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STATE OF CONNECTICUT *v.* LUIS NORBERTO
MARTINEZ
(AC 26180)

Flynn, C. J., and Bishop and Foti, Js.

Argued October 10, 2007—officially released March 25, 2008

(Appeal from Superior Court, judicial district of
Hartford, Espinosa, J.)

Annacarina Del Mastro, senior assistant public
defender, for the appellant (defendant).

Jessica Probolus, special deputy assistant state's
attorney, with whom, on the brief, were *James E.*

Thomas, former state's attorney, and *Anne F. Mahoney*, senior assistant state's attorney, for the appellee (state).

Opinion

FOTI, J. The defendant, Luis Norberto Martinez, appeals from the judgment of conviction, rendered after a jury trial, of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), sexual assault in the first degree (alleging penile penetration) in violation of General Statutes § 53a-70 (a) (1), sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1) and risk of injury to a child in violation of General Statutes § 53-21 (a) (2).¹ On appeal, the defendant claims that the trial court improperly precluded him from questioning the alleged victim about two prior incidents in which she claimed that she was sexually assaulted without first holding a hearing to determine the relevance of that evidence to his claims as to her credibility.² We agree with the defendant and therefore reverse the judgment of the trial court and remand the matter for a new trial.

On February 13, 2002, the alleged victim, J,³ was thirteen years old and lived on the second floor of a multi-family house with her mother and two sisters. The defendant, who was twenty-one years old, lived with his mother on the third floor of the same house. On the evening of February 13, 2002, J walked by herself across the street to a store to purchase a sticker. When J came back from the store, she saw the defendant in front of her apartment. J testified that the defendant then grabbed her by the arm and took her to the back of the house, where he proceeded to force his hands inside her pants, touch her buttocks and put his fingers inside her vagina. He then grabbed her arm and took her up the back stairs to his apartment. The defendant took J to a bedroom, pushed her on the bed, pulled down her pants and forced his penis into her vagina. The bedroom door was partially open, so J was able to see the defendant's sister in the living room.

When the defendant was finished with J, he pulled her into the bathroom where he covered her mouth and told her not to scream. At that point, the defendant's sister knocked on the door to tell the defendant that he had a telephone call. The defendant then rushed J out of the apartment through the back door. J ran down the stairs with the defendant behind her. The defendant ran across the street to his sister's apartment. When J arrived at the front of the house, she ran upstairs to her apartment and immediately disclosed to her mother what had happened. Soon thereafter, J was taken to a hospital where physicians examined her and performed a sexual assault examination.

The defendant was arrested on the night of the sexual assault. With regard to his conduct at the time of J's assault, the defendant told the police that he had been in his mother's bedroom using drugs when his sister walked into the apartment. He then stated that he ran

to the bathroom, flushed the drugs down the toilet and left the apartment by way of the back stairs so his sister would not see him high on drugs. He claims, therefore, that the encounter with the victim never occurred. Additional facts will be set forth as necessary.

The defendant claims that the court improperly refused to hold an evidentiary hearing for the purpose of allowing him to question J about two prior complaints of sexual abuse. We agree.

The following facts and procedural history are relevant to our disposition of the defendant's claim. The state filed a motion in limine seeking to preclude the defendant from offering into evidence J's prior sexual conduct. The defendant presented evidence that, prior to the incident in question, J had accused both her stepuncle and her brother of sexually assaulting her in two different incidents. Both men pleaded guilty.⁴ The defendant then filed an objection to the motion in limine and requested a hearing on whether he should be permitted to question J under one of the exceptions to the rape shield statute, General Statutes § 54-86f.⁵ The defendant argued that the evidence was relevant to two issues: J's credibility and whether the defendant used force in kidnapping and sexually assaulting her.⁶ As part of his offer of proof, the defendant presented to the court two police reports based on complaints filed by J.⁷ One police report concerned the incident with J's brother, and the other involved the incident with J's stepuncle. In addition to offering the police reports, the defendant also argued that he should be allowed to question J about falsely reporting that her brother had forced her against her will to have sex. The defendant cited the police reports for his assertion that J may have made false accusations against her brother. First, he noted that in the police report regarding the sexual assault by J's brother, J's sister, M, had stated that this was the second time that she had observed J having sex with their brother. On a previous occasion, M had observed J having sex with her brother on his bed. With regard to the incident at issue in the police report, M stated that she had been watching television when the brother had come into the room to tell her that J wanted him to shower with her. M stated that a few minutes later, she opened the bathroom door and observed J and her brother having sex in the shower. In contrast, J had reported to the police that when she got out of the shower, her brother came into the bathroom and began to touch her "private parts" inappropriately. She stated that she attempted to get away, but her brother pulled her by the hand into his bedroom, closed the door, put J on the floor and began having sex with her.

The defendant also noted that in the police report regarding the incident with J's stepuncle, a police officer stated that a social worker had told him that J began to change her story about her brother's having sexually

assaulted her. The officer stated that J had told the social worker that, in fact, it was her stepuncle who actually had touched her inappropriately. The defendant argued that this statement by J to the social worker coupled with M's account of the incident with J's brother served to call J's credibility into question. The defendant wanted to question J about what she told the police regarding the incident with her brother and about whether she changed her story regarding that incident.

The court found that the prior incidents of sexual assault were not relevant. The court, therefore, limited the defendant's cross-examination of J to asking her whether she ever had made a false report regarding sexual assault. In addition, the court found that the incidents were protected by the rape shield statute and that, even if the prior incidents were relevant, their probative value did not outweigh their prejudicial impact. The defendant renewed his objection on the following day on the basis of *State v. DeJesus*, 270 Conn. 826, 841, 856 A.2d 345 (2004). He stated that the prior incidents were relevant to J's credibility regarding the element of force and to whether the assault occurred at all. The court refused to change its ruling. The court did state, however, that the defendant's defense, at this point, was that he did not commit the assault but that if the scope of the defense changed later on in the trial, the court would reconsider its ruling.⁸

As a preliminary matter, we set forth the legal principles that guide our resolution of the defendant's claim. "[A] determination that a defendant is entitled to an evidentiary hearing involving the victim's testimony is . . . subject to the discretion of the trial court." *State v. Manini*, 38 Conn. App. 100, 111, 659 A.2d 196, cert. denied, 234 Conn. 920, 661 A.2d 99 (1995). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the trial court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *Id.*, 112.

"For a defendant to introduce evidence of a victim's prior sexual conduct, the proffered evidence must fall into one of the four delineated exceptions provided by the rape shield statute. The evidence is admissible only after a hearing on a motion to offer such evidence containing an offer of proof." *Id.*, 106. In *Manini*, the court concluded that "§ 54-86f requires a defendant to make a preliminary showing that the evidence sought to be explored in the evidentiary hearing is relevant. The showing must be sufficient to enable the trial court to make an informed ruling in connection with the exercise of its discretion on the issue. That showing must be made as part of the offer of proof as a prerequisite to obtaining an evidentiary hearing to determine the

admissibility of evidence of the victim's prior sexual conduct." *Id.*, 114.

"The defendant bears the burden of establishing the relevance of the proffered testimony." *State v. Sullivan*, 244 Conn. 640, 648, 712 A.2d 919 (1998). "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree." (Citations omitted; internal quotation marks omitted.) *State v. Cerreta*, 260 Conn. 251, 261–62, 796 A.2d 1176 (2002).

In the present case, the defendant offered two police reports as part of his offer of proof as to why J's past sexual conduct was relevant. Specifically, the defendant pointed out two things from the police reports. First, he noted that J's sister, M, had stated that this was the second time she had observed J having sex with her brother. Additionally, M stated that with regard to the incident with J's brother, J's brother had told M that J wanted her brother to shower with her, thereby implying the act of sex between J and her brother may have been consensual. Second, the defendant noted that the police officer writing the report had been told by a social worker interviewing J that after J made her initial complaint, she had changed her story regarding her brother.⁹ Finally, the defendant stated that in the police report regarding the incident with J's brother, J had stated that her brother had used force to coerce her into having sex with him. Similarly, in the present situation involving the defendant, J had claimed that the defendant had used force in sexually assaulting her. Therefore, the defendant argued, J's prior sexual conduct was relevant to both J's credibility and to whether the defendant had used force, if he had committed the sexual assault at all.

We agree with the defendant in part. After an examination of the record, we conclude that the police reports provided sufficient proof for the court to be able to determine that J's prior sexual conduct was relevant to whether the defendant had used force in sexually assaulting J. If the defendant had been able to establish that J's brother did not use force, he might have been able to cast reasonable doubt as to whether the defendant had used force in having sex with J. Because we conclude that J's prior sexual conduct was relevant to whether the defendant used force in committing the sexual assault, we do not need to address whether it was relevant to J's credibility, as the defendant argues.

We conclude that the defendant's offer of proof satisfied the requirement of demonstrating a sufficient basis

for the court to decide whether to allow the defendant to present J's testimony in an evidentiary hearing under § 54-86f. Specifically, the defendant presented facts that tended to demonstrate the falsity of J's prior allegations. Cf. *State v. Smith*, 85 Conn. App. 96, 105, 856 A.2d 466 (2004), *aff'd*, 280 Conn. 285, 907 A.2d 73 (2006). Therefore, the court abused its discretion in refusing to grant the defendant an evidentiary hearing to determine the admissibility of evidence of J's prior sexual conduct.

The defendant offered evidence that would have been admissible under subdivision (4) (element of force) of § 54-86f. "The improper exclusion of evidence admissible under § 54-86f (4) is, necessarily, of constitutional magnitude because the statutory subdivision defines the standard of admissibility in terms of the exclusion of the evidence resulting in a violation of the defendant's constitutional rights.

"Normally, even when an evidentiary ruling has been determined to be both improper and of constitutional magnitude, the ruling will be reversed only if the state fails to prove beyond a reasonable doubt that the ruling was harmless to the defendant. . . . [H]owever . . . an evidentiary ruling that excludes evidence properly admissible under § 54-86f (4), contrary to evidence admissible under the other subdivisions of the statute, requires reversal with no additional evaluation of harm, because the establishment of materiality, in a constitutional sense, also establishes harm to the defendant. Thus, analysis of whether the state has proved beyond a reasonable doubt that the ruling was harmless to the defendant would only replicate the analysis already completed under the statute." (Citation omitted.) *State v. DeJesus*, *supra*, 270 Conn. 845.

The defendant claimed that the court improperly precluded evidence that was "relevant and material to a critical issue in the case, namely, whether the defendant kidnapped and had sex with the minor victim while using force." This evidence would have been admissible under § 54-86f (4) as evidence that was "so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights." General Statutes § 54-86f (4). Because the court precluded evidence properly admissible under § 54-86f (4), harm to the defendant was automatically established due to the materiality of the evidence not admitted. Therefore, a new trial is warranted.

The judgment is reversed and the case is remanded for a new trial.

In this opinion FLYNN, C. J., concurred.

¹ The trial court, *Espinosa, J.*, declared a mistrial as to a second count of sexual assault in the first degree (alleging digital penetration) in violation of § 53a-70 (a) (1) after the jury could not reach a unanimous verdict on this count. On November 19, 2004, the defendant was sentenced to a total effective term of twenty-five years imprisonment, execution suspended after twenty years, followed by five years of probation.

² The defendant also claims that the court denied his request for a state

funded DNA expert without holding an indigency hearing. Because the first issue is dispositive of this appeal and because the defendant has not persuaded us that this issue is likely to arise during a retrial, we need not resolve this second issue.

³ In accordance with our policy of protecting the privacy interests of the alleged victims of sexual abuse, we decline to identify the alleged victim or others through whom the alleged victim's identity may be ascertained. See General Statutes § 54-86e.

⁴ J's stepuncle pleaded guilty to a sexual assault charge, while J's brother pleaded guilty to risk of injury to a child.

⁵ General Statutes § 54-86f provides in relevant part: "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. . . ."

⁶ The use of force is an element of two of the crimes with which the defendant was charged. The defendant was charged with sexual assault in the first degree in violation of § 53a-70 (a), which 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"

The defendant was also charged with kidnapping in the first degree in violation of § 53a-92 (a), which provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually"

⁷ These police reports are marked in the file as court's sealed exhibits I and II.

⁸ In making its ruling on the admissibility of the alleged victim's testimony regarding prior incidents of sexual conduct, the court repeatedly presumed that the defendant's defense was that he did not perform the acts with which he was charged. The defense attorney, however, noted that the defendant had not presented a defense at that point. Furthermore, he stated that the defendant was "allowed to visit alternative defenses." The defense attorney argued that the defendant could present the defense that the defendant did not commit the sexual assault but also assert that if he did commit the sexual assault, then the alleged victim consented to the acts. Although the alleged victim's consent would not be a defense for the defendant, as she was only thirteen years old at the time the event occurred; see General Statutes § 53-21; her consent would negate the element of force, which the state had to prove for the crimes of sexual assault in the first degree and kidnapping in the first degree. See footnote 6 of this opinion. Our courts have recognized a defendant's right to present alternative, and even inconsistent, defenses at trial. See *State v. Miller*, 55 Conn. App. 298, 301, 739 A.2d 1264 (1999) ("[a] defendant is permitted to present inconsistent defenses to a jury"), cert. denied, 252 Conn. 923, 747 A.2d 519 (2000). Although the defendant had not presented a defense of consent prior to the court's making its ruling here, he still had a right to develop that defense of consent.

⁹ The dissent states that the offer of proof submitted by the defendant, in the form of the two police reports, contained double and triple hearsay. It should be noted that if the alleged victim had been allowed to testify concerning her prior sexual conduct, her testimony would not constitute hearsay. See *National Publishing Co. v. Hartford Fire Ins. Co.*, 94 Conn. App. 234, 253, 892 A.2d 261, cert. granted on other grounds, 278 Conn. 903, 896 A.2d 105 (2006); *State v. L'Minggio*, 71 Conn. App. 656, 668, 803 A.2d 408, cert. denied, 262 Conn. 902, 810 A.2d 270 (2002). The alleged victim's testimony regarding both her account of the sexual conduct involving her brother and her version of how and why she changed her story regarding

the incident with her brother would be a firsthand account of the events subject to cross-examination. Therefore, the court properly relied on the police reports presented by the defendant in deciding whether to allow him to cross-examine the alleged victim regarding her prior sexual conduct.