

Cite as 2010 Ark. 413

SUPREME COURT OF ARKANSAS

No. CR10-346

ANTHONY NICHOLAS DICANDIA
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 4, 2010

APPEAL FROM THE PERRY
COUNTY CIRCUIT COURT
[NO. CR2008-37]

HON. CHRISTOPHER CHARLES
PIAZZA, JUDGE,

AFFIRMED

JIM HANNAH, Chief Justice Anthony Nicholas Dicandia appeals from a criminal conviction for rape and a sentence of thirty years' imprisonment entered in Perry County Circuit Court. Dicandia asserts that the circuit court erred in excluding evidence under the rape-shield statute, Arkansas Code Annotated section 16-42-101 (Repl. 1999). We find no error and affirm. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(8).

The State alleged that Dicandia raped his daughter, M.L., while she was living with him, by digitally penetrating her and by forcing her to perform oral sex on him. M.L. told a friend about the sexual abuse. A call regarding the sexual abuse of M.L. was received at the child-abuse hotline, and an investigation was undertaken by the Arkansas State Police. A criminal information charging Dicandia with rape was filed August 11, 2008.

On February 11, 2009, Dicandia filed a Motion to Admit Evidence of Prior Sexual Conduct under section 16-42-101, asserting that the evidence was necessary to his defense and that he was entitled to an in camera, pretrial hearing to establish its admissibility. However, Dicandia did nothing to schedule a hearing, and the motion was first brought to the circuit court's attention on the morning trial was to commence. At that time, the circuit court heard arguments of counsel about the nature of the evidence but no evidence was offered at this hearing.

Dicandia's defense was that M.L. was lying to obtain a change of custody and placement with her grandmother in Virginia. Dicandia asserted that evidence of the prior sexual abuse in Virginia was relevant to prove that M.L. knew that a sexual-abuse allegation would cause her custody to be changed to her grandmother. He also argued that his mother's testimony that she overheard a conversation between the victim and another child regarding oral sex constituted evidence that M.L. had prior knowledge about oral sex that predated the present sexual-abuse allegations. The circuit court denied the motion, and Dicandia asserts that the denial was error.

The intent of the rape-shield statute is to shield victims of rape or sexual abuse from the humiliation of having their personal conduct unrelated to, and irrelevant to, the defendant's guilt discussed in front of the jury and the public. *Bond v. State*, 374 Ark. 332, 335-36, 288 S.W.3d 206, 209 (2008). By shielding the victim from unnecessary embarrassment, it is hoped that victims will be encouraged to participate in the prosecution of those who have assaulted them. *See State v. Sheard*, 315 Ark. 710, 716, 870 S.W.2d 212, 215-

16 (1994).

The rape-shield statute prohibits admission of evidence of a victim's prior sexual conduct at trial unless a written motion seeking the evidence is filed and the admissibility of the evidence is determined in a pretrial, in camera hearing as prescribed by Arkansas Code Annotated section 16-42-101(a)–(c). At the in camera hearing, the defendant must offer the evidence of prior sexual conduct. *See* Ark. Code Ann. § 16-42-101(c)(2)(C) (any “offered proof” deemed admissible must be set out in a written order stating what may be introduced and how it is to be introduced). Thus, the in camera hearing is an evidentiary hearing. *Id.* An evidentiary hearing is “[a] hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented.” *Black’s Law Dictionary* 789 (9th ed. 2009).

The in camera evidentiary hearing is mandatory. *Overton v. State*, 353 Ark. 697, 700, 120 S.W.3d 76, 78 (2003) (“This statute clearly provides that a hearing *shall* be held on a motion to admit evidence of a victim’s alleged prior sexual conduct.”) (emphasis in original). It was Dicandia’s obligation not only to file the motion but also to bring the matter to the circuit court’s attention. *Id.* Furthermore, under the rape-shield statute, it is incumbent upon the defendant to obtain the required evidentiary hearing. *Drymon v. State*, 316 Ark. 799, 808, 875 S.W.2d 73, 78 (1994). Dicandia failed to obtain the required evidentiary hearing, and the circuit court did not err in denying Dicandia’s motion.

Dicandia also argues that the testimony of the grandmother about the sexual content of a conversation she overheard between the victim and another child was not evidence of prior sexual conduct and that the circuit court erred in excluding it at trial under the rape-shield

statute. However, the grandmother's testimony was not proffered. It is not possible for this court to determine whether the evidence was evidence of prior sexual conduct, or if it was inadmissible hearsay. The failure to proffer evidence so that this court may make the requested determination precludes review of the issue on appeal. *Haltiwanger v. State*, 322 Ark. 764, 767, 912 S.W.2d 418, 420 (1995).

Affirmed.

William R. Simpson, Jr., Public Defender, by: *Margaret Egan*, Dep. Public Defender, for appellant.

Leslie Rutledge, Att'y Gen., by: *Eileen Harrison*, Ass't Att'y Gen., for appellee.