

STATE OF LOUISIANA

NO. 21-K-283

VERSUS

FIFTH CIRCUIT

PATRICK BOLDEN

COURT OF APPEAL

STATE OF LOUISIANA

ON APPLICATION FOR SUPERVISORY REVIEW FROM THE
TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 19-3781, DIVISION "I"
HONORABLE NANCY A. MILLER, JUDGE PRESIDING

June 30, 2021

JUDE G. GRAVOIS
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Jude G. Gravois, and Stephen J. Windhorst

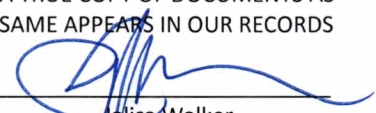
WRIT DENIED

JGG

FHW

SJW

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Alisa Walker
Deputy, Clerk of Court

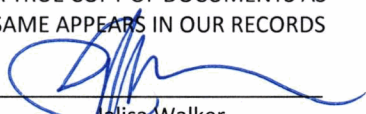
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Thomas J. Butler

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PATRICK BOLDEN

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FIFTH CIRCUIT COURT OF APPEAL
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Alisa Walker
Deputy, Clerk of Court

GRAVOIS, J.

Relator, Patrick Bolden, seeks this Court's supervisory review of the trial court's May 14, 2021 ruling which granted the State's motion in limine, prohibiting relator from questioning the victim, A.T., about prior false allegations of sexual assault allegedly made by her. For the following reasons, we find no abuse of discretion in the trial court's ruling, and thus deny the writ application.

On November 19, 2020, the Jefferson Parish District Attorney filed a bill of information charging relator with indecent behavior with a juvenile (D.O.B. 7/7/2003) in violation of La. R.S. 14:81. The State filed a Motion in Limine to Preclude Questioning Victim A.T. About Prior Allegations of Sexual Assault Pursuant to Louisiana Code of Evidence Article 412. Relator opposed the motion. An evidentiary hearing on the motion was held on May 11, 2021, pursuant to *State v. Smith*, 98-2045 (La. 9/8/99), 743 So.2d 199, and on May 14, 2021, the trial court issued a written ruling granting the State's motion in limine. This timely writ application followed.

ANALYSIS

In its motion, the State requested that the trial court "preclude any questioning of A.T. regarding prior allegations of sexual conduct perpetrated against her pursuant to La. C.E. art. 412 and applicable jurisprudence." The State's motion outlined an incident that occurred in September of 2018 when a mandated reporter (a teacher at the victim's school) contacted the Jefferson Parish Sheriff's Office because the reporter had heard rumors that the victim, A.T., and another individual were having sexual relations. The State noted that the Jefferson Parish Sheriff's Office investigated the incident and determined that no crime had been committed and that A.T. denied all allegations of sexual contact with the individual.

In his Opposition to the State's motion in limine, relator noted a different incident involving the victim and an individual, T.S., an adult, where the victim allegedly met with a New Orleans police officer in June of 2018 and recounted that she had had sexual intercourse with this person a month earlier. Defense counsel's opposition stated that A.T. was diagnosed with a sexually transmitted disease at Children's Hospital, but that T.S.'s test was negative. According to the opposition, A.T. said she had proof on her cell phone that she and T.S. had had sex, in the form of corroborating text messages, but these messages were not produced in the police report or otherwise. Further, defense counsel stated that he would call T.S. as a witness at trial, where T.S. would deny having sexual relations with A.T. Defense counsel stated that the Orleans Parish investigation remained open and that T.S. had not been arrested. These factors, defense counsel argued, showed that A.T.'s report to the New Orleans Police officer that she had had sexual relations with T.S. was false.

The trial court took the matter under advisement and issued a written judgment on May 14, 2021. Therein, the court found that as to the Orleans Parish incident, there was insufficient evidence for a reasonable jury to determine that the victim made a false allegation of sexual assault. The trial court stated that the State produced the New Orleans Police Department's investigative report and that it could not be determined from the report whether the victim's allegations were true or false. The court stated that no other evidence was introduced to support relator's assertion of falsity. Regarding the Jefferson Parish incident, the trial court noted that it did not involve an allegation of sexual assault by the victim and therefore did not fall under *State v. Smith, supra*.

In this writ application, relator argues that the trial court erred in prohibiting the introduction of "clear and over-whelming" evidence that the victim has

previously falsely accused another person of sexual assault, when the entirety of the State's case is based solely on the victim's testimony.

As a general rule, a party may attack the credibility of a witness by examining him or her concerning any matter having a reasonable tendency to disprove the truthfulness of his or her testimony. La. C.E. art. 607(C). In cases involving sexually assaultive behavior, however, La. C.E. art. 412 bars the introduction of evidence of the victim's past sexual behavior, except under limited circumstances as set forth in the article. Specifically, La. C.E. art. 412 prohibits evidence regarding the past sexual behavior of the victim in sexual assault cases, except (1) when there is an issue of whether the accused was the source of semen or injury, and (2) when the past sexual behavior is with the accused and there is an issue of whether the victim consented to the charged sexually assaultive behavior.¹

La. C.E. art. 412 does not apply when a defendant attempts to use evidence of a victim's false allegations of improper sexual behavior to impeach the victim's credibility. *Smith*, 743 So.2d at 202-03. However, the admissibility of such evidence is still subject to all other standards for admissibility under La. C.E. arts. 403, 404, 607, 608, and 613. *State v. Bolden*, 03-266 (La. App. 5 Cir. 7/29/03), 852 So.2d 1050, 1061-62; *State v. Wallace*, 00-1745 (La. App. 5 Cir. 5/16/01), 788 So.2d 578, 587, *writ denied*, 01-1849 (La. 5/24/02), 816 So.2d 297.

In considering a motion in limine seeking to admit or exclude such evidence, the trial judge must evaluate the evidence presented to determine whether reasonable jurors could find, based on the evidence presented by the defendant,

¹ La. C.E. art. 412(A) provides, in pertinent part:

- (2) Other evidence; exceptions. When an accused is charged with a crime involving sexually assaultive behavior, evidence of specific instances of the victim's past sexual behavior is also not admissible except for:
 - (a) Evidence of past sexual behavior with persons other than the accused, upon the issue of whether or not the accused was the source of semen or injury; ... or
 - (b) Evidence of past sexual behavior with the accused offered by the accused upon the issue of whether or not the victim consented to the sexually assaultive behavior.

that the victim had made prior false accusations. *Smith*, 743 So.2d at 203.

Assuming that burden has been met, all other standards for the admissibility of evidence apply. *Id.*; *See also* La. C.E. arts. 403, 404, 607, 608, and 613. The trial court's determination regarding the relevancy and admissibility of evidence will not be overturned on appeal absent a clear abuse of discretion.² *State v.*

Hernandez, 11-712 (La. App. 5 Cir. 4/10/12), 93 So.3d 615, 628, *writ denied*, 12-1142 (La. 9/28/12), 98 So.3d 834.

Additionally, while a defendant has a constitutional right to present a defense, constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, but rather only that which is deemed trustworthy and has probative value. *State v. Governor*, 331 So.2d 443, 449 (La. 1976); *State v. Gaal*, 01-376 (La. App. 5 Cir. 10/17/01), 800 So.2d 938, 950, *writ denied*, 02-2335 (La. 10/3/03), 855 So.2d 294.

In *Smith, supra*, the victim admitted that she made prior accusations of improper sexual behavior and two witnesses corroborated that fact. At least one independent witness testified that the victim recanted those accusations. *Smith*, 743 So.2d at 200-01, 203. *Smith* is distinguishable from the instant case in that defendant herein offered no evidence that A.T. retracted her prior allegation of abuse, the subject of the Orleans Parish ongoing investigation, and there was no independent witness to testify that the allegation was false.

The fact that no charges have been brought against T.S. in Orleans Parish is not determinative that A.T.'s allegations against him are false. In *State v.*

Cervantes, 18-535 (La. App. 5 Cir. 2/27/19), 266 So.3d 569, *writ denied*, 19-662

² "Relevant evidence" is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than without the evidence. La. C.E. art. 401. The trial judge in deciding the issue of relevancy must determine whether the evidence bears a rational connection to the fact at issue in the case. *State v. Williams*, 341 So.2d 370, 374 (La. 1976). Except as limited by the Code of Evidence and other laws, all relevant evidence is admissible and all irrelevant evidence is inadmissible. La. C.E. art. 402. Although relevant, evidence may nonetheless be excluded if the probative value is substantially outweighed by its prejudicial effect. *See* La. C.E. art. 403.

(La. 9/24/19), 279 So.3d 931, the defendant argued that the trial court erred in granting the State's motion in limine to exclude allegations of sexual assault previously made by the victim against another individual, which did not result in criminal charges against that individual. This Court noted that at the hearing on the motion, the defendant only argued that the victim's reports of the other allegation were inconsistent, which was not evidence that the victim's prior allegation of abuse was false. This Court held that the trial court did not abuse its discretion in granting the State's motion in limine prohibiting the defendant from questioning the child victim about her allegation of sexual abuse against an individual other than the defendant. *Id.* at 572-74.

Further, in *State v. Bryant*, 12-591 (La. App. 5 Cir. 2/21/13), 110 So.3d 1191, *writ denied*, 13-648 (La. 10/11/13), 123 So.3d 1218, this Court found that the defendant's mere assertion that a victim's allegations were false did not meet the *Smith* test for admissibility. *Bryant*, 12-591 at 12, 110 So.3d at 1198 (citing *Wallace*, 788 So.2d at 584, *writ denied*, 01-1849 (La. 5/24/02), 816 So.2d 297, 587-88).³

Based on the foregoing, we find that the trial court properly granted the State's motion in limine disallowing the questioning of the victim about her allegations of sexual abuse against an individual other than defendant. First, none of the exceptions to La. C.E. art. 412 apply in this case. There was no issue as to whether defendant was the source of semen or injury and the evidence of past sexual incidents was with persons other than relator. Second, at the hearing, relator asserted that because T.S. did not have a sexually transmitted disease and A.T. did, the victim's allegation had to be false. However, although relator argued

³ This Court has previously upheld the trial court's grant of the State's motion in limine where the victim had not recanted the earlier allegation, and there was no independent witness to testify that the allegation was false. *See State v. Gros*, 17-374 (La. App. 5 Cir. 10/17/01), 800 So.2d 938, 950, *writ denied*, 18-473 (La. 12/17/18), 259 So.3d 343.

that the incident impacted A.T.'s credibility, he never showed, or even attempted to show, that her allegations were false through testimony or evidence. Relator's mere assertion that A.T.'s allegation was false does not meet the *Smith* test for admissibility.

Regarding the incident from Jefferson Parish, the trial court correctly noted that the alleged victim did not make an allegation of sexual abuse, false or otherwise, against another individual. That matter involved a mandatory reporter's report of a rumor at the victim's school of sexual activity involving the minor and another individual, and the victim denied a sexual relationship. Thus, we agree with the trial court that *State v. Smith* does not apply to that incident.

CONCLUSION

For the foregoing reasons, we find that the trial court did not err in granting the State's motion in limine. Accordingly, this writ application is denied.

WRIT DENIED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



FIFTH CIRCUIT

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **JUNE 30, 2021** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

21-K-283

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE NANCY A. MILLER (DISTRICT JUDGE)

THOMAS J. BUTLER (RESPONDENT)

A. BRUCE NETTERVILLE (RELATOR)

MAILED

NO ATTORNEYS WERE MAILED