No. 122059

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-14-2548
Plaintiff-Appellant,	)	
v.	)	There on Appeal from the Circuit Court of Cook County, Illinois No. 10 CR 4270
THEOPHIL ENCALADO,	)	The Honorable Matthew E. Coghlan,
Defendant-Appellee.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
EVAN B. ELSNER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2139
eelsner@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

A Cook County jury convicted defendant Theophil Encalado of three counts of aggravated criminal sexual assault, and the circuit court sentenced him to sixty years of imprisonment. C302-07; C352.[1] On appeal, a majority of the Illinois Appellate Court, First District, affirmed in part, but reversed and remanded for a new trial on the ground that the circuit court "abused its discretion when it refused to ask the venire members whether hearing evidence of prostitution would affect their ability to assess the evidence impartially." *People v. Encalado*, 2017 IL App (1st) 142548, ¶¶ 45-46; *see also id.* at ¶¶ 1, 6, 32.

No question is raised on the sufficiency of the pleadings.

ISSUES PRESENTED

1. Whether the circuit court correctly declined to question the venire regarding prostitution.

2. Whether any purported error in refusing defendant's proposed voir dire question on prostitution was harmless.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court allowed leave to appeal on May 24, 2017. *People v. Encalado*, No. 122059, 2017 WL 2297927 (Ill. May 24, 2017) (Table).

---

[1] "C__" denotes the common law record, and "R. __-__" denotes the report of proceedings.

STATUTE INVOLVED

725 ILCS 5/115-7 (2014)

a. In prosecutions for . . . aggravated criminal sexual assault . . . the prior sexual activity or the reputation of the alleged victim or corroborating witness under Section 115-7.3 of this Code is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim or corroborating witness under Section 115-7.3 of this Code with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim or corroborating witness under Section 115-7.3 of this Code consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted.

b. No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. Such offer of proof shall include reasonably specific information as to the date, time and place of the past sexual conduct between the alleged victim or corroborating witness under Section 115-7.3 of this Code and the defendant. Unless the court finds that reasonably specific information as to date, time or place, or some combination thereof, has been offered as to prior sexual activity with the defendant, counsel for the defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim or corroborating witness under Section 115-7.3 of this Code and the defendant. The court shall not admit evidence under this Section unless it determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. The evidence shall be admissible at trial to the extent an order made by the court specifies the evidence that may be admitted and areas with respect to which the alleged victim or corroborating witness under Section 115-7.3 of this Code may be examined or cross examined.

STATEMENT OF FACTS

Defendant was convicted of three counts of aggravated criminal sexual assault in June 2014. C302-07; C352; R. CCCC-70-73. The victim, Y.C., alleged that in March 2006, on the morning of her twenty-fourth birthday, defendant lured her into his car while she was walking to a local bakery,

drove her into an alley, and forcibly raped her orally, vaginally, and anally. *See generally* R. AAAA-17-59. A corroborating witness, C.C., further alleged that approximately three and a half years earlier, defendant had forcibly raped her as well, luring her into his car while she was walking from a nearby club. *See generally* R. BBBB-28-59.

Defendant's defense consisted of his own testimony that Y.C. and C.C. were prostitutes who had consented to sex in exchange for money and drugs after he had picked them up and asked for "a date." *See generally* R. BBBB-126-161.

Defendant's Proffered Voir Dire

Prior to the commencement of voir dire, during a discussion of the State's motion in limine to exclude evidence of the victim's prior sexual history under Illinois's rape shield statute, counsel for defendant informed the court that defendant intended to testify that "he had consensual sex [with Y.C. and C.C.] in exchange for money and drugs," R. ZZZ-23, but that no evidence would be presented regarding "any other prior sexual conduct [involving] the alleged victims," R. ZZZ-10-11; *see generally* R. ZZZ-7-17. Soon thereafter, however, defendant requested that the jury be "voir dired on prostitutes," on the basis that evidence would be presented that defendant had "engage[d] in soliciting and using prostitutes." R. ZZZ-36, 38, 41; *see also* R. ZZZ-42 (defense counsel following up with court on requested voir dire: "What about the question about prostitutes?"). The trial court asked

defendant to clarify what specific question he wanted the venire to be asked, and defendant offered the following: "The fact that you will hear evidence about – and just put it mildly – to not try to indoctrinate them at all – you will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?" R. ZZZ-42. The trial court asked defendant how to "not try to indoctrinate them" with the question, and defendant proposed: "[J]ust like I presented it – if you hear evidence about prostitution, would that prevent you from being fair to either side[?]" R. ZZZ-43.

The trial court rejected defendant's request, stating repeatedly that it was an improper question, R. ZZZ-37, 42-44, that the court would not "ask [jurors] about specific types of evidence that they may hear," R. ZZZ-39; *see also* R. ZZZ-37, and that the question seemed to be "an attempt to indoctrinate the jurors a little bit," R. ZZZ-39; *see also* R. ZZZ-43-44. The court assured counsel that "the jurors [would] be properly instructed," R. ZZZ-39-40, and that defendant's concerns would all be addressed by the standard questions whether any "sympathy or bias or prejudice [would a]ffect [their] decision," R. ZZZ-42; *see also* R. ZZZ-37 ("I always ask whether or not there is anything about the nature of the charges that would prevent anybody from giving . . . both sides a fair and impartial trial."). The court similarly rejected a voir dire question regarding "narcotics." R. ZZZ-36-37, 39.

Voir Dire

During voir dire, the trial court reiterated the jury's duty to apply the law and render a verdict free of bias or prejudice. Venire members were instructed as a whole that they "must not allow sympathy or prejudice to influence [their] verdict," R. ZZZ-56; *see also* R. ZZZ-59 ("Is there anything about the nature of the charges that would prevent anyone from giving both sides a fair and impartial trial in this case?"), and each prospective juror was asked individually (1) whether he or she would "use sympathy, bias, or prejudice in reaching your decision," (2) whether he or she could be "fair to both sides," and (3) whether there was anything that had not been asked that would affect his or her ability to be fair. *See* R. ZZZ-68-274.

Empaneled jurors were again asked, as they were sworn in, whether they would "honestly try these issues joined in this case and without fear of sympathy or prejudice render a just . . . and fair verdict according to the law and evidence," and affirmed that they would. R. AAAA-6. As the trial commenced, the court repeated that jurors were to "keep an open mind, not reaching any opinions or conclusions until you've heard everything there is to hear and . . . [and w]hen you decide this case, you must not allow sympathy, bias, or prejudice of any kind to influence your verdict." R. AAAA-8. And after both sides rested, the court instructed the jury that it was their duty to follow the law as stated in the instructions, to determine the facts only from the evidence presented, to apply the law to those facts, and to not be

influenced by any prejudice. R. CCCC-52. The court also instructed that "[i]t is a defense to the charge . . . that [Y.C.] consented . . . mean[ing] a freely given agreement to the act of sexual penetration in question." R. CCCC-60.

Trial Testimony

Y.C. testified that she was walking to a local bakery at 6:00 a.m. on March 5, 2006, the morning of her twenty-fourth birthday, R. AAAA-19-20, when defendant lured her into his car by telling her that her cousin Jose was looking for her, R. AAAA-22-25. Defendant drove her to an abandoned alley, R. AAAA-24-26; threatened to kill her and displayed a gun, R. AAAA-28-29, 49; beat her repeatedly in the face, R. AAAA-27-32; and then forcibly sexually assaulted her orally, vaginally, and anally, R. AAAA-30, 33-35. Y.C. recalled in detail how defendant repeatedly told her "you know what this is" as he drove her into the alley, R. AAAA-25-27, unzipped his pants, grabbed her by the hair, and forced her to perform oral sex on him, R. AAAA-29-30. Then, after hitting her several more times, defendant covered her face with a coat, climbed on top of her, held her down, pulled down her pants and underwear, and penetrated her vaginally and anally with his penis, R. AAAA-30-35. Y.C., who was pregnant at the time of the assault, begged him to stop and attempted to protect her face and stomach from defendant's punches, but was unable to fend off the sexual assault. R. AAAA-26-28, 31, 33, 35. Afterwards, defendant kicked Y.C. out of the car, threatening to kill her and throwing her

underwear, which had fallen onto the car floor during the assault, into the alley. R. AAAA-35-36.

An off-duty officer, Sheriff's Deputy Fernando Rodriguez, spotted Y.C., who he was acquainted with through mutual friends, "frantically" attempting to flag down a car for help. R. AAAA-62-63, 66; *see also* R. AAAA-35-37. He observed that she had a bloodied mouth and was visibly distraught ("crying very hysterically"), and when he stopped to assist her, Y.C. informed him that she had just been sexually assaulted. R. AAAA-63-64. Deputy Rodriguez immediately drove Y.C. to the nearest police station. R. AAAA-64; *see also* R. AAAA-37. He testified that Y.C. was crying hysterically in the car, appeared to be very scared, and was shaking throughout the ride to the station — at times, she was unable to speak. R. AAAA-66.

Y.C. was eventually taken to a hospital, where oral, vaginal, and anal swabs were taken for analysis. R. AAAA-37-38; R. AAAA-73. Estrella Mitchell, the emergency room nurse who treated Y.C., testified that Y.C. reported being raped orally, vaginally, and anally and had a bruised lower lip. R. AAAA-71-73, 86. Detective James Gillespie, the lead detective assigned to Y.C.'s case, also spoke with Y.C. at the hospital, and testified that Y.C. was "visibly upset," "nervous," and appeared to have been crying. R. AAAA-90-91. Detective Gillespie also observed that Y.C. had a cut on her lip. R. AAAA-91. He later recovered Y.C.'s underwear from the alley where the assault occurred. R. AAAA-91-94.

Forensic experts identified defendant's semen in Y.C.'s vaginal swab, R. BBBB-109-10, 113; R. BBBB-79-80; R. BBBB-16-17, and in early 2009, Y.C. identified defendant, in both a photo array and a physical lineup, as the man who sexually assaulted her. R. AAAA-39, 42-43, 45; *see also* R. BBBB-20-21.

Defendant admitted to having oral and vaginal intercourse with Y.C. but claimed that it was consensual — that Y.C., who was walking down the street at 6:00 a.m. in a black long-sleeved shirt, a black undershirt, and long black pants, R. BBBB-144-45; *see also* R. AAAA-72; R. AAAA-40, was in fact a prostitute whose services he had solicited in exchange for money and drugs. R. BBBB-126-33, 139-40. He also acknowledged anally penetrating Y.C. but stated that it was accidental. R. BBBB-149-50, 154.

Another of defendant's victims, C.C., detailed a similar sexual assault by defendant in 2002, occurring less than two miles from the scene of Y.C.'s assault. *See generally* R. BBBB-28-44, 54-57; R. BBBB-26; *see also* R. MMM-27-30 (granting People's motion to introduce testimony from C.C., as well as another of defendant's sexual assault victims, S.A., to show intent, lack of consent, and propensity pursuant to 725 ILCS 5/115-7.3); C145-59; R. CCCC-56-57. C.C. testified that in the early morning hours of September 1, 2002, as she was walking through an alley to find her sister's car after leaving a nearby club, defendant twice approached and offered her a ride to her car, R. BBBB-30-33; she eventually accepted the ride because she was cold, R.

BBBB-33; after she entered the car, defendant locked the doors and put a bandana over his face, R. BBBB-34-35; as with Y.C., defendant then punched C.C. repeatedly in the face and demanded that she remove her clothes, before he climbed on top of her, held her down, pulled her pants down, and forcibly penetrated her vaginally with his penis, R. BBBB-34-37; *see also* R. BBBB-44. C.C. recalled screaming, being "punched . . . again to shut me up," and crying when she could not escape from the locked car. R. BBBB-35-36. She further recalled defendant telling her that "it was going to happen whether I liked it or not," and after finishing the assault, driving C.C. back to the club, kicking her out of the car, and telling her "I'm done with you." R. BBBB-35-38. On cross-examination and redirect, C.C. stated that defendant had also wielded a knife as he ordered her to take her clothes off. R. BBBB-47, 54-55.

C.C. found her sister and reported the sexual assault to police, who were stationed near the club as it let out in the early morning hours. R. BBBB-38. She was then taken to a hospital, where she provided samples for a sexual assault kit. R. BBBB-38-39. C.C. testified that she had a "busted lip" from defendant's punches, and a photograph of C.C. from that day showed an injury to her face. R. BBBB-40-42; *see also* R. BBBB-159-60. Forensic experts eventually identified defendant's semen in C.C.'s vaginal swab. R. BBBB-111-13; R. BBBB-98, 100; *see also* R. BBBB-39.

Defendant acknowledged engaging in oral and vaginal sexual activity with C.C. but claimed that she, like Y.C., was a prostitute who had

consented. R. BBBB-133-37, 139-40. Defendant claimed that the women accused him of sexual assault because he snatched back the money he had given them after each transaction had been completed ($65 or $70 and some marijuana from Y.C., and $60 from C.C.). R. BBBB-129, 132-33, 135, 137. He denied punching either woman in the face, R. BBBB-131, 136, and when asked why he would take back the money and drugs, his only explanation was "I was an idiot," R. BBBB-133; R. BBBB-137 ("I did the same stupid act. . . . I went and took my money back from her."); *see also* R. BBBB-156. Defendant's prior conviction for predatory criminal sexual assault against a third victim, J.H., was admitted for impeachment purposes. R. BBBB-139; *see also* R. BBBB-123.

The jury ultimately found defendant guilty on all counts of aggravated criminal sexual assault against Y.C. R. CCCC-70-73.

Decision on Direct Appeal

On appeal, a majority of the Illinois Appellate Court, First District held that the trial court abused its discretion in refusing to voir dire potential jurors regarding their opinions on prostitution, reasoning that paying for sex was a behavior that "can evoke from many venire members strong responses that prevent the venire members from assessing evidence without bias." *Encalado*, 2017 IL App (1st) 142548, ¶¶ 31-32, 34, 37. The majority concluded that defendant's prostitution question was appropriate "to help him determine whether the potential jurors could weigh the evidence against

him, without a predisposition to find him guilty of criminal sexual assault because he patronized prostitutes," *id.* at ¶ 34, and that this was an "area of potential bias not covered by other questions," *id.* at ¶ 43. In so holding, the majority largely relied on *People v. Strain*, 194 Ill. 2d 467 (2000), *Encalado*, 2017 IL App (1st) 142548, ¶¶ 27, 29, 38, 41, and rejected an argument made by the dissent that a voir dire question regarding prostitution would facilitate an indirect violation of Illinois's rape shield statute, *id.* at ¶¶ 35-40.

That dissent concluded that a voir dire question on prostitution was designed to both "gauge prospective jurors' reactions to particular facts that would come out at trial," *Encalado*, 2017 IL App (1st) 142548, ¶ 59 (Mason, J., dissenting in part) — namely, a "preposterous claim that the victim, a 24-year-old, pregnant woman on her way to a neighborhood bakery at 6:00 a.m., was a prostitute" — and serve as an impermissible "'preliminary final argument' for the defense," *id.* at ¶ 56. *See also id.* at ¶¶ 48, 52. The dissent reasoned that the "purpose of *voir dire* is not to explore prospective jurors' opinions with respect to evidence that will be presented at trial . . . [or] to preview the evidence for the jury, or to measure the jurors' reactions to certain facts." *Id.* at ¶ 53 (quotations omitted). It further underscored that a voir dire question informing potential jurors that they would hear evidence of prostitution before asking their opinions about it would, in and of itself, signal the veracity of defendant's expected testimony that Y.C. was a prostitute, *id.* at ¶ 58, while simultaneously "insinuat[ing] that the victim[,

as] a prostitute . . . [was] less worthy of belief," *id.* at ¶ 64; *see also id.* at ¶¶ 60-63. The dissent characterized the question as an attempt to "accomplish indirectly what the rape shield statute prohibits him from doing directly," namely, present evidence of the victims' sexual histories beyond their interactions with defendant. *Id.* at ¶ 56. Furthermore, the dissent expressed concern that if "all a defendant need do to circumvent the protections of the rape shield statute is claim that the victim is a prostitute and that his patronization of a prostitute is so sensitive as to mandate *voir dire* questioning on the subject[,] . . . rape victims might well be discouraged from coming forward," knowing it could "be suggested to a roomful of strangers that they were prostitutes before they had even taken the stand." *Id.* at ¶ 67; *see also id.* at ¶¶ 54-57, 65-66. The dissent also concluded that "[t]he evidence against [defendant] was, by any measure, overwhelming, and so if there was constitutional error, it was harmless." *Id.* at ¶ 66.

The appellate court unanimously rejected defendant's separate claim that the trial court erred in admitting his prior conviction for predatory criminal sexual assault as impeachment. *Encalado*, 2017 IL App (1st) 142548, ¶¶ 1, 25, 48.

STANDARD OF REVIEW

Because the trial court has discretion over the manner and scope of voir dire, a decision not to ask a question of the venire is reviewed for abuse of discretion. *People v. Rinehart*, 2012 IL 111719, ¶ 16.

ARGUMENT

The goal of empaneling a jury free from bias or prejudice would collapse if parties were entitled to questioning during voir dire that predisposed jurors to view the evidence from a particular perspective. Illinois law therefore prohibits allusion to specific evidence, theories, or defenses during voir dire unless an issue is of such extraordinary controversy that the failure to question the venire about it would undermine the trial's fundamental fairness. The majority below improperly expanded this exceedingly narrow exception to include issues with any potential to "evoke . . . strong responses," thereby swallowing the rule itself. Criminal trials by their nature routinely require jurors to confront evidence of unsavory or illicit activities. The appellate court's rule should not stand.

Indeed, the subject of soliciting a prostitute, though controversial to some degree, is not on par with the narrow category of topics that are of such extraordinary controversy that the failure to question the venire about them puts at risk a defendant's right to a fair trial by an impartial jury; rather, it is more akin to the overwhelming majority of distasteful conduct that jurors are regularly entrusted to evaluate in a criminal trial.

Defendant's choice to testify that he offered money and drugs for consensual sex with both Y.C. and C.C. did not earn him the right to indoctrinate the jury during voir dire. Nor is the pursuit of an unbiased jury furthered by a voir dire question that (1) presents as fact the very testimony

that the jury has been empaneled to weigh and predisposes them to believe it before the trial even begins, and (2) invites inferences about a victim's prior sexual history, which, regardless of its veracity, is both irrelevant and generally inadmissible under Illinois's rape shield statute. Therefore, the circuit court did not abuse its discretion in rejecting such a question.

I. The Trial Court Properly Rejected Defendant's Voir Dire Question Regarding Prostitution.

The trial court appropriately exercised its discretion when it rejected defendant's voir dire question regarding "prostitutes" or "prostitution."

A. Trial Courts Have Broad Discretion to Reject Voir Dire Questions that Indoctrinate Potential Jurors.

Defendant's claim — that he was entitled to preview to the venire a particular aspect of his defense — asks this Court to abandon longstanding legal principles vesting the trial court with broad discretion to manage voir dire, assure impartiality, and prevent jury indoctrination. "The primary responsibility of conducting the *voir dire* examination lies with the trial court and the manner and scope of such examination rests within that court's discretion." *People v. Terrell*, 185 Ill. 2d 467, 484 (1998); *see also* Ill. Sup. Ct. R. 431(a) ("The court shall conduct *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate . . . ."). This broad discretion empowers the trial court to

impose reasonable limitations on voir dire, *People v. Lobb*, 17 Ill. 2d 287, 300 (1959), and reject questions that "indoctrinat[e] a jury," "impanel[] a jury with a particular predisposition," "educat[e] jurors as to the defendant's theory of defense prior to trial," or "select[] a jury that [i]s receptive to that defense" — all of which Illinois law has long prohibited due to the tendency of such questioning to undermine the very purpose of voir dire: to empanel an impartial jury free from bias or prejudice. *People v. Bowel*, 111 Ill. 2d 58, 64-65 (1986); *Rinehart*, 2012 IL 111719, ¶¶ 16-17. Questions that are "tailored to the facts and intended to serve as 'preliminary final argument,'" or that preview a defendant's specific defense, are generally not permitted. *Id.* at ¶ 17; *Bowel*, 111 Ill. 2d at 65 (rejecting questions "for the purpose of educating jurors as to the defendant's theory of defense prior to trial"); *People v. Mapp*, 283 Ill. App. 3d 979, 986 (1st Dist. 1996) ("Ordinarily, a defense lawyer's questions concerning a specific defense will be excluded."); *People v. Boston*, 383 Ill. App. 3d 352, 354 (4th Dist. 2008); *cf. People v. Bell*, 152 Ill. App. 3d 1007, 1017-18 (3d Dist. 1987) (disputed questions improper for indoctrinating jurors and "ask[ing] them to prejudge the facts of the case"). Indeed, it is improper to ask a question that will "thwart[] the selection of an impartial jury." *Terrell*, 185 Ill. 2d at 484 (quotation omitted).

Instead, voir dire is typically implemented through broad questions about the venire's ability to evaluate the evidence and apply the law without bias, *Rinehart*, 2012 IL 111719, ¶ 17; *Mapp*, 283 Ill. App. 3d at 987; *Boston*,

383 Ill. App. 3d at 354, delving no further into potential jurors' specific beliefs and opinions than necessary to remove "minds . . . so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath," *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993), *cited in Rinehart*, 2012 IL 111719, ¶ 16. Citizens sworn as jurors are presumed to follow the law and instructions given to them, *People v. Glasper*, 234 Ill. 2d 173, 201 (2009), and so long as voir dire provides "reasonable assurance that any prejudice or bias of a prospective juror would have been discovered," a trial court has not abused its discretion, *Bowel*, 111 Ill. 2d at 64-65; *Rinehart*, 2012 IL 111719, ¶ 16 (citing, *inter alia*, *People v. Williams*, 164 Ill. 2d 1, 16 (1994)); *People v. Peeples*, 155 Ill. 2d 422, 459 (1993).

B. Voir Dire Previewing Defendant's Case as Involving "Evidence of Prostitution" Would Have Indoctrinated Potential Jurors and Predisposed Them to Be More Receptive to Defendant's Defense.

Here, the trial court prudently rejected a question that, in its view, "attempt[ed] to indoctrinate the jurors a little bit." R. ZZZ-39; *see also* R. ZZZ-37, 43-44. "*Voir dire* cannot . . . be used as an opportunity *to even slightly indoctrinate a juror*." *Cloutier*, 156 Ill. 2d at 496 (emphasis added); *see also People v. Morgan*, 112 Ill. 2d 111, 129 (1986). Presenting the case to the venire as "involving evidence" of "prostitution" or "prostitutes," would have portrayed at least part of defendant's defense — that Y.C. and C.C. were prostitutes — as a fact, and consequently predisposed the jury to view the trial evidence from that perspective. At the very least, it would have

improperly highlighted an aspect of the defense to the jury and skewed the case in his favor from the outset. *See, e.g.*, *People v. Anderson*, 407 Ill. App. 3d 662, 681 (1st Dist. 2011) (rejecting voir dire question that did not legitimately attempt to expose bias or prejudice, but rather, highlighted aspect of defense in contest of credibility); *People v. Brandon*, 157 Ill. App. 3d 835, 841 (1st Dist. 1987) ("[T]he question proffered by the defendant was, in our judgment, an improper question under the circumstances, particularly because it would have tended to unfairly tip the balance in favor of the defendant's case.").

Defendant's question here would have usurped the jury's role as factfinder and signaled to the venire, before any evidence was presented, that it could accept as true defendant's eventual testimony that Y.C. and C.C. were prostitutes — or alternatively, disbelieve any testimony from Y.C. or C.C. suggesting that they were not.[2] *See People v. Reeves*, 385 Ill. App. 3d 716, 729-30 (1st Dist. 2008) (where defendant planned to present false confession defense and sought voir dire question about potential jurors' attitudes on "false confessions," appellate court found that question "improperly indoctrinated the prospective jurors to defendant's affirmative defense" and "invade[d] the province of the jury" by requiring jurors "to

[2] Even counsel for defendant revealed how plainly improper the question was when he offered the caveat that the court should somehow "put it mildly – to not try to indoctrinate them." R. ZZZ-42.

accept as an ultimate fact that defendant's statement was false before hearing the evidence").

The question was also poorly suited to achieving its own ostensible purpose. Defendant purportedly sought to eliminate from the venire any bias against men who pay for sex (i.e., solicitors/patrons/customers of prostitutes). Yet, his proffered voir dire question on "prostitutes" or "prostitution" would have focused on attitudes toward either women who accept money in exchange for sex or the profession as a whole. By design, the question would have delved into attitudes toward defendant's accusers, even though his purported need for it was to probe for bias or prejudice regarding his defense and him personally. *See, e.g.*, *People v. Dow*, 240 Ill. App. 3d 392, 398-99 (1st Dist. 1992) (affirming rejection of poorly phrased question on entrapment).

Thus, the trial court was well within its discretion to reject defendant's proffered voir dire question in favor of thorough voir dire and jury instructions that were sufficient to expose any juror bias without also unfairly previewing defendant's final argument and skewing the jury in his favor. R. ZZZ-37, 39-40, 42-44. The court methodically inquired into each potential juror's ability to be fair, R. ZZZ-68-274, repeatedly admonished the empaneled jurors — before and after the evidence was presented — of their duty to apply the evidence to the law without sympathy, bias, or prejudice, R. AAAA-6, 8; R. CCCC-52, and also explicitly instructed the jury on Illinois law on consent, R. CCCC-60. This voir dire provided ample assurance that any

potential bias among the venire would be exposed (and the venire member removed).

C. Patronizing a Prostitute Is Not a Subject that Is So Intensely Controversial that a Voir Dire Question Was Required to Assure the Selection of an Impartial Jury.

Defendant argued below, and the appellate majority agreed, that despite the general prohibition on issue-specific voir dire, a question regarding juror opinions toward prostitution fell within the exception for matters of "intense controversy." *Encalado*, 2017 IL App (1st) 142548, ¶¶ 19, 27, 29, 31-33, 41. Not so. That exception is reserved for a narrow class of cases in which the jury will face an issue of such extraordinary and overwhelming controversy that the trial court's failure to ask the requested issue-specific question renders the defendant's proceedings "fundamentally unfair." *Terrell*, 185 Ill. 2d at 485. Such fundamentally unfair proceedings have been found to result from either (1) an "extraordinarily controversial legal requirement against which many members of the community may [be] prejudiced," such as an insanity defense, *People v. Stack*, 112 Ill. 2d 301, 312-13 (1986), an intoxication defense, *People v. Lanter*, 230 Ill. App. 3d 72, 76 (4th Dist. 1992), or the death penalty, *People v. Wright*, 111 Ill. 2d 128, 155-59 (1985), or (2) an issue so historically evocative of extreme and deep-seated societal prejudice or bias that jurors may be prevented from returning a verdict according to the law and evidence, *e.g.*, *People v. Hope*, 184 Ill. 2d 39, 43-44 (1998) (interracial crime under special circumstances, such as in

capital sentencing voir dire); *People v. Murawski*, 2 Ill. 2d 143, 147 (1954) (abortion); *People v. Clark*, 278 Ill. App. 3d 996, 1004 (1st Dist. 1996) (interracial relationships); *but see Peeples*, 155 Ill. 2d at 459-60 (sole fact that case involved interracial crime was not sufficiently special circumstance to warrant voir dire specific to racial bias). For this small subset of inordinately controversial issues, "simply asking jurors whether they could faithfully apply the law as instructed [was] not enough to reveal juror bias and prejudice toward that defense." *Boston*, 383 Ill. App. 3d at 354 (quotation omitted); *Mapp*, 283 Ill. App. 3d at 987.

Not every controversial issue or defense "is *so* controversial as to render *voir dire* questioning appropriate," *People v. Dixon*, 382 Ill. App. 3d 233, 244 (1st Dist. 2008) (quotation omitted; emphasis added); indeed, the overwhelming majority of issues and defenses routinely encountered in criminal cases do not require issue-specific voir dire to ensure an impartial jury. Thus, courts have rejected arguments that the affirmative defense of self-defense, *People v. Kendricks*, 121 Ill. App. 3d 442, 449 (1st Dist. 1984), the defense of a false confession, *People v. Polk*, 407 Ill. App. 3d 80, 106-07 (1st Dist. 2010), the defense of mistaken identity, *Bowel*, 111 Ill. 2d at 64-65, or the compulsion defense, *People v. Phillips*, 99 Ill. App. 3d 362, 369 (1st Dist. 1981), require a specific voir dire inquiry. Even the issue of guns — undeniably a matter of significant controversy — does not necessitate questioning regarding prospective jurors' attitudes toward guns merely

because a case involved evidence of firearm use. *See People v. Howard*, 147 Ill. 2d 103, 135-36 (1991); *see also Peeples*, 155 Ill. 2d at 459-60 (interracial crime, by itself, insufficient to warrant voir dire).

Here, the potential social stigma attached to patronizing prostitutes, though not insignificant, is not so intense that it can be likened to matters of fierce and deeply embedded societal controversy like racial bias, abortion, or the legitimacy of an insanity defense. Nor does the fact that defendant's defense involved a claim of consent and an admission that he had engaged in uncharged illegal conduct demonstrate a need for the proposed question. The defense of consent, in a case of criminal sexual assault, is "not so intensely controversial that the general rule against questions about specific defenses should be disregarded." *Boston*, 383 Ill. App. 3d at 355-56 (voir dire questions regarding consent "may have resulted in the selection of a jury that was neither fair nor impartial" by improperly pre-educating and indoctrinating jurors, inappropriately highlighting factual details of case, and asking jurors to prejudge those facts). And criminal juries are regularly presented with evidence of a defendant's other illegal activities — whether in the context of the charged offense, as an explanation for how defendant could not have committed the more serious charged offense, or to impeach the defendant's credibility, for example — yet such issue-specific voir dire has consistently been rejected. *See Anderson*, 407 Ill. App. 3d at 681-82 (rejecting voir dire inquiry about jurors' opinions of defendant's felony record); *Brandon*, 157 Ill.

App. 3d at 841-44 (same as to jurors' opinions of defendant's prior convictions).

A question on juror attitudes toward prostitution undoubtedly would have been helpful to the defense — that defendant's encounters with Y.C. and C.C. were consensual transactions. But voir dire may not be used to poll a potential jury's receptiveness to a defendant's planned testimony, *see In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 44; *Reeves*, 385 Ill. App. 3d at 730, and thus, the fact that the proffered question might have been "helpful" to his defense was no valid basis for the requested voir dire, *see Terrell*, 185 Ill. 2d at 485.

Defendant's case did not hinge on a subject so extraordinarily controversial that the trial court was constitutionally compelled to deviate from Illinois's longstanding prohibition on indoctrinating jurors as to the defense's theory and predisposing them to prejudge key factual conclusions in the defendant's favor. Nor should this Court allow the intense controversy standard to be supplanted by a standard entitling a party to voir dire on every subject with the potential to evoke a "strong response[]" from a juror. *Cf. Encalado*, 2017 IL App (1st) 142548, ¶¶ 31-32. Such a standard would produce an avalanche of issue-specific voir dire and attendant litigation, particularly in criminal cases, which are rife with topics that law-abiding jurors often find extremely unpleasant. Were the Court to embrace such a standard, the exception to the prohibition on "educating jurors as to the

defendant's theory of defense prior to trial," *Bowel*, 111 Ill. 2d at 65, would soon swallow the rule.

D. *Strain* Does Not Compel an Expansion of the Intense Controversy Exception to the Subject of Prostitution.

The appellate court majority's reliance on *People v. Strain*, 194 Ill. 2d 467 (2000), was misguided. *See Encalado*, 2017 IL App (1st) 142548, ¶¶ 27, 29, 38, 41.

First, the result in *Strain*, entitling defendants to "expose juror predisposition toward, and bias against, gangs," was highly specific to the numerous sources of potential impartiality in gang cases. *Strain*, 194 Ill. 2d at 480. Jurors whose notions of the inherent criminality of gang members lead them to presume a defendant's guilt, regardless of the evidence presented; jurors who are associated with gangs, are related to or acquainted with gang members, or simply live in a community where a particular gang is prominent or disfavored; and jurors whose fear of gang retribution prevents them from honestly considering the evidence, pose a risk of impartiality in cases where extensive gang evidence is to be admitted.

No analogous presumption of criminality or guilt is associated with a person who patronizes a prostitute or prostitution generally. Nor do personal affiliations or fears of retaliation regularly compromise potential jurors' ability to impartially weigh evidence in cases where evidence of prostitution is presented.

Second, Illinois courts have repeatedly limited *Strain*'s holding to the gang bias context; courts have not viewed *Strain* as a launchpad for expanding the "intense controversy" exception. *Dixon*, 382 Ill. App. 3d at 244-45; *People v. Abram*, 2016 IL App (1st) 132785, ¶ 63; *Anderson*, 407 Ill. App. 3d at 681-82; *People v. Morales*, 329 Ill. App. 3d 97, 113-14 (1st Dist. 2002), *rev'd on other grounds*, 209 Ill. 2d 340 (2004). In *People v. Sanders*, 238 Ill. 2d 391 (2010), for example, this Court held that *Strain* was a "clear break from precedent" announcing a new constitutional rule of mandatory gang-specific voir dire, rather than an extension of the traditional rules regulating voir dire. *Id.* at 398-413 (holding that *Strain* was not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989)). In *Sanders*, this Court emphasized the *Strain* dissent's warning that "the court was setting a troubling precedent which would result in future litigants requesting *voir dire* on any potential bias merely by showing that the evidence on a particular subject will play a major role in the trial and that segments of our society view the subject with considerable disfavor." *Sanders*, 238 Ill. 2d at 411 (citing *Strain*, 194 Ill. 2d at 483-84 (Heiple, J., dissenting, joined by Bilandic, J.)). The appellate majority's decision here overlooks *Sanders*'s warning about the dangers of expanding *Strain*.

Third, *Strain* relied on an expansive body of Illinois precedent recognizing the "considerable disfavor [against gangs] by other segments of our society" and "strong prejudice against street gangs," "particularly in

metropolitan areas," the equivalent of which does not exist as to patrons of prostitutes. 194 Ill. 2d at 476-77 (collecting cases). In fact, insofar as Illinois law addresses bias in the context of prostitution, the salient concern is a widespread prejudice against the prostitutes themselves, particularly those who have been raped and report it. *See, e.g.*, *People v. Davis*, 205 Ill. 2d 349, 362-63 (2002); *People v. Ivory*, 139 Ill. App. 3d 448, 453-54 (1st Dist. 1985) (collecting cases); *People v. Hughes*, 121 Ill. App. 3d 992, 999-1000 (1st Dist. 1984); *People v. Tennin*, 162 Ill. App. 3d 520, 525-26 (2d Dist. 1987).[3] A defendant in a sexual assault case is not prevented from offering a defense that he had consensual sex with the victim in exchange for money, *see* 725 ILCS 5/115-7, but the case law does not support the need for a special voir dire rule to remedy some long-acknowledged bias against those who patronize prostitutes.[4]

---

[3] The cases cited by the majority do not indicate otherwise. *See Commonwealth v. Harris*, 825 N.E.2d 58, 75-76 (Mass. 2005) (Marshall, C.J., concurring in part and dissenting in part, joined by Greaney, J.) ("[C]ourts have long sought means to minimize jury bias *against prostitutes*. . . . Prostitutes are frequent victims of rape. . . . Yet societal beliefs persist that prostitutes cannot be raped, or that they are not harmed by rape, or that they somehow deserve to be raped. . . . Courts have long recognized the difficulty in persuading juries that prostitutes are the victims of rape.") (emphasis added); *Wood v. Alaska*, 957 F.2d 1544, 1552-53 (9th Cir. 1992) ("Because many people consider *prostitution* . . . to be particularly offensive, there is a significant possibility that jurors would be influenced by their impression of [the victim] as an immoral woman . . . conclud[ing], contrary to the rape law, that a woman with her sexual past cannot be raped, or that she somehow deserved to be raped after engaging in these sexual activities.") (emphasis added).

[4] The majority also cites as evidence of "strong disgust and antipathy towards . . . patrons of prostitutes" several articles describing the increased use of

Finally, unlike *Strain*, where the topic of gangs was "pervasive" in the *prosecution*'s case, with "gang information permeat[ing] the testimony of almost every witness at trial," 194 Ill. 2d at 473, 477-81, the topic of prostitution was not mentioned at all by the State. Rather, defendant chose to support a consent defense with testimony about his patronage of prostitutes (both in these instances, and in general) and then protested that his own decision might harm the jury's perception of him. In fact, as the dissent observed, because defendant retained the ability to opt out of testifying, he could just as easily have presented a voir dire question regarding "prostitutes" or "prostitution" — laden with implications about Y.C. and C.C. — without ever having to provide the testimony that made the question relevant in the first place. *Encalado*, 2017 IL App (1st) 142548, ¶ 58 (Mason, J., dissenting in part).

Therefore, defendant's case should not be analogized to *Strain*, nor should *Strain*'s narrow rule, itself a "clear break from precedent," *Sanders*, 238 Ill. 2d at 411, be broadened to cover voir dire questions about prostitution.

---

public forums to embarrass or shame patrons of prostitutes in the 1990s. *See Encalado*, 2017 IL App (1st) 142548, ¶¶ 32-33. But none of these articles purports to measure the actual prevalence or strength of social bias against patrons of prostitutes, or what inferences, if any, the law-abiding public tends to draw about an individual who has paid for sex. The fact that evidence at trial may embarrass a defendant does not, on its own, entitle him to voir dire.

E. Voir Dire Should Not Be Used as a Vehicle to Circumvent Illinois's Rape Shield Statute.

The majority's willingness to cast aside Illinois's rape shield protections, and the policy underlying them, on the basis that the statute "only prescribes rules for the admissibility of evidence" is also troubling. *Encalado*, 2017 IL App (1st) 142548, ¶ 39. Illinois's rape shield statute provides that "the prior sexual activity or the reputation of the alleged victim or corroborating witness under Section 115-7.3 of this Code is inadmissible" except as evidence of past sexual conduct between the defendant and the alleged victim tending to show consent regarding the alleged offense, or when constitutionally required. 725 ILCS 5/115-7(a). It reflects a policy of preventing a defendant from "harassing and humiliating the complaining witness with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than defendant, since such evidence has no bearing on whether she consented to sexual relations with the defendant." *People v. Summers*, 353 Ill. App. 3d 367, 373 (4th Dist. 2004).

Courts have interpreted the rape shield law to bar evidence of a victim's or corroborating witness's alleged profession as a prostitute because such evidence implies a great deal about her prior sexual activity and/or reputation beyond the relevant question of whether she consented to have sexual relations with the defendant on the day in question. *See Ivory*, 139 Ill. App. 3d at 453-54 (collecting cases); *Hughes*, 121 Ill. App. 3d at 999-1000. This does not preclude a defendant from presenting a defense that his

accuser(s) consented to the sex in question in exchange for money or other goods. *See People v. Sandoval*, 135 Ill. 2d 159, 180-81 (1990); *see also People v. Johnson*, 2014 IL App (2d) 121004, ¶¶ 42-43. But there is a fine line — which defendant here attempted to cross — between introducing evidence at trial of the purported transaction in question, and inviting potential jurors during voir dire to draw inferences based on the complainant's sexual history or reputation. Defendant's proffered voir dire did not target potential bias toward a man that offers payment for sex. Instead, he attempted to invoke Y.C.'s and C.C.'s purported profession as prostitutes, despite his counsel affirmatively acknowledging, moments earlier, that Y.C.'s and C.C.'s prior sexual histories were off limits under the rape shield statute. R. ZZZ-10-11; *see generally* R. ZZZ-7-17. Defendant's attempt to indirectly present such evidence runs counter to section 115-7(a), and the trial court correctly denied his requested voir dire.

Even if the majority were correct that the protections of the rape shield statute technically do not reach non-evidentiary proceedings like voir dire, the statute would lose much of its force if defendants could circumvent its evidentiary prohibitions by commenting on a victim or witness's sexual history in any other portion of trial proceedings so long as it was not considered "evidence." At the very least, the statute's policy underpinnings are relevant to whether a trial court acted within its discretion by rejecting a voir dire question that would have subverted the statute. By the same token,

comments made in opening statements and closing arguments are not "evidence," yet courts still address potential violations of the statute occurring at that stage of trial proceedings. *See, e.g.*, *People v. Carlson*, 278 Ill. App. 3d 515, 523 (1st Dist. 1996) ("In the instant case, the State admits that in clear violation of the Rape Shield Statute, it introduced evidence and argued in its closing statements, that M.O. was a virgin before she was attacked.").

For these reasons, the trial court appropriately exercised its discretion in rejecting defendant's voir dire question regarding prostitution.

II. Any Error in Rejecting Defendant's Proposed Voir Dire Question on Prostitution Was Harmless.

As the dissent correctly noted, regardless of whether the trial court abused its discretion in rejecting the requested voir dire question, any error was harmless in light of the overwhelming evidence against defendant. *Encalado*, 2017 IL App (1st) 142548, ¶ 66 (Mason, J., dissenting in part). Although the failure to permit a pertinent voir dire question enabling a party to determine whether potential jurors are free from bias or prejudice "*may* constitute reversible error," *People v. Porter*, 111 Ill. 2d 386, 401 (1986) (emphasis added), such an error is subject to harmless error review in the case of permissive voir dire inquiries, required only upon a party's request, *Glasper*, 234 Ill. 2d at 193-94, 199-200. The evidence against defendant here was overwhelming, so this Court should conclude that any error in rejecting defendant's proposed voir dire was harmless. *Id.* at 202-03; *see also People v.*

Pitts, 104 Ill. App. 3d 451, 457 (1st Dist. 1982) ("[W]e find that the trial judge's refusal to ask the questions in this case does not constitute reversible error due to the overwhelming evidence of defendant's guilt. The finding of defendant's guilt would not have changed even if the suggested questions had been put to the prospective jurors."); *cf. People v. Stack*, 128 Ill. App. 3d 611, 617 (1st Dist. 1984) (error in failure to ask insanity voir dire question not harmless where two doctors agreed on defendant's paranoid schizophrenia diagnosis and several lay witnesses testified defendant was screaming about "God, devils and demons" before being taken into custody).[5]

There is no question that defendant penetrated Y.C. orally, vaginally, and anally: Y.C. testified to as much and identified defendant in both a photo array and physical lineup, R. AAAA-29-35, 39, 42-43, 45; R. BBBB-20-21; the DNA evidence conclusively established that defendant's DNA was present on Y.C.'s vaginal swab, R. BBBB-16-17, 79-80, 109-10, 113; and defendant admitted all three forms of penetration on the stand, R. BBBB-126-33, 139-40, 149-50, 154. Moreover, Y.C. testified extensively as to the attack's forcible and nonconsensual nature, explaining that defendant had lured her into his car under a false pretense, R. AAAA-22-25; punched her repeatedly in the face while she attempted to protect her unborn child, R. AAAA-27-29; threatened to kill her, flashed a gun, and repeatedly told her "you know what

[5] *Glasper* clarifies that although a trial before a biased jury is structural error, no structural error exists in the absence of any evidence that any juror was biased. 234 Ill. 2d at 200-201. Defendant has never contended, nor does the record support any evidence of a biased juror.

this is" as he drove her into an alley, R. AAAA-25-29, 49; forced her to perform oral sex on him, R. AAAA-29-30; and finally climbed on top of her, overpowered her, pulled down her pants and underwear against her will, and forcibly raped her both vaginally and anally, R. AAAA-27-28, 31, 35. Deputy Rodriguez and Detective Gillespie both described Y.C.'s demeanor afterward as consistent with having just survived a sexual assault, R. AAAA-63-64, 66; R. AAAA-90-91, and three witnesses — the officers and as well as an emergency room nurse who treated Y.C. — observed an injury to Y.C.'s mouth that corroborated Y.C.'s testimony that defendant punched her in the face, R. AAAA-63-64; R. AAAA-71-73, 86; R. AAAA-91.

C.C. also detailed a sexual assault by defendant with signature elements uncannily similar to the assault of Y.C.: the luring of C.C. into his car under a false pretense, R. BBBB-30-35, the repeated punching of C.C. in the face and uttering of a threatening statement ("it was going to happen whether I liked it or not"), the display of a deadly weapon, and finally, climbing on top of her, pulling down her pants, overpowering her, and forcibly raping her, R. BBBB-34-38, 44, 47, 54-55. *See generally* R. BBBB-28-44, 54-57. And as with Y.C., C.C.'s account was corroborated by conclusive DNA evidence establishing the presence of defendant's semen on her vaginal swab. R. BBBB-39, 98, 100, 111-13.

On the other hand, the only evidence of a consensual transaction between defendant and a willing prostitute, in either instance, was

defendant's vague and self-serving testimony, *see generally* R. BBBB-126-61, which was not only uncorroborated, but also impeached by the admission of a prior conviction for predatory criminal sexual assault, R. BBBB-139; *see also* R. BBBB-123. Defendant was also unable to provide believable explanations for many of his purported actions. He could not explain, for example, why he took his money back after having sex with either woman. R. BBBB-133 (with Y.C., "Q[:] Why did you do that? . . . [W]hy would you take your money and drugs back? A[:] I was an idiot."); R. BBBB-137 (with C.C., "Q[:] So what happened after you guys had sex? A[:] I did the same stupid act. I took – I went and took my money back from her."); *see also* R. BBBB-158, 161. He could not explain why, in the case of Y.C., he was purportedly looking for a prostitute at 6:00 a.m. R. BBBB-142-43 (defendant testifying at first that he generally looked for prostitutes "at nighttime," yet, when asked why in Y.C.'s case he was looking for a prostitute between 5:00 and 6:00 a.m., testifying "[i]t was late – early – late morning, yes. . . . I was out and about around 5:00 in the morning. . . . To me, that's like the evening time. Early morning then, yes; early morning"); *see also* R. BBBB-143-44. And contrary to his suggestion that he believed Y.C. to be a prostitute working in an area known for prostitution, Y.C. wore a black long-sleeved shirt and long black pants, and there were apparently no other prostitutes on the street when he approached her at 6:00 a.m. to purportedly "ask[] for a date." R. BBBB-127, 144-45; *see also* R. AAAA-72; R. AAAA-40.

His denial that he ever punched Y.C. or C.C. in the face — or in the case of C.C., even noticed an injury to her face — was belied by clear evidence that each woman bore signs of such an injury immediately after her encounter with defendant. *Compare* R. BBBB-131, 136, 160, *with* R. AAAA-63-64; R. AAAA-71-73, 86; R. AAAA-91 (Y.C.'s injury), *and* R. BBBB-40-42 (C.C.'s injury).

Weighing such testimony against the overwhelming evidence of defendant's guilt — Y.C.'s detailed account of a violent sexual assault, DNA evidence and admissions from defendant conclusively proving each form of penetration (vaginal, anal, and oral), testimony from multiple witnesses describing Y.C. as appearing visibly distressed immediately afterward and corroborating her account that defendant struck her repeatedly in the face, and testimony from another of defendant's victims detailing a very similar assault — no rational juror would have acquitted defendant. *See, e.g.*, *Johnson*, 2014 IL App (2d) 121004, ¶ 59 (finding jury instruction error harmless where defendant's claim of consent lacked credibility and overwhelming evidence, including other-crimes testimony from other sexual assault victims, indicated that defendant sexually assaulted victim). Combined with the fact that each juror, and the jury as a whole, was repeatedly reminded of the duty to apply the evidence to the law fairly and without sympathy, bias, or prejudice, R. ZZZ-56, 59, 68-274; R. AAAA-6, 8; R.

CCCC-52, any error in rejecting defendant's voir dire on prostitution was harmless.

CONCLUSION

This Court should reverse the portion of the First District's judgment addressing the voir dire issue and affirm defendant's conviction.

July 28, 2017

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK

By: /s/ *Evan B. Elsner*
EVAN B. ELSNER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2139
eelsner@atg.state.il.us

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is thirty-four pages.

/s/ *Evan B. Elsner*
EVAN B. ELSNER
Assistant Attorney General

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned deposes and states that on July 28, 2017, the foregoing **Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses listed below:

Michael J. Pelletier
Patricia Mysza
Jennifer L. Bontrager
Office of the State Appellate
Defender, First Judicial District
203 North LaSalle Street
24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us

Alan J. Spellberg
Mary P. Needham
Caitlin M. Valiulis
Assistant State's Attorneys
Richard J. Daley Center, 3rd Floor
Chicago, Illinois 60602
eserve.criminalappeals@cookcountyil.gov

Counsel for Defendant-Appellee

Additionally, upon the brief's acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ *Evan B. Elsner*
EVAN B. ELSNER
Assistant Attorney General
eelsner@atg.state.il.us

No. 122059

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-14-2548
Plaintiff-Appellant,	)	
v.	)	There on Appeal from the Circuit Court of Cook County, Illinois No. 10 CR 4270
THEOPHIL ENCALADO,	)	The Honorable Matthew E. Coghlan,
Defendant-Appellee.	)	Judge Presiding.

SEPARATE APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
EVAN B. ELSNER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2139
eelsner@atg.state.il.us

Counsel for Plaintiff-Appellant People of the State of Illinois

ORAL ARGUMENT REQUESTED

Table of Contents

Table of Contents of the Record on Appeal

A. Common Law Record

Volume 1 of 2:

Volume 2 of 2:

B. Report of Proceedings[1]

Volume 1 of 8:

---

[1] Defendant faced charges in multiple cases simultaneously (Nos. 09 CR 11708, 10 CR 4270, 10 CR 4271, 09 CR 5040 superseded by 10 CR 10308, 11 CR 8099), all of which were addressed in the same trial court. Because the Report of Proceedings contains transcripts relating to several of them — not just 10 CR 4270 — case numbers are cited, as necessary, to clarify the context of substantive hearings.

Illinois Official Reports

Appellate Court

***People v. Encalado*, 2017 IL App (1st) 142548**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. THEOPHIL ENCALADO, Defendant-Appellant.
District & No.	First District, Second Division Docket No. 1-14-2548
Filed	February 14, 2017
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 10-CR-4270; the Hon. Matthew E. Coghlan, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	Michael J. Pelletier, Patricia Mysza, and Jennifer L. Bontrager, of State Appellate Defender's Office, of Chicago, for appellant. Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Mary P. Needham, and Caitlin M. Valiulis, Assistant State's Attorneys, of counsel), for the People.
Panel	JUSTICE NEVILLE delivered the judgment of the court, with opinion. Justice Pierce concurred in the judgment and opinion. Justice Mason concurred in part and dissented in part, with opinion.

OPINION

¶ 1 A jury found Theophil Encalado guilty on three counts of aggravated criminal sexual assault. In this appeal, we find that the trial court did not abuse its discretion when it permitted the prosecution to impeach Encalado's testimony by showing that he had a prior conviction for predatory criminal sexual assault. However, we find that the trial court abused its discretion when it refused to ask venire members questions about potential bias against persons who participate in prostitution. Accordingly, we reverse the convictions and remand for a new trial.

¶ 2 BACKGROUND

¶ 3 Around 7 a.m. on March 5, 2006, Deputy Fernando Rodriguez of the Cook County sheriff's department brought Y.C. to St. Elizabeth's Hospital, where Y.C. told medical personnel that she had been raped and punched in the face. A doctor collected oral, vaginal, and anal swabs for testing. In 2008, tests showed that DNA in the fluid on the vaginal swab matched Encalado's DNA. Prosecutors charged Encalado with three counts of aggravated criminal sexual assault in that he threatened Y.C. with a weapon and forced contact between (1) his penis and her mouth, (2) his penis and her vagina, and (3) his penis and her anus.

¶ 4 Before the jury trial, the prosecution filed a motion for leave to present evidence that Encalado had committed similar sexual assaults against C.C., S.A., and J.H., a minor. The trial court held the crime against J.H. too dissimilar, but it permitted the State to present evidence of the assaults against C.C. and S.A. The court separately ruled that if Encalado chose to testify, the prosecution could impeach him with evidence that he was convicted of predatory criminal sexual assault for the offense committed against J.H.

¶ 5 The prosecutor filed a motion *in limine* based on the rape shield statute (725 ILCS 5/115-7(a) (West 2004)), asking the court to bar any evidence of prior sexual contact between Encalado and Y.C. Encalado did not object, and the trial court granted the motion. The prosecutor also asked the court to bar evidence that the anal swab of Y.C. held the semen of Y.C.'s boyfriend and not the semen of Encalado. Again, Encalado did not object, and the court granted the motion. Encalado's attorneys adhered to the rape shield rulings, as they offered no evidence concerning the anal swab and any prior sexual contact between Y.C. and Encalado.

¶ 6 Encalado informed the court that he intended to testify that Y.C., as well as C.C. and S.A., consented to the sexual contact in exchange for the payment of cash and drugs, but after they delivered the agreed services, he decided to take back the payments he made. He asked the court to question the venire as to whether they could evaluate the evidence of assault without bias if they knew Encalado had narcotics with him at the time of the alleged offenses. He also asked the court to say to the venire, "you will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?" The court refused to ask the venire any questions relating to drugs or prostitution.

¶ 7 Y.C. testified that around 6 a.m. on March 5, 2006, as she walked toward a bakery near her home, a man she did not recognize leaned out of a car and said to her, "yo, your cousin Jose, he was looking for you." Y.C., who had a cousin Jose who lived a few blocks away, went over to the car and asked what Jose wanted. The driver, Encalado, offered to take her to Jose. Y.C. asked to stop by the bakery first. Encalado said, "yeah," and she got into the car. Encalado started driving the wrong direction for going to either the bakery or Jose's home. Y.C. asked

where they were going. Encalado said, "[Y]ou know what this is." Encalado stopped in an alley. Y.C. tried to open the door but found it locked. Encalado struck Y.C. repeatedly in the face. Encalado opened the glove compartment and took out a pistol. He called Y.C. a bitch, a whore, and a slut. He unzipped his pants and pushed Y.C.'s head onto his penis. He covered Y.C.'s head with his coat, got on top of her, pulled down her pants, and penetrated her vaginally and anally. When he stopped, he pushed her out of the car and threw her shoe at her. Y.C. ran screaming until she saw Rodriguez, who brought her first to the police station and then to the hospital.

¶ 8 Rodriguez testified that he saw Y.C. in the street, trying to persuade passing cars to stop, crying hysterically, with blood on her mouth. Y.C. told him she had been raped. The nurse who saw Y.C. noted the bruise on her lip.

¶ 9 The prosecution then presented its evidence that Encalado committed a similar crime against C.C. The prosecution elected not to present evidence of the crime committed against S.A.

¶ 10 C.C. testified that on September 10, 2002, she went to a club with her sister. C.C. decided to leave the club and wait for her sister in her sister's car. As she walked down an alley, a man drove up and asked if she needed a ride. She said no and kept walking, but she did not remember correctly where her sister had parked. A few minutes later the same man drove up again and asked if she needed help. She got into his car. She then noticed that the driver wore a bandana that covered most of his face. He locked the car doors, punched C.C. in the face, and covered her face with her clothes. He forced his penis into her vagina. When he finished, he robbed her of some jewelry before driving her back to the club. C.C.'s sister took her to a nearby hospital. C.C. admitted to police that she did not see clearly the man who raped her, and she made no identification of her rapist. But swabs in the rape kit taken at the hospital held DNA that matched Encalado's DNA.

¶ 11 On cross-examination, C.C. admitted that in 2009, when she first told police about the assault, she said the rapist held a knife when he assaulted her. She explained that he held it to her neck when she got into the car, but she did not see it again after that.

¶ 12 Encalado admitted that he had sex with Y.C. and C.C., and he also admitted that he had a prior conviction for predatory criminal assault. Encalado testified that on March 5, 2006, after 5 a.m., he went to an area of Chicago known for prostitution, looking to find someone willing to trade sex for cash. He saw Y.C., and he asked if she was working. She said yes and got into his car. He asked for oral and vaginal sex in exchange for $65 and some marijuana. She agreed. He parked in an alley, and they engaged in oral and vaginal intercourse. During the vaginal intercourse, his penis came out of the vaginal canal and made contact with Y.C.'s anus. She said, "[T]oo low, wrong hole." He said, "I am sorry," but then he lost his erection and could not regain it. He testified that "like an idiot," he took back the money he had paid her. Y.C. started yelling at him, demanding the cash. He pushed her out of the car and drove off. He never punched her or said anything about a cousin Jose.

¶ 13 Encalado testified that he picked up C.C. on September 1, 2002, in another area known for prostitution. Encalado saw C.C. on the street, and she waved him to an alley. He asked if she was working, and she said yes and got into his car. He offered her $60 and told her he could get some cocaine. In exchange for the cash plus the cocaine, she agreed to have oral and vaginal sex with him. After he ejaculated, he took out of her pocket the money he had paid her. She

yelled at him and called him names, but she got out of the car without her payment. He did not punch her or steal her jewelry.

¶ 14 The jury found Encalado guilty on all three counts. In his motion for a new trial, Encalado again objected to the decision disallowing the questions he sought to ask the venire and the decision to permit the prosecution to use his prior conviction for predatory criminal sexual assault to impeach his testimony. The trial court denied the motion for a new trial.

¶ 15 At the sentencing hearing, the prosecution chose to present evidence of the crime against S.A. S.A. testified that around 1 a.m. on August 11, 2007, while she worked as a prostitute, Encalado drove up and waved her to his car. She got in. She told him the price for her work. He said he had only $40. She refused the proposed transaction. Encalado then punched her in the face and demanded that she pull her shirt over her eyes. He forced his penis into her mouth and her vagina. After she got out of the car, she returned to the area where she worked, and she saw Encalado across the street. She also saw some police officers. As she started to approach the officers, Encalado ran off. She told the officers about the assault. She did not tell them that she had been working as a prostitute. She explained:

> "I wanted to be taken seriously, I didn't want them to shrug it off and say, oh, it was just a prostitution gone bad, and I wanted to be treated like a human."

¶ 16 At first S.A. refused medical treatment, but after she took narcotics to calm herself down, she went to a nearby hospital where she underwent standard treatment for a criminal sexual assault victim. Two years later, police brought her to the police station to show her a lineup. She identified Encalado as the man who raped her in 2007. She also told police that she had been working as a prostitute when she got into Encalado's car.

¶ 17 The trial court sentenced Encalado to three terms of 20 years each, with the sentences to run consecutively. Encalado now appeals.

¶ 18 ANALYSIS

¶ 19 Encalado contends that this court should remand for a new trial because the trial court mistakenly permitted the prosecution to use his prior conviction for impeachment and because the trial court refused to question venire members about their attitudes toward prostitution and drugs.

¶ 20 Prior Conviction

¶ 21 The trial court has discretion to permit the prosecution to use prior convictions for impeachment of a criminal defendant. *People v. Montgomery*, 47 Ill. 2d 510, 515 (1971). This court will not reverse the trial court's judgment due to the admission into evidence of a prior conviction unless the trial court abused its discretion. *People v. Atkinson*, 186 Ill. 2d 450, 461-63 (1999). To decide whether to admit evidence of the prior crime for impeachment, the trial court should consider "the nature of the crime, nearness or remoteness of the crime, the subsequent career of the person, and whether the crime was similar to the one charged." *People v. Redd*, 135 Ill. 2d 252, 325 (1990). The court must not allow the conviction into evidence if the unfair prejudicial effect of the evidence substantially outweighs its probative value. *Montgomery*, 47 Ill. 2d at 517-18.

¶ 22 Encalado points out that the trial court did not expressly weigh the appropriate factors, and the court made no findings to support its conclusion that the probative value of the evidence

outweighed its unfair prejudicial effect. However, the parties brought the appropriate factors to the court's attention and argued about their application to the facts of the case. The court knew that several women had accused Encalado of criminal sexual assaults that took place between 2002 and 2007, and Encalado admitted that on several occasions he robbed women selling sex. One prior court found Encalado guilty of a predatory criminal sexual assault, with the conviction dated 2013 for conduct that occurred in 2002.

¶ 23 The case presented a credibility contest between Y.C.'s and Encalado's accounts of the encounter on March 5, 2006. The prior felony conviction could substantially aid the jury in assessing Encalado's credibility. See *Atkinson*, 186 Ill. 2d at 461-62. But "[w]here multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' As a general guide, those convictions which are for the same crime should be admitted sparingly ***." *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967).

¶ 24 We find this case effectively indistinguishable from *Redd*. Redd had a prior conviction for rape and attempted murder, and he faced new, similar charges. After a jury found him guilty of the new charges, Redd, on appeal, argued that the trial court erred when it admitted the prior convictions for impeachment and that the trial court failed to weigh explicitly the appropriate factors before deciding to admit the convictions into evidence. Our supreme court held:

> " 'Since the court was aware of *Montgomery* and its provisions, it must be assumed that the judge gave appropriate consideration to the relevant factors and they need not appear of record.' [*People v.*] *Hovanec*, 76 Ill. App. 3d [401,] 421 [(1979)].
>
> In this case, defendant argued to the circuit court that the prior rape and attempted murder convictions are so similar to the charges defendant faced at trial that defendant could not get a fair trial. The State responded that defendant's case turned on credibility; the State argued to the circuit court that 'the discretion you are given under *Montgomery* in order to know whether or not that [defendant's] conviction for the similar offense is also an aid in determining credibility and will not be reversed if in granting our motion using your discretion you allow us to use a similar offense.' The circuit court then denied the motion. From the record, it appears the trial court understood its discretion under *Montgomery*, and properly denied defendant's motion." *Redd*, 135 Ill. 2d at 326.

¶ 25 Here, too, the transcript shows that the parties brought to the court's attention the appropriate factors, and the court understood its discretion. In light of the jury's need for information relevant to Encalado's credibility, we cannot say that the trial court abused its discretion when it permitted the prosecution to use Encalado's prior conviction for predatory criminal sexual assault for impeachment. See *Redd*, 135 Ill. 2d at 326; see also *Atkinson*, 186 Ill. 2d at 461-62.

¶ 26 *Voir Dire*

¶ 27 Our supreme court, in *People v. Strain*, 194 Ill. 2d 467 (2000), articulated the guiding principles for appellate review of questions asked on *voir dire*:

> "[T]he trial court is given the primary responsibility of conducting the *voir dire* examination, and the extent and scope of the examination rests within its discretion.

> [Citations.] However, the trial court must exercise its discretion in a manner consistent with the purpose of *voir dire*. [Citations.] As the court observed in *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993), '[t]he purpose of *voir dire* is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath.' [Citations.] The jurors must harbor no bias or prejudice which would prevent them from returning a verdict according to the law and evidence. [Citation.] Thus, 'a failure to permit pertinent inquiries to enable a party to ascertain whether the minds of the jurors are free from bias or prejudice which would constitute a basis of challenge for cause, or which would enable him to exercise his right of peremptory challenge intelligently, may constitute reversible error.' [*People v.*] *Lobb*, 17 Ill. 2d [287], 300 [(1959)]." *Strain*, 194 Ill. 2d at 476-77.

¶ 28 However, the trial court should not permit the parties to use *voir dire* to indoctrinate the jurors or to "ascertain prospective jurors' opinions with respect to evidence to be presented at trial." *In re Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 17.

¶ 29 The *Strain* court held that Strain had a right to have the court question the venire to help him determine whether his membership in a street gang would prevent individuals in the venire from weighing the evidence against him without bias. *Strain*, 194 Ill. 2d at 477. Courts have also found a duty to question venire members about possible bias against drug users (*People v. Lanter*, 230 Ill. App. 3d 72, 74-76 (1992)) and the insanity defense (*People v. Stack*, 112 Ill. 2d 301, 311 (1986)) when those biases might affect the jurors' ability to decide the case impartially.

¶ 30 Encalado informed the court that he intended to introduce evidence that Y.C. and C.C. had agreed to exchange sex for money and drugs, and after they delivered the agreed services, he robbed them of the amounts he had paid them. Under *Butler*, Encalado had no right to indoctrinate the jury or ascertain their attitudes toward his defense, so he could not ask whether the venire members could weigh impartially evidence that he robbed prostitutes. See *Butler*, 2013 IL App (1st) 113606, ¶ 17; see *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 40. However, Encalado did not request that question. Instead, he asked the court to say to the venire, "you will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?"

¶ 31 Several courts have noted that some sexual behaviors can evoke from many venire members strong responses that prevent the venire members from assessing evidence without bias. Courts have noted potential juror bias against persons who exchange sex for money (*Commonwealth v. Harris*, 825 N.E.2d 58, 75 (Mass. 2005) (Marshall, C.J., concurring in part and dissenting in part, joined by Greaney, J.)), homosexuals (*In re Commitment of Hill*, 334 S.W.3d 226 (Tex. 2011); *Gavin*, 2014 IL App (1st) 122918, ¶ 41), persons who "posed nude and had sex both for money and for the purpose of making pornography" (*Wood v. Alaska*, 957 F.2d 1544, 1552 (9th Cir. 1992)), and persons engaged in sexually immoral conduct (*People v. Scaggs*, 111 Ill. App. 3d 633, 636 (1982); *People v. Liapis*, 3 Ill. App. 3d 864, 868 (1972)).

¶ 32 We find that jurors may hold similar biases against customers of women who exchange sex for money. A number of jurisdictions have used public antipathy toward patrons of prostitutes as a means of reducing prostitution:

> "[T]he Pennsylvania state legislature approved an amendment to its criminal code requiring courts to publish the name and the sentence of any person twice found guilty of patronizing a prostitute.
>
> *** [H]undreds of communities across the nation employ various methods of systematically shaming johns. The names or faces of those arrested for soliciting prostitutes may flash across local papers, scattered billboards, hand painted signs, or city-run cable television channels.
>
> * * *
>
> A large part of the appeal of shaming johns lies in its theoretical effectiveness. Applying punishment theories to those factors peculiar to public humiliation of prostitutes' patrons demonstrates that the chance of some measurable effect is strong.
>
> * * *
>
> In all likelihood, prostitutes' patrons, their immediate communities, and the surrounding public will all perceive stigmatizing publicity as painful." Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 Vand. L. Rev. 1525, 1536-38 (1996).

¶ 33 A researcher found that "In the 1990s, a growing number of communities have sought to apply a new range of sanctions to punish men who buy sex, including: publicity ***. *** When confronted with the threat of a penalty more serious than a fine—*** [such as] publication of a photo—defendants resist, delay, and plead to a lesser offense to avoid the sanction." Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. Cal. L. Rev. 523, 567-68 (2000). Another researcher found that "Customers *** are more fearful of arrest and punishment and more vulnerable than prostitutes to public shaming and stigmatization. [Citation.] A British study found that arrested customers were unconcerned about fines but very worried about damage to their reputations if their activities were made public [citation]." Ronald Weitzer, *Prostitution Control in America: Rethinking Public Policy*, 32 Crime, L. & Soc. Change 83, 96 (1999). See also Julie Lefler, Note, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 Hastings Women's L.J. 11 (1999). Thus, we find that legislatures and the customers of women who exchange sex for money know that many persons feel strong disgust and antipathy toward the patrons of prostitutes.

¶ 34 The State points out that Encalado accused the prosecution's witnesses of working as prostitutes so that the venire members may have held biases against the State's witnesses. The question Encalado sought to ask the venire would also have helped probe for any potential bias against the two witnesses accused of engaging in commercial affections. The fact that the prosecution had an interest in a jury free from bias against prostitutes does not excuse the trial court's failure to probe for such potential bias. We find that Encalado requested an appropriate question during *voir dire* to help him determine whether the potential jurors could weigh the evidence against him, without a predisposition to find him guilty of criminal sexual assault because he patronized prostitutes. The trial court's *voir dire* questions failed to reveal whether any members of the venire harbored a bias against persons who participate in prostitution, and therefore Encalado could not "ascertain whether the minds of the jurors are free from bias or prejudice which would constitute a basis of challenge for cause, or which would enable him to exercise his right of peremptory challenge intelligently." *Lobb*, 17 Ill. 2d at 300.

¶ 35 The dissent argues that the trial court applied the policy behind the rape shield law when it refused to ask the questions Encalado sought on *voir dire*. See *infra* ¶¶ 48-67. The parties and the court recognized that Encalado had a constitutional right to present evidence directly bearing on his defense that Y.C. agreed to have sex with him in exchange for money and drugs. See *People v. Hill*, 289 Ill. App. 3d 859, 862 (1997). The rape shield law expressly requires courts to permit defendants "to offer certain evidence which [is] directly relevant to matters at issue in the case, notwithstanding that it concern[s] the victim's prior sexual activity." *People v. Santos*, 211 Ill. 2d 395, 405-06 (2004).

¶ 36 Thus, the court knew it could not preclude Encalado from testifying that Y.C. agreed to have sex with him in exchange for money. The dissent acknowledges that jurors may harbor biases against persons who engage in acts of prostitution. The trial court here, knowing about the evidence Encalado intended to present and the widespread bias against both prostitutes and their customers, needed to decide what to do about the potential effect of Encalado's expected testimony on the rights of the parties to a fair trial.

¶ 37 The judge chose the course that gave the parties no opportunity to discover whether any members of the venire could weigh the evidence impartially once Encalado testified. The judge's choice led to a high likelihood that some persons serving on the jury would react with strong disgust and antipathy toward Encalado when he testified that he patronized prostitutes.

¶ 38 The dissent states as grounds for affirmance that the evidence in this credibility contest "was, by any measure, overwhelming," (*infra* ¶ 66) and that Encalado's "preposterous" testimony was a "transparent ploy" (*infra* ¶¶ 56, 67). The dissent appears to suggest that the trial court should assess the credibility of the defendant's testimony, and if the court finds the defendant not credible, the court need not bother with impaneling an impartial jury. We hold that the trial court must protect the defendant's constitutional right to have an impartial jury and not assess the credibility of his testimony. See *Strain*, 194 Ill. 2d at 476-77.

¶ 39 The rape shield statute only prescribes rules for the admissibility of evidence. The statute does not prescribe the rules for conducting *voir dire*. The statute does not give any party the right to a trial by a biased jury. The statute does not give any party a right to prevent another party from discovering whether potential jurors harbor biases that could affect the right to trial by an impartial jury.

¶ 40 The rape shield statute protects the integrity of trials by requiring courts to exclude certain kinds of highly prejudicial evidence of little relevance that could lead juries to base their verdicts on emotional reactions rather than an honest appraisal of the evidence. *State v. Budis*, 593 A.2d 784, 788-89 (N.J. 1991); *People v. Williams*, 614 N.E.2d 730, 733 (N.Y. 1993); see also *People v. Sandifer*, 2016 IL App (1st) 133397, ¶ 22. However, the rape shield statute does not tell the court how to maintain the integrity of the trial and protect the parties' rights to trial by an impartial jury when the court must allow a party to introduce highly prejudicial evidence. When the court must allow the evidence, *Strain* provides guidance for the protection of the right to an impartial jury.

¶ 41 We recognize that even if the court asked the question Encalado sought to ask the venire, venire members biased against prostitutes and their patrons may have served on the jury. *Voir dire* does not perfectly exclude biased jurors, especially because venire members may lie in their answers on *voir dire*. See *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Nonetheless, questioning on *voir dire* provides a means for the parties to attempt to discover biases that could affect the parties' right to a fair trial. See *Strain*, 194 Ill.

2d at 476-77. The procedure used by the trial court here, and defended by the dissent, removed the possibility of discovering whether a venire member held a widespread bias that would affect his or her ability to weigh the evidence impartially.

¶ 42 Moreover, if a woman who works as a prostitute, like S.A., accuses a man of injuring her in a sexual assault, she may want to exclude from the jury deciding the case any venire members biased against her because of her source of income, persons who may "decide the case on an improper or emotional basis." *State v. Hudlow*, 659 P.2d 514, 521 (Wash. 1983) (*en banc*). S.A., for one, knew that if she told police she worked as a prostitute, they would treat her complaint of an assault as insignificant, as they would see her as less than human. The dissent would stand as precedent for disallowing any questioning of the venire about attitudes toward prostitution. Fortunately, a woman like S.A. will have this case, instead, to rely on to help her get a fair trial.

¶ 43 Because the trial court erred when it refused to ask an appropriate question during *voir dire*, which would have tested an area of potential bias not covered by other questions, we must reverse the convictions and remand for a new trial. See *Lanter*, 230 Ill. App. 3d at 76. On remand, if Encalado requests *voir dire* questions concerning possible bias due to his drug possession, the court should allow appropriate questions on the issue. See *Lanter*, 230 Ill. App. 3d at 75-76.

¶ 44 CONCLUSION

¶ 45 The trial court did not abuse its discretion when it decided that the prosecution could use Encalado's prior conviction for predatory criminal sexual assault for impeachment in this prosecution for aggravated criminal sexual assault. The trial court abused its discretion when it refused to ask the venire members whether hearing evidence of prostitution would affect their ability to assess the evidence impartially. Accordingly, we reverse the convictions and remand for a new trial.

¶ 46 Reversed and remanded.

¶ 47 JUSTICE MASON, concurring in part and dissenting in part.

¶ 48 I concur in the majority's conclusion that the trial court properly admitted evidence of Encalado's prior conviction for predatory criminal sexual assault. But I disagree that the trial court abused its discretion in refusing to permit Encalado to question prospective jurors during *voir dire* regarding whether evidence of prostitution would prevent them from being fair or that the refusal "thwarted the selection of an impartial jury." *People v. Williams*, 164 Ill. 2d 1, 16 (1994) (superseded on other grounds by rule as stated in *People v. Garstecki*, 234 Ill. 2d 430, 438 (2009)). Under the circumstances here, the rape shield statute (725 ILCS 5/115-7(a) (West 2004)), and the strong public policy it reflects, precludes a finding that the trial court abused its discretion by refusing to allow the defense to introduce the issue of prostitution into jury selection. Therefore, I respectfully dissent from the majority's decision to reverse Encalado's conviction on this ground.

¶ 49 Encalado admitted he had sex with both the victim and the corroborating witness. He could hardly do otherwise as his DNA was recovered from both victims. He claimed, however, that

on both occasions, the women were prostitutes, the sex was consensual, and they only complained afterward because Encalado took back the money he paid them.

¶ 50 Prior to trial, the State filed a motion *in limine* to preclude Encalado from introducing evidence of the victim's prior sexual history or from attempting to impeach the corroborating witness with a conviction for prostitution. Although no order granting the motion is in the record, I must assume the motion was granted since no questions along those lines were asked on cross-examination of either witness. Thus, prior to jury selection, Encalado was aware that he could not introduce evidence of either the victim's or the corroborating witness's sexual history.

¶ 51 Notwithstanding Encalado's recognition that the trial court properly limited the scope of his cross-examination of both the victim and the corroborating witness, Encalado complains that he should have been permitted to propound the following question to prospective jurors: "You will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?" He further argues that refusal to propound that single question to members of the venire deprived him of his right to a fair trial.

¶ 52 Our supreme court has long recognized that "the primary responsibility for both initiating and conducting the *voir dire* examination lies with the circuit court, and the manner and scope of that examination rests within the discretion of that court." *Williams*, 164 Ill. 2d at 16; *People v. Terrell*, 185 Ill. 2d 467, 484 (1998). There is no "bright-line" test for determining the propriety of *voir dire* questioning; rather, the scope of permissible questions

> "is a continuum. Broad questions are generally permissible. For example, the State may ask potential jurors whether they would be disinclined to convict a defendant based on circumstantial evidence. See *People v. Freeman*, 60 Ill. App. 3d 794, 799-800 (1978). Specific questions tailored to the facts of the case and intended to serve as 'preliminary final argument' (*People v. Mapp*, 283 Ill. App. 3d 979, 989-90 (1996)) are generally impermissible." *People v. Rinehart*, 2012 IL 111719, ¶ 17.

See also *People v. Howard*, 147 Ill. 2d 103, 135-36 (1991) (no error in trial court's refusal, in defendant's prosecution for crimes committed with a firearm, to ask prospective jurors about their attitudes toward guns).

¶ 53 The purpose of *voir dire* is not to explore prospective jurors' opinions with respect to evidence that will be presented at trial. *In re Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 17. "[I]t is not the purpose of *voir dire* to preview the evidence for the jury, or to measure the jurors' reactions to certain facts." *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 44 (citing *Butler*, 2013 IL App (1st) 113606, ¶ 17). "Further, to be constitutionally compelled, it is not enough that a *voir dire* question be helpful; rather, the trial court's failure to ask the question must render the defendant['s] proceedings fundamentally unfair." *Butler*, 2013 IL App (1st) 113606, ¶ 15 (citing *Terrell*, 185 Ill. 2d at 485).

¶ 54 In this case, measured against Encalado's right to conduct *voir dire* is the protection afforded victims and corroborating witnesses under the rape shield statute. 725 ILCS 5/115-7 (West 2004). Under the statute, in a prosecution for, *inter alia*, criminal sexual assault and aggravated criminal sexual assault, the prior sexual activity or the reputation of the alleged victim or corroborating witness is inadmissible except (1) to show that the victim's or corroborating witness's past sexual conduct *with the accused* bears on the issue of consent to the conduct charged or (2) "when constitutionally required to be admitted." 725 ILCS 5/115-7(a) (West 2004). The statutory prohibition of inquiry into a victim's or corroborating

witness's sexual past includes the victim's alleged profession as a prostitute. *People v. Ivory*, 139 Ill. App. 3d 448, 453 (1985).

¶ 55 Our supreme court has recognized that in "extraordinary circumstances," a defendant's constitutional right of confrontation through cross-examination may take precedence over the protections of the statute. *People v. Sandoval*, 135 Ill. 2d 159, 185 (1990) (cross-examination of sexual assault victim regarding prior sexual history potentially permissible when relevant (1) to show bias, interest, or motive for making false charge; (2) to explain physical facts such as presence of semen, pregnancy, or evidence of sexual intercourse; or (3) to demonstrate victim's prior conduct clearly similar to conduct in issue). But Encalado does not claim that his right of confrontation was violated by his inability to cross-examine Y.C. regarding his assertion that she was a prostitute or that this case presented any of the "extraordinary circumstances" recognized in *Sandoval*. Indeed, defense counsel never even asked Y.C. (or the corroborating witness) if she consented to have sex with his client, which, given Encalado's defense, he would have been entitled to do. It stands to reason, therefore, that because Encalado claims no error in the court's ruling on the State's motion *in limine* based on the rape shield statute, there was likewise no error in precluding him from questioning prospective jurors about whether evidence of prostitution would prevent them from fairly judging the case.

¶ 56 In essence, Encalado claims that his trial was rendered "fundamentally unfair" because the trial court refused to allow him to accomplish indirectly what the rape shield statute prohibits him from doing directly. That the question regarding prostitution was designed to be a "preliminary final argument" for the defense is illustrated by defense counsel's opening statement, in which the jury was informed that they would hear evidence about the "oldest profession," *i.e.*, prostitution, a theme that was repeated at length in closing argument. But other than Encalado's preposterous claim that the victim, a 24-year-old, pregnant woman on her way to a neighborhood bakery at 6:00 a.m., was a prostitute (a claim that Encalado had also used in connection with his attack on the corroborating witness), there was absolutely no evidence to support that assertion.

¶ 57 At the beginning of *voir dire*, the trial court informed the venire of the nature of the charges against Encalado and that he was presumed innocent of those charges. Central to Encalado's defense was not that the victim was a prostitute or that he paid her, in part, with drugs but rather that she agreed to have sex with him, and consequently, he was not guilty of the crimes charged. There was, therefore, nothing in the trial court's decision to preclude Encalado from suggesting during *voir dire* that the victim was a prostitute that deprived Encalado of a fair trial.

¶ 58 This is particularly true in this case given that the only way Encalado's jury would hear evidence regarding prostitution is if Encalado testified. Had Encalado exercised his right not to testify, as the vast majority of criminal defendants do (even those who profess pretrial an intention to testify), no evidence regarding prostitution would have been admitted. Thus, the question proposed by Encalado prefaced by "you will hear evidence of prostitution in this case" was an accurate statement only if Encalado testified. See *Gavin*, 2014 IL App (1st) 122918, ¶ 44 (purpose of *voir dire* is not to "measure the jurors' reactions to certain facts"). Yet, whether or not Encalado testified, if prospective jurors had been asked the question he proposed, they would have been left with the impression, as Encalado undoubtedly hoped, that the victim was a prostitute. The conditional relevance of the question (which was dependent on

Encalado's decision to testify) and its improper and unfounded insinuation underscores the propriety of the trial judge's decision not to allow it during *voir dire*.

¶ 59 No reported Illinois decision has found an abuse of discretion, much less an error of constitutional dimension, under analogous circumstances. *In re Commitment of Gavin*, 2014 IL App (1st) 122918, the only Illinois authority cited by the majority on this point, provides no support for the conclusion that there was any error in Encalado's jury selection. In *Gavin*, the respondent, in proceedings to determine whether he should be committed as a sexually violent person, proposed to question prospective jurors as to whether they could be fair given his conviction for indecent liberties with a child. The trial court denied the request, but allowed the respondent to ask whether jurors could be fair given his four convictions for sexually violent offenses. *Id.* ¶ 10. As noted, *Gavin* found no error and unequivocally stated that respondent's attempted use of *voir dire* to gauge prospective jurors' reactions to particular facts that would come out at trial was not proper. *Id.* ¶¶ 38-45. This is exactly what Encalado attempted to do here, and it was properly rejected by the trial court for the same reasons articulated in *Gavin*. *People v. Scaggs*, 111 Ill. App. 3d 633, 636 (1982), and *People v. Liapis*, 3 Ill. App. 3d 864, 868 (1972), also cited by the majority, stand for the unremarkable proposition that it is error to introduce evidence of a defendant's sexual conduct in prosecutions having nothing to do with that conduct.

¶ 60 The majority also relies on a number of cases from other jurisdictions, but like *Gavin*, none is on point. In particular, as support for its observation that "[c]ourts have noted potential juror bias *against persons who exchange sex for money*" (emphasis added) (*supra* ¶ 31), the majority cites *Commonwealth v. Harris*, 825 N.E.2d 58, 75 (Mass. 2005) (Marshall, C.J., concurring in part and dissenting in part, joined by Greaney, J.). What Justice Margaret Marshall's dissent in *Harris* actually says is "[p]rejudice or disbelief occurs with particular intensity when the complainant is a prostitute, and courts have long sought means to minimize *jury bias against prostitutes*." (Emphasis added.) *Id. Harris* says nothing about jury bias against men who patronize prostitutes. And it is ironic that the majority relies on *Harris* as supporting the result here given that Justice Marshall was dissenting from the majority's holding that the trial court could, in its discretion, admit evidence of the victim's past conviction for being a "common nightwalker" for impeachment purposes. *Id.* at 73. Justice Marshall persuasively argued that this result was at odds with the very protections the Massachusetts rape shield statute was designed to provide rape victims. ("Prostitutes are frequent victims of rape. [Citation.] Yet societal beliefs persist that prostitutes cannot be raped, or that they are not harmed by rape, or that they somehow deserved to be raped. [Citation.] In enacting the rape-shield statute, the [l]egislature could well have recognized that these prejudices outweighed the little—or nonexistent—probative value of a sexual conduct conviction in determining a rape complainant's credibility." *Id.* at 75-76.) Indeed, as Justice Marshall recognized, rape shield statutes were prompted, in large part, by the realization that jurors were unwilling to convict men who patronized prostitutes where the rape charge depended on the prostitute's testimony because jurors harbored such deep-seated biases against prostitutes and were unwilling to believe them. Thus, the majority's citation of *Harris* provides no support for its finding of error.

¶ 61 Significantly, unlike *Harris*, no Illinois court has held that despite the Illinois rape shield statute's prohibitions, a rape victim can nevertheless be impeached with a prostitution conviction. See *Sandoval*, 135 Ill. 2d at 178 ("Defendant's right of confrontation necessarily

includes the right to cross-examine witnesses, but that right does not extend to matters which are irrelevant and have little or no probative value. Complainant's past sexual conduct has no bearing on whether she has consented to sexual relations with defendant." (Internal quotation marks omitted.)); *People v. Buford*, 110 Ill. App. 3d 46, 50 (1982) (victim's past solicitation of prostitution conviction inadmissible over defendant's claim that victim had motive to fabricate so as not to establish violation of her probation on a federal conviction). As noted, the trial court prevented Encalado from cross-examining the corroborating witness about a past conviction for solicitation of prostitution, a ruling he does not challenge on appeal.

¶ 62 The other non-Illinois authorities cited by the majority are likewise unhelpful. *In re Commitment of Hill*, 334 S.W.3d 226 (Tex. 2011), involved a civil commitment proceeding in which the State was required to prove that the respondent was a repeat sexually violent offender and suffered from a behavioral abnormality that rendered him likely to engage in a predatory act of sexual violence. Part of the State's evidence that the respondent suffered from a behavioral abnormality was that, although heterosexual, respondent had engaged in homosexual activity with male inmates while in prison. During *voir dire*, respondent's counsel asked potential jurors whether they could be fair to an individual they believed to be a homosexual. After several members of the venire stated they could not be fair, the court terminated counsel's questioning. *Id.* at 228. *Hill* concluded that, particularly in light of admissions from several members of the venire that they could not be fair to a homosexual, the trial court's conduct in curtailing questions on the topic "prevented [respondent] from discovering the potential jurors' biases so as to strike them for cause or intelligently use peremptory challenges." *Id.* at 229.

¶ 63 Unlike homosexuals, whose causes and rights have prompted widespread national attention, there has been no similar public discourse about bias against men who pay women for sex. Thus, it is pure speculation to conjure that the mere mention of prostitution, particularly when the members of the venire had already been told of the nature of the charges against Encalado, would provoke such a negative response that a prospective juror would believe that he or she could not be fair. In other words, having heard that Encalado was accused of raping the victim vaginally and anally and of forcing her to perform oral sex on him, it is unlikely in the extreme that any juror who believed they could be fair and impartial notwithstanding that information would feel otherwise if they were told that evidence of prostitution would be introduced at trial.

¶ 64 *Wood v. Alaska*, 957 F.2d 1544 (9th Cir. 1992), actually supports the result reached in the trial court. In *Wood*, the defendant in a sexual assault case, who claimed he had a prior sexual relationship with the victim, sought to admit evidence that the victim told him she posed nude for *Penthouse* magazine, acted in pornographic films and had been paid to have sex while others watched. After a pretrial hearing, the court refused to admit the evidence. Affirming, the Ninth Circuit observed, "[t]he fact that [the victim] was willing to pose for *Penthouse* or act in sexual movies and performances says virtually nothing about whether she would have sex with [defendant]. It only tends to show that she was willing to have sex, not that she was willing to have sex with this particular man at this particular time." *Id.* at 1550. Further, the court found that evidence of the victim's past sexual activities unrelated to the defendant could persuade a jury "that a woman with her sexual past cannot be raped, or that she somehow deserved to be raped after engaging in these sexual activities." *Id.* at 1552-53. Similarly, Encalado's proposed

questioning of prospective jurors regarding prostitution was a thinly veiled effort to insinuate that the victim was a prostitute and, thus, less worthy of belief.

¶ 65 In closing, the majority attempts to cast its decision as benefitting women who work as prostitutes, but this argument cannot withstand analysis. If a woman who works as a prostitute is sexually assaulted, the rape shield statute protects her from a defendant's attempt to introduce her vocation to a jury. *Ivory*, 139 Ill. App. 3d at 453. Given that evidence of her prostitution would more than likely be inadmissible, it would be unnecessary (and illogical) for the State in such a case to query a venire as to their attitudes about prostitutes.

¶ 66 The Illinois legislature has decided that in prosecutions for sexual assaults, the fact that the victim is a prostitute is, with limited exceptions not applicable here, inadmissible. It is impossible to understate Encalado's burden to demonstrate error in the trial court's refusal to allow him to ask prospective jurors whether the mention of prostitution could affect their ability to be fair and impartial. He must show not only that no reasonable judge would have refused to allow the question proposed by defense counsel but also that the failure to propound that single question to the venire is an error of constitutional dimension rendering his trial fundamentally unfair. And given the absence of any controlling authority in Illinois, or anywhere else for that matter, the trial court's refusal to introduce the topic of prostitution into jury selection simply cannot be deemed an abuse of discretion. The evidence against Encalado was, by any measure, overwhelming, and so if there was constitutional error, it was harmless beyond a reasonable doubt. See *In re E.H.*, 224 Ill. 2d 172, 180-81 (2006).

¶ 67 If a defendant like Encalado *must* be allowed to ask prospective jurors about prostitution because without that question he cannot be assured of a fair and impartial jury, then all a defendant need do to circumvent the protections of the rape shield statute is claim that the victim is a prostitute and that his patronization of a prostitute is so sensitive as to mandate *voir dire* questioning on the subject. It is not difficult to imagine that rape victims might well be discouraged from coming forward if they knew that it would be suggested to a roomful of strangers that they were prostitutes before they had even taken the stand. This transparent ploy was properly rejected by the trial court. I would affirm.

MR. GORELICK: Which count?

MS. MCCOY CUMMINGS: Just the additional verbiage in the counts that we are going under are the to wit, Theophil Encalado displayed a firearm. I am just letting Counsel know.

Remember, the last trial we had an issue. I am just telling you the additional verbiage. It is not pursuant to statute. We are not going with the armed with a firearm.

MR. GORELICK: I have no idea what you are talking about because Count 2 is with a firearm.

THE COURT: It says he displayed a firearm, but he wasn't armed with a firearm. Is that the distinction you are making?

MS. MCCOY CUMMINGS: I am making that distinction. So it is (a)(3) that we are going under.

There is a count -- and that is included in the indictment -- we are not going on that. The accused was armed with a firearm. So I am just making the distinction that it is just additional verbiage, to put Counsel on notice at the time that it was charged with how we said he was threatening or endangering the life of.

THE COURT: All right. And you had some voir dire

questions you wanted to ask?

MR. GORELICK: Yes, Judge. These are questions I would suggest for court since I -- I know that you do the initial questioning -- the majority of the questioning, I should say.

So what I would suggest is you are going to hear testimony about narcotics, I would like the jury voir dired on that. Mr. Encalado had narcotics. I don't want the jury to decide the case based on the fact that he possessed and sometimes, he is going to testify, paid for prostitution with narcotics in some of these cases.

I would like the jury also voir dired on prostitutes. They are going to hear evidence that he did engage in soliciting and using prostitutes.

I would like the jury -- and I think you do this anyway -- but the credibility of police officers or attorneys, that they wouldn't give them any more or less credibility. I don't think attorneys -- maybe attorneys isn't relevant. I don't think you are going to hear from any State's Attorneys in this case, but definitely police officers.

I would like to know if they were on a jury, a civil jury -- and I think you probably ask this,

too -- the difference -- the different standards of burden between civil and criminal case.

I want the Zehr questions, and I would also like the question about anything about the charges itself that would prevent them from being fair and/or impartial. And, lastly, anything about the defendant as he sits before you that would prevent anyone from giving him a fair and impartial trial.

THE COURT: All right. I always ask whether or not there is anything about the nature of the charges that would prevent anybody from giving the defendant a fair -- both sides a fair and impartial trial. I will go over that.

The civil juries -- I will ask if they understand there is a different burden of proof.

With regard to the fact that they may hear that the defendant, you know, pays for prostitutes with narcotics -- it seems like you are asking me to have them pre -- comment on particular types of evidence, which I don't think is appropriate for voir dire.

MR. GORELICK: Well, maybe the fact that he had narcotics on his person, would that prevent them -- because the issue they are here to decide is whether he basically raped, kidnapped these three individuals. So

I don't want them to have prejudice against him or decide the facts based on, oh, he is a drug user, guilty.

I just want to make sure they don't have any preconceived notions about individuals who use drugs when it comes to the issue at hand, which is really ag. crim. sex assault and -- yeah, ag. crim. sex assault. So I would like some sort of voir dire on him possessing drugs. If you feel like it is going too far by saying he used part of that to pay for prostitution, I understand that. But I would like some voir dire on the fact that he had narcotics on his person. And then when he testifies, that's fine. I mean, as long as the jury understands that. I just don't want them having any undue prejudice just based on that just to ensure he gets a fair trial.

THE COURT: State, any comment?

MS. MCCOY CUMMINGS: Judge, we think that's improper questioning. The defendant is not charged with any type of narcotics. He is not charged with the narcotics offense. So the fact that the defendant may or may not testify to any alleged narcotic use, we don't believe that that should be done or trying to poll the jury on their particular beliefs as to that.

Even in situations where there are witnesses that may testify as to drug use or alleged drug use, the State is generally not in a position where we are doing early on voir dire questioning as to the jury's belief as to drug use. We believe sometimes that there are instances based upon answers from your general questions that may come up that may need some additional followup. That as charged and the anticipated testimony, the State believes that that would be improper questioning.

THE COURT: I am not going to ask them about specific types of evidence that they may hear. So with regard to that, your request is denied.

MR. GORELICK: Judge, just so I can clarify, I am assuming your ruling -- and please correct me if I am wrong -- prevents me from asking the jurors as well.

THE COURT: It does -- I mean, it seems to me an attempt to indoctrinate the jurors a little bit.

MR. GORELICK: I am not trying to do that, Judge.

The State brings up a good point. He is not charged with drugs. I don't want them to convict him based on the fact that he said that he had drugs on his person.

THE COURT: I am sure that they won't. I am sure

that the jurors will be properly instructed.

You have had juries in front of me before. You have picked juries in front of me before. Anybody who hasn't, I do question the jurors initially myself. I ask the Zehr questions as a group, several of the other questions that may disqualify them. You know, then I will call 14 people up, question them individually.

After I have done so, each side will have an opportunity to ask questions. You are not obligated to do so. After we have questioned them all, we will go back to chambers. We will select in panels of four. First, I ask for motions for cause. If there are any hits on the LEADS checks, I expect the State to inform the Defense before they have to make any motions for cause.

If there is an open panel when we finish with the fourteenth person, the parties are required to make their decisions as far as the open panel. Then we will come back and keep going until we have 12 jurors plus two alternates.

Any other questions?

MR. GORELICK: Back striking?

THE COURT: I do not allow back striking.

Anything else? Don't show the jurors' cards to your client in front of the jury.

MR. GORELICK: Okay.

THE COURT: And that's all I can think of right now.

Anything else? Let me see if I have the witness list.

MR. GORELICK: Judge, are you still ruling on my questions?

THE COURT: Yes, what questions?

MR. GORELICK: Prostitutes, credibility of police officers -- you haven't commented on the Zehr questions.

THE COURT: I ask the Zehr questions.

MR. GORELICK: Well, I just want to --

THE COURT: Of course, I ask the Zehr questions. I ask them as a group. I ask them. I do go into the facts that police officers will testify and does anybody disagree that the testimony of a police officer is to be judged the same as any other witness.

What was the other question that you had?

MR. GORELICK: Anything about the defendant as he sits before you today prevent you from being fair and impartial.

THE COURT: Just by his looks?

MR. GORELICK: Well, I mean, I have had people raise their hand and say yes. One jury I had in front of Judge Fox, the woman just said the fact that he doesn't speak English. Obviously, he speaks English. But it actually happens where people will comment on that.

THE COURT: Well, I think that's covered by, you know, sympathy or bias or prejudice effect your decision making. I will not ask that question.

MR. GORELICK: What about the question about prostitutes?

THE COURT: What do you want me to ask them about that?

MR. GORELICK: The fact that you will hear evidence about -- and just put it mildly -- to not try to indoctrinate them at all -- you will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?

THE COURT: No, I am not going to ask that.

MR. GORELICK: Am I denied from asking that?

THE COURT: I would have to hear the question. Can you not try to indoctrinate them, ask them to comment on particular types of evidence -- so that question seems to be asking them to comment on particular types of

evidence that they may hear, so I think it would be objectionable.

MR. GORELICK: If I -- well, I want to -- you are saying you would have to hear the question. If I asked them just like I presented it -- if you hear evidence about prostitution, would that prevent you from being fair to either side. If I ask it just like that or write it out, I will say it word for word.

THE COURT: State, do you have any --

MS. MCCOY CUMMINGS: I mean, Judge, the same argument can be used with us, that the victim by the initials of SA was a prostitute at the time. We do believe that questioning isn't trying to indoctrinate the jury as to their beliefs. It goes for each sides.

We believe that it is improper questioning trying to get the view from the jury on how they believe people who engage in prostitution would feel -- because the exact opposite could be asked -- how do you feel about prostitutes.

Once again, that is -- the allegations aren't drug related. The State is not attempting to indoctrinate how they may feel about the witnesses. I think the same thing should stand for the defendant.

THE COURT: Yes, I think that's an improper

question, Mr. Gorelick. I won't allow it.

THE COURT: Has the lockup been cleared, Kathy?

THE SHERIFF: Yes, it is.

THE COURT: The mike is on. We will bring out the jury.

MS. MCCOY CUMMINGS: Judge, I think we were -- one more thing with Lorne's motion.

THE COURT: The motion in limine or what?

MR. GORELICK: Yes.

THE COURT: Any more questions as far as voir dire?

MR. GORELICK: No.

MS. MCCOY CUMMINGS: Judge, the State just had one more thing. I did ask Lorne with regards to DNA. They were going into what's called a data search. They informed me they were not -- if they were, the State would file an additional motion. It is my belief that you stated that was not an area --

MR. GORELICK: We will not go into that area.

THE COURT: What area again?

MS. MCCOY CUMMINGS: Judge, just because the State had an anticipation of another motion in limine that we would file -- another motion in limine if that was an area they were going into with regards to DNA. So I am just putting on the record that they stated they are not

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS)
) No. 10CR4270
-vs-) Trial Judge: Coghlan
Theophil Encalado) Attorney: Lorne Gorelick

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:
APPELLANT'S NAME: Theophil Encalado
IR# 1088093 D.O.B. 15 March 1977
APPELLANT'S ADDRESS: ILLINOIS DEPARTMENT OF CORRECTIONS
APPELLANT'S ATTORNEY: State Appellate Defender
ADDRESS: 203 N. LaSalle, 24th Floor, Chicago, IL 60601
OFFENSE: Agg Crim Sex Assault (6 counts)
JUDGEMENT: Verdict of Guilty
DATE: 6-5-14
SENTENCE: 60 YEARS ILLINOIS DEPARTMENT OF CORRECTIONS

APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS
COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the appellant; order the Clerk to prepare the Record on Appeal and the Appoint Counsel on Appeal: Appellant, being duly sworn, says that at the time of his conviction he was and is unable to pay for the Record or appeal lawyer.

FILED
CRIMINAL APPEALS
JUL 29 2014
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

APPELLANT'S ATTORNEY

ENTERED
Judge [illegible] Coghlan
JUL 29 2014
Circuit Court 1812

ORDER

IT IS ORDERED the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished appellant without cost within 45 days of receipt of this Order.

Dates to be transcribed;

PRE-TRIAL MOTION DATES(S):
JURY TRIAL DATE(S): 6-2-14, 6-3-14, 6-4-14, 6-5-14
BENCH TRIAL DATE(S): N/A
SENTENCING DATE(S): 7-29-14
DATE: 7-29-14

OTHER: 7/29/14

ENTER: [signature] 1812
JUDGE

C: 00357

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

NOTICE OF
NOTICE OF APPEAL

To: Honorable Lisa Madigan
Attorney General of Illinois
Springfield, Illinois 62706

Honorable Anita Alvarez
State's Attorney of Cook County
Daley Center, Room 573

Honorable Steven M. Ravid
Clerk of the Appellate Court
160 N. LaSalle, 14th Floor
Chicago, Illinois 60601

In Death Penalty Matters:
Honorable Juleann Hornyak
Clerk of the Supreme Court
Supreme Court Building
200 East Capitol
Springfield, IL 62701

People of the State of Illinois
v.
ENCALADO, THEOPHIL

Case Number: 10 CR 4270

YOU ARE HEREWITH NOTIFIED that pursuant to Rule 606E of the Illinois Supreme Court, effective January 1, 1967, a Notice of Appeal was filed with the Clerk of the Circuit Court of Cook County, County Department, Criminal Division on: A copy of which is hereto attached.

Submitted by:

State of Illinois }
Cook County } ss:

DOROTHY BROWN
Clerk of the Circuit Court of Cook County, Illinois
County Department, Criminal Division

I, Dorothy Brown, Clerk of the Circuit Court of Cook County, County Department, Criminal Division certify that the foregoing Notice and Copy of the Notice of Appeal attached thereto was served upon each of the above named persons by personal service and/or by depositing same in the United States Mail Depository in a sealed envelope, first class postage prepaid addressed to the named persons on

Date: 8-8-, 2014

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS)
) No. 10CR4370
-vs-) Trial Judge: Coghlan
Thophil Encalado) Attorney: Lorne Gorelick

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:
APPELLANT'S NAME: Thophil Encalado
IR# 1088093 D.O.B. 15 March 1977
APPELLANT'S ADDRESS: ILLINOIS DEPARTMENT OF CORRECTIONS
APPELLANT'S ATTORNEY: State Appellate Defender
ADDRESS: 203 N. LaSalle, 24th Floor, Chicago, IL 60601
OFFENSE: A-agg Crim Sex Assault (6 counts)
JUDGEMENT: Verdict of Guilty
DATE: 6-5-14
SENTENCE: 60 YEARS ILLINOIS DEPARTMENT OF CORRECTIONS

APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS
COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the appellant; order the Clerk to prepare the Record on Appeal and the Appoint Counsel on Appeal: Appellant, being duly sworn, says that at the time of his conviction he [illegible] for the Record or appeal lawyer.

APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED that State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished appellant without cost within 45 days of receipt of this Order.

Dates to be transcribed;

PRE-TRIAL MOTION DATES(S):
JURY TRIAL DATE(S): 6-2-14, 6-3-14, 6-4-14, 6-5-14 OTHER: 7/29/14
BENCH TRIAL DATE(S): N/A
SENTENCING DATE(S): 7-29-14
DATE: 7-29-14

ENTER: 1812
JUDGE

C: 00359

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Attorney General of Illinois - Criminal Division
100 W. Randolph St., 12th Flr.
Chicago IL 60601

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

May 24, 2017

In re: People State of Illinois, Appellant, v. Theophil Encalado, Appellee.
Appeal, Appellate Court, First District.
122059

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned deposes and states that on July 28, 2017, the foregoing **Separate Appendix of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses listed below:

Michael J. Pelletier
Patricia Mysza
Jennifer L. Bontrager
Office of the State Appellate
Defender, First Judicial District
203 North LaSalle Street
24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us

Alan J. Spellberg
Mary P. Needham
Caitlin M. Valiulis
Assistant State's Attorneys
Richard J. Daley Center, 3rd Floor
Chicago, Illinois 60602
eserve.criminalappeals@cookcountyil.gov

Counsel for Defendant-Appellee

Additionally, upon the separate appendix's acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of it to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ *Evan B. Elsner*
EVAN B. ELSNER
Assistant Attorney General
eelsner@atg.state.il.us