

With respect to the remainder of S's statements to Couture, the court stated that, although S's statement that she had not had sexual intercourse with anyone had limited probative value, the court would allow the defendant to elicit testimony regarding that statement. The court emphasized, however, that "[Couture] has got to be forewarned, *under no circumstances is she to mention anything other than that one interview and that statement made*. I do not want her referencing any activity with a boy of [S's] own age, or sexual intercourse, or anything of that nature. Because if that comes out, we've got a real problem here." (Emphasis added.) Defense counsel responded: "And I have consistently said that that is not what I'm asking her. Nor do I intend to go into that area at all." The court's ruling did not mention S's statement that no adult had touched her. The court's ruling suggests that it shared the state's understanding that only two statements were at issue: S's statement on August 2, 2004, that she had not had sexual intercourse with anyone, and S's statement on August 9, 2004, that she had had sexual intercourse with a fourteen year old. The court's ruling clearly allows testimony regarding the former and precludes testimony regarding the latter. The effect of the court's ruling on S's third statement, that no adult had touched her, is less clear.

It is possible to interpret the court's ruling to confine the defendant to questioning Couture about "one interview," namely, the August 2, 2004 interview. That interpretation would be consistent with the defendant's claim that the court precluded him from questioning Couture regarding S's August 9, 2004 statement that no adult had touched her. That interpretation does not, however, explain the court's failure to mention that statement in its ruling, and does not account for the confusing colloquy that preceded the court's ruling or give adequate effect to the court's preeminent concern about the "real problem"—the preclusion of S's statement that she had engaged in sexual intercourse with a boy. In light of the confusion dominating the exchange, and also in light of the court's concern to ensure that the proffered testimony did not violate the rape shield statute, the more reasonable interpretation of the court's ruling is that the court only intended to preclude testimony regarding S's statement as to sexual

intercourse with the fourteen year old, and intended to allow the defendant to elicit testimony regarding the remaining two statements. This interpretation is consistent with the court's ruling permitting the defendant to elicit testimony from Couture that S had stated that no adult had sexually assaulted her.

Even if we assume that either interpretation of the court's ruling is reasonable, and therefore conclude that the court's ruling was ambiguous, the defendant failed to ask the court to clarify the ruling. "[I]f defense counsel believed that the trial court's ruling was unclear, it was defense counsel's obligation to seek further clarification." *State* v. *Lugo*, 266 Conn. 674, 685, 835 A.2d 451 (2003). Moreover, when the defendant subsequently questioned Couture in the presence of the jury, he neither sought to question her regarding S's statement that no adult had touched her nor sought to elicit testimony from her that S had denied being sexually assaulted by an adult, testimony that the court specifically had ruled permissible. Instead, he confined his questions to the August 2, 2004 interview, and asked Couture whether S had told her on that day that she had not been sexually active with anyone. Accordingly, the defendant abandoned the claim. See Practice Book § 61-10 (appellant's responsibility to provide court with record that is complete and correct, including all trial court decisions); see also *State* v. *Lugo*, supra, 685.

The judgment is affirmed.

In this opinion the other justices concurred.

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[1] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3), which provides in relevant part: "The following matters shall be taken directly to the Supreme Court . . . an appeal in any criminal action involving a conviction for a . . . class A felony . . . for which the maximum sentence which may be imposed exceeds twenty years . . . ."

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

Although § 53-21 (a) has been amended since the actions giving rise to this appeal; see Public Acts 2007, No. 07-143, § 4; the changes are not relevant to this appeal. In the interest of clarity, we refer herein to the current revision of the statute.

[3] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

[4] The defendant's brief to this court also challenged his conviction on

the basis of the trial court's ruling precluding the defendant from eliciting testimony from Couture regarding S's statement that she had had sexual relations with a fourteen year old boy. The defendant claimed that the testimony was relevant to impeach the credibility of S. During oral argument before this court, however, the defendant withdrew that claim and stated that he does not challenge the trial court's ruling with respect to that particular statement.

[5] Kids In Crisis is an organization that provides crisis counseling and temporary shelter for children. See http://www.kidsincrisis.org/ (last visited June 19, 2012).

[6] F tried to prevent the defendant from seeing all of her children following A's complaint, but the defendant sued for visitation rights with M and G, and prevailed.

[7] The rape shield statute, General Statutes § 54-86f, provides: "In any prosecution for sexual assault under sections 53a-70, 53a-70a, and 53a-71 to 53a-73a, inclusive, no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. Such evidence shall be admissible only after a hearing on a motion to offer such evidence containing an offer of proof. On motion of either party the court may order such hearing held in camera, subject to the provisions of section 51-164x. If the proceeding is a trial with a jury, such hearing shall be held in the absence of the jury. If, after hearing, the court finds that the evidence meets the requirements of this section and that the probative value of the evidence outweighs its prejudicial effect on the victim, the court may grant the motion. The testimony of the defendant during a hearing on a motion to offer evidence under this section may not be used against the defendant during the trial if such motion is denied, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify as part of the defense."

[8] The defendant ultimately did not question Couture regarding the physical examination and does not claim that the trial court improperly precluded him from doing so.

[9] Because Couture was unable to perform the physical examination on August 2, 2004, following an interview with S, she rescheduled the exam for August 9, 2004.

[10] In contending that the trial court's alleged improper preclusion of S's statement that no adult had touched her constitutes harmful error, the defendant argues that the two statements are not identical, and that the statement that no adult had touched her is more precise.