

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0616

STATE OF LOUISIANA

VERSUS

DONALD RAY ALLEN

Judgment Rendered: March 23, 2012.

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On Appeal from the  
32nd Judicial District Court,  
in and for the Parish of Terrebonne  
State of Louisiana  
District Court No. 544,987

The Honorable David W. Arceneaux, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

**CARTER, C.J.**

The defendant, Donald Ray Allen, was charged by grand jury indictment with one count of aggravated rape (Count 1), a violation of Louisiana Revised Statutes section 14:42A(4), and with one count of aggravated incest (Count 2), a violation of Louisiana Revised Statutes section 14:78.1. The defendant entered a plea of not guilty and waived his right to a jury trial. During the presentation of evidence, the state discovered in its file a witness statement that it had failed to disclose prior to trial. The defendant immediately moved for a mistrial, but this motion was denied by the trial court. The defendant renewed his motion for a mistrial at the close of the state's presentation of evidence, but the trial court denied that motion as well. The trial court subsequently found the defendant guilty as charged on both counts. The trial court denied the defendant's motions for new trial and post-verdict judgment of acquittal.

For his conviction on Count 1, the defendant was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. For his conviction on Count 2, the defendant was sentenced to fifteen years at hard labor. The trial court ordered that the defendant's sentences be served consecutively. The defendant filed a motion to reconsider his sentences, which was denied.

The defendant appeals, asserting as his only assignment of error the denial of his motion for mistrial.<sup>1</sup> For the following reasons, we affirm defendant's convictions and sentences.

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<sup>1</sup> The defendant also filed a "Motion to Summarily Reverse Conviction for Failure to Produce Transcripts," in that the record was lodged with this court without pertinent transcripts. Subsequent to the filing of the motion, the appellate record was supplemented and is now complete. Therefore, the defendant's motion is denied.

## FACTS

On January 15, 2009, J.T.,<sup>2</sup> the defendant's stepdaughter, visited the Terrebonne Parish Sheriff's Office and met with Detective Patrick Babin to discuss a criminal complaint that she had filed against the defendant on the previous evening. The subject matter of this complaint involved a domestic violence incident between J.T. and defendant that is unrelated to the allegations in the instant case. In her conversation with Detective Babin, J.T. stated that she had been the victim of sexual abuse by the defendant from the approximate ages of eight to fourteen years old and that her seven-year-old son, D.T., was conceived as a result of that sexual abuse. J.T. was twenty-two years old when she made this report to Detective Babin. The results of a paternity test later revealed that the defendant is the biological father of D.T. In an interview with Detective Nicole Voisin of the Houma Police Department and Detective Babin, the defendant admitted to engaging in sexual intercourse with the victim, but he stated that it occurred only one time, when J.T. was approximately fourteen or fifteen years old, and that J.T. had seduced him. The defendant was arrested and subsequently charged by grand jury indictment with one count of aggravated rape and one count of aggravated incest.

At trial, J.T. testified that the defendant had engaged in sexual intercourse with her on multiple occasions, beginning when J.T. was eight years old. J.T. described in great detail at least three distinct occasions when the defendant forced her to engage in vaginal sexual intercourse with him

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<sup>2</sup> In accordance with La. R.S. 46:1844W, the victim herein is referenced only by her initials, or referred to as "the victim." To further protect the identity of the victim, her biological family members are also referenced by their initials.

when she was younger than twelve years old. J.T. also described one distinct occasion of oral sexual intercourse with the defendant that occurred when she was approximately twelve or thirteen years old. J.T. stated that she had told her mother, A.A., “[o]ver fifty times” since she was eight years old that the defendant had raped her on multiple occasions, but A.A. never believed her claims.

When J.T. was thirteen years old, she became pregnant with her son, D.T. J.T. testified that when her mother initially asked her who fathered the child, J.T. responded that “G.R.” did.<sup>3</sup> J.T. stated that her mother did not believe that the defendant was the father, so J.T. changed her story to say that her cousin was D.T.’s father. J.T. also admitted that she later falsely changed her story again to name her boyfriend as the father of D.T. At trial, J.T. admitted to lying to her mother, her grandmother, and Office of Community Services (“OCS”) investigators about the identity of the father of D.T. J.T. stated that she refrained from telling OCS investigators that the defendant was the father of D.T. because she was afraid that she and her siblings would be put into foster homes.

A.A. testified at trial as a state witness and stated that J.T. had never said that the defendant raped her. A.A. did admit that J.T. told her that the defendant was D.T.’s father when J.T. initially found out about her pregnancy, but A.A. said that J.T. soon changed that story to say that her cousin was the father. A.A. testified that she asked the defendant whether he was D.T.’s father, but the defendant said that he was not, so she never worried about the issue again. Despite the results of the paternity test

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<sup>3</sup> “G.R.” is J.T.’s colloquial name for the defendant.

indicating that the defendant is the father of D.T., A.A. testified that she still did not believe that the defendant impregnated J.T.

The defendant did not testify at trial, nor did defense counsel call any witnesses on the defendant's behalf. The trial judge found the defendant guilty as charged on both counts. The trial judge noted that he was convinced beyond a reasonable doubt that the defendant had engaged in vaginal sexual intercourse with the victim at least four times before she was twelve years old. The trial judge also noted that he was convinced beyond a reasonable doubt that the defendant was the father of D.T., who was conceived with J.T., his stepdaughter, when she was thirteen years old.

#### **ASSIGNMENT OF ERROR**

In his sole assignment of error, the defendant argues that the trial court erred in denying defendant's motion for a mistrial when a witness statement allegedly constituting *Brady*<sup>4</sup> material was discovered after the trial had already commenced. Specifically, the defendant contends that a witness statement written by A.A. during the investigation of the instant offenses contained exculpatory material that was relevant to his ability to prepare a defense.

The defendant filed a motion seeking pretrial discovery under Louisiana Code of Criminal Procedure article 718. During cross-examination of state witness Detective Voisin, it was established that the victim's mother had given a written statement to the police. The prosecutor interjected during this testimony that A.A.'s statement was not provided to the defendant because it contained no *Brady* material. After Detective

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<sup>4</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

Voisin's testimony, the state discussed the existence of A.A.'s statement with Detective Voisin and subsequently discovered that a copy of this statement was located in the state's file. During a break in the trial, the state admitted to the trial court that a copy of this statement had not been provided to the defendant, even though it appeared to contain *Brady* material, because the state was unaware of its existence until Detective Voisin had testified. The state noted that this statement had been inadvertently tucked behind a search warrant return for the defendant's DNA sample.

In the statement, which was written during the investigation of the instant offenses, A.A. stated:

[J.T.] didn't tell me anything about her stepdad until she was about 18-20 [years old,] and she told me that he was laying [sic] down with my daughter. She said it every time she would get mad. When she wasn't mad no more[,] she would tell me she was sorry and she was talking out of her head. When she at [sic] one of [the] elementary schools someone came and talked to us about it. They talked to her and then they told me they was going to drop it because [J.T.] said that [the defendant] didn't do anything.

After being provided with this statement, defense counsel moved for a mistrial, alleging that the late disclosure of A.A.'s statement violated the defendant's due process rights and affected the defendant's ability to challenge the credibility of the victim. The trial court denied the defendant's motion for a mistrial, noting that neither the victim nor A.A. had testified in this case. The trial court agreed with the state's argument that the late disclosure of A.A.'s statement would only result in unfairness to the defendant in the event J.T. denied making such a statement to OCS investigators because the defendant might then need to secure an additional witness in order to attack J.T.'s credibility. The trial court agreed to revisit

the matter after the presentation of all of the evidence in the case. The defendant's renewed motion for a mistrial on these grounds was again denied after the state rested its case.

Article 718 requires that, "on motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect . . . documents . . . which are within the possession, custody, or control of the state, and which: (1) are favorable to the defendant and which are material and relevant to the issue of guilt or punishment." In pertinent part, Article 729.5A of the Louisiana Code of Criminal Procedure provides for sanctions for the failure to comply with the statutory discovery procedures as follows:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Chapter or with an order issued pursuant to this Chapter, the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate.

Mistrial is a drastic remedy and should be declared only when unnecessary prejudice results to the accused. *State v. Smith*, 430 So. 2d 31, 44 (La. 1983). The determination of whether prejudice has resulted lies within the sound discretion of the trial judge. *Id.*

In his brief, the defendant contends that defense counsel was not provided with A.A.'s written statement until "minutes before she was called to the stand by the state." However, our review of the record reveals that while defense counsel was provided with this statement immediately before J.T. testified, the defendant's trial was recessed for the evening in the middle of defense counsel's cross-examination of J.T. in order to allow defense counsel to inspect this and other documents that he had been provided with

during the first day of the defendant's trial. Given the simplistic nature of A.A.'s written statement, an overnight recess was sufficient for defense counsel to prepare for any further questioning of J.T. with regard to the statement. We also note that A.A. testified at trial after J.T., so the recess allowed sufficient time to prepare for her cross-examination as well.

The defendant also argues in his brief that the late disclosure of A.A.'s statement was not cured by J.T.'s admission about lying to OCS investigators about the paternity of her son because A.A.'s statement actually references statements allegedly made by J.T. regarding sexual abuse prior to her pregnancy. Thus, the defendant claims that the statements allegedly made by J.T. to someone at an elementary school reference the time period relevant for the more serious charge of aggravated rape. Accordingly, the defendant states that his ability to prepare a defense on this charge was unfairly hindered by not having access to this statement prior to trial.

When A.A. was questioned by the state regarding her statement, she initially testified that the people from the elementary school had interviewed J.T. about her pregnancy. In response to further questioning regarding the statement, A.A. responded that ladies who were "probably . . . with the State" questioned J.T. about sexual abuse, but A.A. testified this time that she could not remember whether this questioning occurred before or after it was discovered that J.T. was pregnant. Therefore, the only information in the record regarding the timing of the statements allegedly made by J.T. to someone at an elementary school is in the form of equivocal testimony from A.A.



Not all cases involving late disclosure of exculpatory evidence result in reversible error. *Smith*, 430 So. 2d at 42. We must determine whether the late disclosure so prejudiced the defendant that he was denied his constitutional right to a fair trial. *Id.* We note that A.A.'s written statement contains no concrete information about the identity of the persons to whom J.T. allegedly made a statement or about the timing of such a statement. Even if defense counsel had received this statement prior to trial, the vague nature of this statement, coupled with A.A.'s inability to remember specific information regarding it, leads this court to conclude that the trial court did not abuse its discretion in finding that the defendant was not prejudiced by the late discovery of A.A.'s statement.

J.T. admitted on the stand that after her initial disclosure to her mother that "G.R." was the father of her child, she lied to everyone, including her mother, grandmother, and OCS investigators about the identity of the father of her child. Despite these admitted fabrications, the trial court ultimately found J.T.'s testimony to be "very credible," "very forthright," and "very honest." Thus, the court made a credibility determination with regard to J.T.'s testimony and found her testimony to be credible, despite the statement written by A.A. that indicated J.T. once said the defendant did not do anything to her. Further, the trial court allowed defense counsel adequate time to prepare for his cross-examinations of J.T. and A.A. based on this statement by calling an overnight recess prior to the completion of the testimonies of J.T. and A.A. Therefore, the trial court did not abuse its discretion in concluding that the defendant was not entitled to a mistrial as a result of the late disclosure of A.A.'s statement.

This assignment of error is without merit.

**CONCLUSION**

For the foregoing reasons, the defendant's motion to summarily reverse his convictions for failure of the district court to lodge with this court a complete appellate record is denied, and the defendant's convictions and sentences are affirmed.

**MOTION TO SUMMARILY REVERSE DENIED;  
CONVICTIONS AND SENTENCES AFFIRMED.**