FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-874

CHRISTOPHER JASON
TRAFFANSTEAD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Santa Rosa County.
John F. Simon, Jr., Judge.

December 31, 2019

WINOKUR, J.

Christopher Jason Traffanstead appeals his judgment and sentence, arguing that the trial court violated his Sixth Amendment right to counsel by prohibiting defense counsel from relying on the information contained in the victim's comprehensive assessments, which denied him a meaningful opportunity to present a complete defense. We agree and reverse.

I.

Traffanstead was charged with two counts of sexual battery by a person in a position of familial or custodial authority and one count of lewd or lascivious molestation of child over the age of

twelve, but under the age of sixteen. The victim was K.T., Traffanstead's adopted son.

Prior to trial, defense counsel sent the State two comprehensive psychological assessments of K.T. dated before any of the abuse charged to Traffanstead occurred. Traffanstead obtained the reports legally as K.T.'s guardian during the adoption process. The assessments included interviews with K.T. and his prior foster family, and observations of mental health professionals. Defense counsel claimed that there were troubling incidents and findings in the assessments bearing on K.T.'s bias, credibility, and state of mind. In pertinent part, K.T.'s assessments made a referral diagnosis for a mood disorder, attention-deficit-hyperactivity-disorder (ADHD), and reactive attachment disorder (RAD).[1]

Upon receiving the assessments, the State filed a motion for protective order that would prohibit Traffanstead "from presenting any evidence or testimony which would violate the psychotherapist-patient privilege." After hearing, the trial court granted the State's motion, but allowed Traffanstead "to file [an] appropriate motion for the Court to review the documents in camera."

Traffanstead then filed a "Motion to Release Clinical Records" requesting that the trial court release K.T.'s assessments so that his defense could use them to prepare for trial and for cross-examination of K.T. The motion also stated that defense counsel wanted the assessments reviewed by an expert who could then testify at trial as to whether K.T. displayed any symptoms or indicators relating to RAD. The trial court denied Traffanstead's motion, finding that K.T.'s assessments were "covered by the

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[1] RAD is a recognized mental-health condition found in children who may have received grossly negligent care and do not form a healthy emotional attachment with their primary caregivers leading to an inability to regulate one's emotions, develop healthy relationships, and create a positive self-image. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 116-18 (4th ed. 2000) (DSM-IV).

psychotherapist-patient privilege" prohibiting Traffanstead "from questioning [K.T.] regarding any matters that are protected by the psychotherapist-patient privilege . . . ."

After reviewing the assessments in camera, the trial court stated that it was "going to stand by [its] ruling," denying Traffanstead the ability to use K.T.'s assessments at trial. The trial court, however, issued an order finding that some of the information "may be relevant to the [case]."

At trial, the State's case primarily relied on K.T.'s testimony that Traffanstead abused him on multiple occasions. K.T., however, admitted that his first specific allegation of abuse was not true. The State also presented forensic evidence that two items linked to Traffanstead's abuse contained a possible DNA match to K.T. Testimony was also elicited that crime scene technicians did not change gloves after each item of evidence was recovered from Traffanstead's residence as is recommended. For his part, Traffanstead denied ever abusing K.T. The jury found Traffanstead guilty as charged.

II.

Whether a privilege exists, as well as its parameters, is subject to de novo review. *See League of Woman Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 142 (Fla. 2013) (holding that whether a legislative privilege exists requires de novo review); *Stewart v. Draleaus*, 226 So. 3d 990, 994 (Fla. 4th DCA 2017) (finding that whether "[t]he trial court excluded this testimony and evidence based on its interpretation of the accident report privilege . . . is a question of law subject to de novo review"); *United Servs. Auto. Ass'n v. Roth*, 859 So. 2d 1270, 1271 (Fla. 4th DCA 2003) (noting that a review of an attorney-client privilege claim is de novo).

Florida law shields the disclosure of an individual's confidential communications and records regarding mental health treatment and diagnosis. § 90.503(2), Fla. Stat. This psychotherapist-patient privilege can be waived under three circumstances: 1) when the records are the subject of involuntary commitment proceedings involving the patient; 2) when the

mental examination was court-ordered; or 3) when the patient relies on an issue of their mental condition as part of their defense in litigation. § 90.503(4)(a)-(c), Fla. Stat. Additionally, any privilege can be waived by voluntary disclosure. § 90.507, Fla. Stat.

Neither Traffanstead nor the State dispute that K.T.'s comprehensive assessments fall under the psychotherapist-patient privilege. Furthermore, none of the three grounds for waiver under section 90.503(4), apply in this case. Similarly, the record does not contain any evidence that K.T., his current guardian, or psychotherapist waived the privilege.[2] Therefore, we must determine whether Traffanstead may overcome the privilege in order to cross-examine K.T. with relevant information regarding K.T.'s bias and credibility.

III.

While this is a matter of first impression for our Court, other courts have addressed this issue in the context of whether a trial court can conduct an in camera review of privileged records.

In *State v. Pinder*, 678 So. 2d 410, 411-12 (Fla. 4th DCA 1996), defense counsel sought to compel two sexual assault counselors to answer questions regarding what the victim told them, but the counselors refused citing Florida's sexual assault counselor-victim privilege. The trial court then requested that both counselors appear in camera to testify in order to determine if there was any exculpatory evidence that may outweigh the privilege. *Id*. at 412.

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[2] Traffanstead makes the alternative argument that the privilege was waived due to Traffanstead obtaining the assessments when he was K.T.'s lawful guardian. *See Slim-Fast Foods Co. v. Brockmeyer*, 627 So. 2d 104, 106 n.4 (Fla. 4th DCA 1993) (finding that "[h]olders of statutory privileges may waive protection by voluntary disclosure of privileged information to third parties"). This argument is unpersuasive because, as K.T.'s guardian, Traffanstead had the statutory authority to claim the privilege on K.T.'s behalf or waive it. § 90.503, Fla. Stat. Thus, Traffanstead was not a third party when he obtained the records.

On review, the Fourth District recognized that while "[l]egislatively created rules of privilege shield potential sources of evidence to foster relationships deemed socially valuable, [d]ue process requires that these competing interests be examined and weighed." *Id*. at 415. As a result, the court found that in order "[t]o obtain in camera review of confidential communications or records . . . a defendant must first establish a reasonable probability that the privileged matters contain material information necessary to his defense." *Id*. at 417. The court, however, quashed the trial court's order, holding that the defendant had "failed to make the requisite factual showing" and "alleged only that the victim ha[d] talked to the counselors." *Id*. at 416-17.

A few years after *Pinder*, the Third District considered "whether the defendant in a criminal case can invade the victim's privileged communications with her psychotherapist if the defendant can establish a reasonable probability that the privileged matters contain material information necessary to his defense" and "conclude[d] that the answer is no" finding that "no applicable constitutional provision authorizes an intrusion into matters protected by the psychotherapist-patient privilege." *State v. Famiglietti*, 817 So. 2d 901, 902 (Fla. 3d DCA 2002). Similarly, the Fifth District has held that the records pertaining to a victim's prior Baker Act hospitalizations fall under the privilege and are not subject to in camera review. *State v. Robertson*, 884 So. 2d 976 (Fla. 5th DCA 2004).

As opposed to *Pinder* and *Famiglietti*, the trial court here reviewed K.T.'s records in camera and found that some of the information was relevant. Thus, the concerns about a defendant engaging in a "fishing expedition" that were evident in both *Pinder* and *Famiglietti* are not implicated in this case.

The State argues that the information in the assessments is not relevant and overly prejudicial to K.T. We disagree. Traffanstead requested to use information contained in K.T.'s comprehensive assessments that weighed on his credibility and/or bias. Specifically, Traffanstead wished to have experts review the assessment so they could testify as to whether K.T.'s behaviors aligned with a RAD diagnosis, a disorder known to cause irritability and fearfulness with caregivers. This would help

explain K.T.'s concerning behavior with his prior foster family, including violent outbursts and incidents where K.T. was untruthful. These facts are relevant as to K.T.'s credibility or bias, especially in the context of allegations of child sexual abuse where K.T. was the outcry witness and arguably the only source of evidence for the State's case other than a possible DNA match on two items.

Credibility may be attacked by showing that a witness is biased. § 90.608(2), Fla. Stat. Similarly, a party can provide evidence of a defect in witness's capacity, ability, or opportunity to observe, remember, or recount an event in order to attack their credibility. § 90.608(4), Fla. Stat. The probative evidence that Traffanstead could have elicited from an expert review of K.T.'s assessments, in the context of a RAD diagnosis, implicate K.T.'s bias towards his caregivers, as well as his ability to perceive and understand events.

As a result, the information Traffanstead requested to use not only complemented his theory of defense—that K.T. was upset over being disciplined and fabricated the abuse allegations—but was also limited to a relevant and material issue in the case: K.T.'s bias and credibility. As such, the information is relevant and not overly prejudicial.

The State also argues that Florida's statutory psychotherapist-patient privilege does not provide for the exception Traffanstead requests and that defendants should not be able to vitiate this privilege without clear statutory authorization. As a general matter, we agree that "defendant's right to present relevant evidence is not unlimited." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (holding that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."). As a result, "[s]uch rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* (internal citations omitted).

Nonetheless, it is undeniable that strict adherence to procedural rules may give way to a defendant's right to present relevant evidence in his defense. "[T]his Court has made it clear

that 'judges have a duty to admit evidence that does not fit neatly within the confines of the Evidence Code in order to protect the defendant's right to a fair trial.'" *Payton v. State*, 239 So. 3d 129, 132 (Fla. 1st DCA 2018) (quoting *Curtis v. State*, 876 So. 2d 13, 19 (Fla. 1st DCA 2004)); *Lewis v. State*, 591 So. 2d 922, 925 (Fla. 1991) (finding that if "application of [the rape shield statute] interferes with confrontation rights, or otherwise precludes a defendant from presenting a full and fair defense, the rule must give way to the defendant's constitutional rights").

A defendant's Sixth Amendment right to confront adverse witnesses may implicate this rule. Accordingly, we agree with the *Pinder* court's conclusion that disclosure of privileged records "is required only under rare and compelling circumstances." 678 So. 2d at 416. This case is such an occurrence.[3]

IV.

Traffanstead was accused of sexual abuse where the majority of the State's evidence consisted of the victim's testimony. Traffanstead attempted to use K.T.'s comprehensive assessments for the limited purpose of having experts testify as to K.T.'s behavior in relation to RAD. Such testimony would have been relevant to K.T.'s bias and credibility and, in this specific circumstance, the trial court erred by denying him this opportunity. Accordingly, we vacate Traffanstead's conviction and remand for a new trial.

REVERSED and REMANDED.

ROBERTS and BILBREY, JJ., concur.

[3] We also reject the State's argument that any error in refusing to permit the evidence is harmless.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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Ashley Moody, Attorney General, and Virginia Chester Harris, Assistant Attorney General, Tallahassee, for Appellee.