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IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
RIORDAN, P.J., AND METER AND FORT HOOD, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,
People-Appellee,

vs

Supreme Court
No. 155747-8

LOVELL CHARLES SHARPE,
Defendant-Appellant.

Circuit Court No. 16-001606-FC
Court of Appeals No. 332879/333872

PEOPLE-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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Counterstatement of Jurisdiction

On October 20, 2017, this Court granted defendant's application for leave to appeal. The People file this Brief timely and in accordance with MCR 7.312.

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Counterstatement of Questions Presented

I.

The plain meaning of the rape-shield statute, and its intended purpose, does not include evidence that relates to the underlying offense. Here, evidence that the victim was vaginally penetrated by defendant, became pregnant, had an abortion, and had no other sexual partners all relates to the underlying offense. Is evidence of the victim's pregnancy, abortion, and lack of other sexual partners within the scope of the rape-shield statute?

The trial court answered: "Yes."
The Court of Appeals answered: "No."
The People answer: "No."
Defendant answers: "Yes."

II.

When evidence is subject to the rape-shield statute, it may be admitted if it is material to a fact at issue and it is evidence of the victim's past sexual conduct with defendant or it is evidence of specific instances of sexual activity showing the source or origin of pregnancy. Here, the victim's lack of sexual partners other than defendant, pregnancy, and subsequent abortion established the victim's source of pregnancy, and is relevant to prove the victim's sexual conduct with defendant. Is evidence of the victim's lack of sexual partners, pregnancy, and abortion admissible under the rape-shield statute?

The trial court answered: "No, as to lack of sexual partners and abortion. Yes as to pregnancy."
The Court of Appeals answered: "Yes."
The People answer: "Yes."
Defendant answers: "No."

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III.

All evidence helpful on throwing light to a material point is relevant and admissible unless its probative value is outweighed by unfair prejudice. Here, evidence that the victim had no other sexual partners, was vaginally penetrated by defendant, became pregnant, and subsequently had an abortion, is relevant. Is the evidence the People intend to introduce at trial relevant and not outweighed by unfair prejudice?

The trial court answered: "No, as to lack of sexual partners and abortion. Yes, as to pregnancy."
The Court of Appeals answered: "Yes."
The People answer: "Yes."
Defendant answers: "No."

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Summary of the Argument

The rape-shield statute does not apply to evidence of sexual conduct that is the subject of the underlying charged offense. Evidence of the victim's lack of other sexual partners before, during, and after the sexual abuse, pregnancy, and abortion are admissible at trial against defendant because they directly relate to the sexual conduct that formed the basis of the underlying charges against defendant. Because the evidence directly relates to the victim's credibility, is proof of the acts charged, and is not an admission of "other acts of sexual conduct," it is not subject to the rape-shield statute.

Regardless, the plain language of the statute, "specific instance of sexual conduct," does not include a *lack* of sexual conduct. Therefore, evidence of the victim's virginity is not subject to the rape-shield statute, but only MRE 402 and MRE 403. Alternatively, if the sexual conduct underlying the offense is subject to the rape-shield statute, then evidence of the victim's virginity, pregnancy, and abortion are material to show that defendant vaginally penetrated the victim with his penis, and is admissible as evidence of the victim's sexual conduct with defendant and/or evidence of specific instances of sexual activity showing source of pregnancy.

When considered under MRE 402 and MRE 403, evidence that the 14-year-old victim—who was previously a virgin and had no other sexual partners—became pregnant after defendant sexually abused her by vaginally penetrating her with his penis, and that the victim then aborted her pregnancy with defendant's financial help, is highly probative evidence that makes it more likely that defendant was the perpetrator.

This Court should affirm the Court of Appeals' opinion.

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Counterstatement of Facts

The People charged defendant, Lovell Charles Sharpe, with multiple counts of first, third, and fourth-degree criminal sexual conduct against the now 15 year-old victim, who was 14 years old when she was sexually abused by defendant.[1]

The victim, the daughter of RL,[2] was born on July 21, 2000.[3] Defendant and RL were in a dating relationship and defendant fathered the victim's two younger siblings.[4] Defendant and RL did not live together. Defendant lived at 2911 Sturtevant, Detroit.[5] From December 31, 2013 through January 5, 2014, RL was hospitalized.[6] During that time, defendant stayed at RL's home to watch his child, and the victim.[7]

While RL was at the hospital, defendant was alone with the victim and his other child. While alone, defendant sexually abused the victim. Defendant touched the victim's breasts with his lips and

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[1] Transcripts are cited throughout this Brief referencing the Appellant's Appendix Page Number. 5a-6a.

[2] The writer refers to the victim as "the victim" and by her initials "DM" and the victim's mother by her initials "RL" to protect the underage victim's identity.

[3] 12a.

[4] 12a.

[5] 13a.

[6] 13a.

[7] 13a-14a. The victim's youngest sibling had not been born yet.

her genital area with his penis.[8] Defendant inserted his penis inside the victim's vagina.[9] The victim did not tell her mother about this assault right away.

Afterwards, sometime before November 2014, the victim was in the living room of defendant's home with her brothers, while her mother was sleeping in defendant's bedroom.[10] The victim's brothers, at the time one and four years-old, were sleeping while the victim was lying down. Defendant came into the living room.[11] Defendant started to play a video game in the living room, then he stopped playing and got on the floor where the victim was. Defendant took the victim's clothes off and started touching her.[12] Defendant touched the victim's chest and vagina. Defendant touched the victim's vagina with his lips and penis.[13] Defendant's penis went inside the victim's vagina.[14]

Later in November 2014, the victim, while still 14 years old, found out she was pregnant.[15] RL told defendant that the victim was pregnant. Defendant offered to pay and did pay for half of the abortion, without any expectation of being reimbursed.[16] Afterwards, the victim's mother took her

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[8] 28a. The victim's mother testified that the victim has learning disabilities.

[9] 28a.

[10] 29a.

[11] 30a.

[12] 30a.

[13] 31a.

[14] 31a. The victim testified that defendant never told her not to tell anyone. 32a.

[15] 15a, 32a. The victim's mother took her to the hospital after the doctor said that the victim had an abnormal test result. 14a

[16] 23a. At the time, RL did not know that defendant was the source of the pregnancy.

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to Planned Parenthood and the victim underwent an abortion.[17] RL continued to ask the victim how she got pregnant, but she would not tell her.[18] After the abortion, the victim kept to herself and became really depressed.[19] Before the pregnancy, RL had no reason to believe that the victim was sexually active[20] and was not aware of any boyfriends the victim may have had.[21] The victim did not tell her friends or her teachers that she got pregnant or how.[22] The victim testified that she did not have a boyfriend while she was 14 years old.[23] The victim also testified that, besides defendant, no one else "in the world" put his penis in her vagina.[24] The victim did not tell her mother about what defendant had done to her until after defendant and her mother ended their relationship in April 2015.[25]

At the preliminary examination, the district court judge permitted testimony regarding the victim's lack of sexual partners other than defendant, her pregnancy, and her subsequent abortion. At the final conference in the trial court, the People asked the trial court to permit the prosecutor to ask the victim whether she had any other sexual partners before defendant's abuse, during

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[17] 15a.

[18] 38a.

[19] 20a.

[20] RL suspected she had a boyfriend after she found out the victim was pregnant. 16a.

[21] 15a.

[22] 38a.

[23] 33a.

[24] 33a.

[25] 15a, 29a.

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defendant's abuse, and before the victim's abortion. The prosecutor stated that, based on the exam testimony, she expects the victim's answer to these questions to be "no." The prosecutor also asked that the People be permitted to introduce evidence of the victim's pregnancy and subsequent abortion.[26] Defendant argued that the evidence was inadmissible because the evidence was more prejudicial than probative and unnecessary to prove the charges, in light of the victim's anticipated testimony identifying defendant as the person who touched her and penetrated her vagina.[27]

The trial judge denied the People's motion, except it permitted testimony that the victim was pregnant at one point. The trial court stated the following in its ruling:

> Well I know from my experience that the issue in this particular case is gonna be the credibility of the witness. In this particular case, we're dealing with a 14-year-old teenager.
>
> It would be helpful to have the DNA from the aborted fetus. Because if we had that DNA, what if that DNA didn't come back to the defendant? Then that would mean that possibly she was having consensual sex maybe with someone her own age. We don't know. And we won't know because the fetus was not preserved for DNA purposes.
>
> So I have to agree with the defense that the prejudicial nature of the proposed evidence outweighs the probative value in this case, and I'm not gonna allow it.[28]

The People disagreed and filed an application for leave to appeal with the Court of Appeals claiming that the trial court abused its discretion when it excluded evidence that the victim had no other sexual partners and that the victim underwent an abortion. Defendant appealed the trial court's

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[26] 46a-48a.

[27] 50a.

[28] 52a.

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ruling, contending that the trial court abused its discretion when it ruled that the People could introduce evidence that the victim was pregnant. The Court of Appeals granted the applications and consolidated the cases. The Court of Appeals found, in a published opinion, that evidence of the victim's pregnancy, abortion, and lack of sexual partners was admissible.[29]

The Court of Appeals held that evidence of the victim's pregnancy was properly admitted by the trial court because, while it falls within the categories of excluded evidence under MCL 750.520j(1)(a), "it is clearly admissible under the statute exception for '[e]vidence of the victim's past sexual conduct with the actor.'" The Court of Appeals rejected defendant's argument that the pregnancy related evidence was inadmissible because it was prejudicial under MCL 750.520j. The Court of Appeals held that the victim's pregnancy is highly probative and objective proof that corroborated the victim's claims that she was vaginally penetrated by defendant: Contrary to the reasons stated by defendant, the Court of Appeals failed to see how this evidence was unduly prejudicial.[30]

Next, the Court of Appeals held that the trial court abused its discretion when it excluded evidence of the victim's lack of sexual activity with men other than defendant.[31] The Court of Appeals found that evidence of her lack of sexual partners was not prohibited, offered for an improper purpose, under MRE 404(a)(3), because the purpose of its admission was to substantiate her claim that she was, in fact, sexually penetrated and impregnated by defendant because she had a lack of sexual partners. The Court of Appeals also found that the evidence was not prohibited

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[29] *People v Lovell Charles Sharpe,* 319 Mich App 153; 899 NW2d 787 (2017).

[30] *Sharpe*, 319 Mich App at 164.

[31] *Sharpe*, 319 Mich App at 169.

under MCL 750.520j(1). The Court of Appeals found that the plain language of the statute does not bar evidence concerning a victim's lack of specific instances of sexual conduct. And even if it did, the evidence would be admissible under the statutory exception to show "specific instances of sexual activity showing the source or origin of . . . pregnancy." The Court of Appeals also reasoned that the evidence would not be inadmissible on the basis of its potential prejudice. The Court of Appeals held that the evidence "only is prejudicial to the extent that it makes more likely the fact that defendant actually committed the offenses, and '[r]elevant evidence is inherently prejudicial. . .'"[32]

Lastly, the Court of Appeals held that the trial court erred when it concluded that, at trial, the prosecution could not present any evidence of the victim's abortion. The Court of Appeals held that, because evidence surrounding the victim's abortion was not character evidence and was not being offered to prove action in conformity with the victim's character, the evidence was not excluded under MRE 404(a)(3). The Court of Appeals found that evidence of the victim's abortion would fall within MCL 750.520j(1), as "[e]vidence of specific instances of the victim's sexual conduct." The evidence was admissible because it was material and within the exception of evidence of the victim's past sexual conduct. Evidence of the victim's abortion "provided further objective evidence that the victim was, in fact, pregnant, which necessarily resulted from defendant's alleged vaginal penetration of her." The Court of Appeals rejected defendant's argument that the evidence was unfairly prejudicial and found that its probative value, showing that defendant engaged in an act of sexual penetration with the victim, outweighed any prejudice.

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[32] *Sharpe*, 319 Mich App 170 (citation omitted).

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The People submit this Brief pursuant to this Court's October 20, 2017 order, granting defendant's application for leave to appeal the Court of Appeals decision. Further facts will be developed as they relate to the issues presented in this Brief.

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Argument

I.

The plain meaning of the rape-shield statute, and its intended purpose, does not include evidence that relates to the underlying offense. Here, evidence that the victim was vaginally penetrated by defendant, became pregnant, had an abortion, and had no other sexual partners all relates to the underlying offense. Evidence of the victim's pregnancy, abortion, and lack of other sexual partners is not within the scope of the rape-shield statute.

Standard of Review

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion.[33] To the extent the trial court's decision involves a question of law, this Court reviews the question of the admissibility of evidence de novo.[34]

Discussion

This Court has asked "whether evidence related to the complainant's pregnancy, abortion, and lack of other sexual partners was within the scope of the rape-shield statute." The People contend that evidence directly related to the underlying abuse with defendant is not within the scope of the rape-shield statute. Alternatively, the People contend that, based on the plain language of the rape-shield statute, evidence of the victim's lack of sexual partners is not within the scope of the rape-shield statute and, while evidence of the victim's pregnancy and subsequent abortion would be subject to the rape-shield statute, it is admissible under the exceptions to the statute.

"The Court's primary responsibility in statutory interpretation is to determine and give effect to the Legislature's intent. The words of a statute are the most reliable indicators of the Legislature's

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[33] *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

[34] *Mardlin*, 487 Mich at 614.

intent and should be interpreted according to their ordinary meaning and the context within which they are used in the statute. Once the Legislature's intent has been discerned, no further judicial construction is required or permitted, as the Legislature is presumed to have intended the meaning it plainly expressed."[35]

A. The statute was not meant to exclude evidence related to the underlying charge of sexual abuse between the victim and defendant.

The People contend that, under the plain language and purpose of the statute, the statute was not meant to exclude evidence that is relevant to the underlying criminal charges in a prosecution against a defendant.[36] The statute states that "[e]vidence of specific instances of the victim's sexual conduct . . . shall not be admitted."[37] No logical reading of this language could support the exclusion of a specific instance of sexual conduct as it relates to the underlying charges. The evidence to be admitted here is evidence of the victim's sexual conduct as it relates specifically to her allegations of the charged offenses, not *other* acts of the victim's sexual conduct.

This is further evidenced by the practical application of the statute and how its application is illogical in this case.[38] The People are asking the trial court to admit evidence to directly prove

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[35] *People v Smith*, 496 Mich 133, 138; 852 NW2d 127 (2014) (citations omitted). See also MCL 8.3a.

[36] *See People v Perkins*, 424 Mich 302, 307-308; 379 NW2d 390 (1986) ("Because the proposed testimony in this case related to sexual activity between the complainant and the defendant, the strong prohibitions on evidence of a complainant's past sexual activities, which we have discussed in several recent opinions, are not involved."). Here, the evidence at issue does not even relate to "past sexual activities" but the sexual activities that form the basis of the underlying charges. Therefore, only the general rules MRE 402 and 403 should apply. See Argument, III, *infra*.

[37] MCL 750.520j.

[38] While the trial prosecutor was the party who filed a motion to admit the offered evidence under the rape-shield statute, it was done simply as a precautionary measure to ensure that the

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the elements of the charges against defendant. For example, the People contend that there were two instances where defendant sexually assaulted the victim, and one of those assaults resulted in the victim's pregnancy. Does the rape-shield statute require that the prosecutor obtain approval in order to admit evidence of the sexual activity (the same sexual activity giving rise to the charges) that led to the victim's pregnancy?[39] The answer must be no.

Additionally, this Court has previously interpreted the rape-shield statute to exclude evidence of the complainant's sexual activity *not* incident to the alleged rape.[40] This Court has also found that the rape-shield statute "was designed to exclude evidence of the victim's sexual conduct with persons other than defendant," and that the statute was meant to protect the victim.[41] At the very least, the statute was not meant to exclude evidence of sexual activity related to the underlying charges. Instead, the statute was meant to apply to "other acts of sexual conduct" between the victim and defendant, not to evidence offered as proof of the acts charged. Therefore, MCL 750.520j does not apply to evidence of the victim's virginity, pregnancy, and abortion when the evidence relates to the very sexual activity that is the basis of the underlying offense.

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evidence would be admitted at trial.

[39] See *People v Adair*, 452 Mich 473, 487; 550 NW2d 505 (1996) ("the Legislature, by the use of the term "unless and only to the extent that" in the rape-shield statute, expressly limited admission of such evidence to what is necessary for the defense.").

[40] *Adair*, 452 Mich at 478 (citation omitted) (the rape-shield statute bars, with two narrow exceptions, evidence of all sexual activity by the complainant not incident to the alleged rape.").

[41] *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). If this Court determines that the testimony of the victim's virginity is admissible, and if defendant can set forth a valid offer of proof to rebut the victim's testimony, then he may be entitled to a hearing to determine whether the evidence defendant offers is admissible at trial. See *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991) (cautioning that the evidentiary hearing in this regard should not be utilized as a fishing expedition) and MCL 750.520j(2)).

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There is perhaps an argument that involuntary conduct of a victim during the sexual abuse is not "sexual conduct" covered by the statute, but the People do not make that argument.[42] The narrow question is: Whether "conduct" under the statute includes involuntary acts? The People acknowledge that, if sexual conduct does not include the victim's involuntary acts, then the sexual abuse that led to the victim's pregnancy or subsequent abortion in the instant case is not subject to the rape-shield statute. But the People submit that the plain language of the statute does not support such an interpretation. The plain meaning of the word "conduct" naturally includes both voluntary and involuntary behavior. Persuasive on this point is Justice Young's concurring opinion in *People v Parks*.[43] Justice Young stated:

> MCL 750.520a provides definitions for Chapter LXXVI of the Michigan Penal Code, which encompasses the rape shield statute (MCL 750.520j). Although the section does not define the word "conduct," it does define both "actor" and "victim" with reference to their "conduct." An "actor" is someone "accused of criminal sexual conduct," MCL 750.520a(a), while a "victim" is someone "subjected to criminal sexual conduct," MCL 750.520a(p). By including these definitions, the Legislature expressed its understanding that "sexual conduct" is something that both "actors" and "victims" take part in-"actors" voluntarily and "victims" involuntarily.[44]

The reason the victim's pregnancy and subsequent abortion are admissible is instead because it all relates to the charged offenses committed by defendant against the victim. The rape-shield

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[42] See *People v Parks*, 483 Mich 1040, 1045; 766 NW2d 650 (2009) (Markman, J., dissenting); *People v Scott*, 465 Mich 942; 636 NW2d 771 (2001) (Markman, J., dissenting); *People v Piscopo*, 480 Mich 966; 741 NW2d 826 (2007) (Markman, J., dissenting). (In all cases the dissent argues that the rape-shield statute does not apply to non-consensual (involuntary) sexual activity.).

[43] *People v Parks*, 483 Mich 1040, 1045; 766 NW2d 650 (2009).

[44] *Parks*, 483 Mich at 1045 (Young, J., concurring) ("To hold otherwise would presume that the Legislature intended to give prostitutes more protection than rape victims.").

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statute cannot be read to mean that the People are unable to provide evidence relating to the actual elements and circumstances of the charged offenses.

B. The plain language of the statute does not apply to evidence of the victim's virginity.

As is done in all interpretations of the application of a statute, we begin with the plain language of the statute. MCL 750.520j states the following:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

The text of the statute clearly states that "specific instances of the victim's sexual conduct" shall not be admitted, subject to two exceptions identified in the statute and a requirement of materiality. Based on the plain language of the statute and the evidence at issue in this case, the

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question to be answered is: Is the victim's lack of sexual partners considered "specific instances of the victim's sexual conduct" within the meaning of the statute? The People answer, No.[45]

Here, the Legislature chose the words "specific instances of the victim's sexual conduct." The statute does not define "specific instances." We can look, therefore, to a dictionary to determine its plain, ordinary meaning. Black's Law Dictionary defines "specific" as "[o]f, relating to, or designating a particular or defined thing."[46] Black's Law Dictionary defines "instance" as "an example or occurrence."[47] The American Heritage Dictionary defines "specific" as "specified, precise, or particular."[48] The American Heritage Dictionary defines "instance" as "a case or occurrence of anything."[49]

When looking at these two sources and their definitions of the words "specific" and "instance," it is clear there is only one plain, ordinary meaning of "specific instances,": a particular occurrence of something. Applied to the rape-shield statute, the "something" is the "victim's sexual conduct." Read together, the statute excludes evidence of a particular occurrence of the victim's

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[45] See *Colorado v Johnson,* 671 P 2d 1017 (1983) (Colorado's rape-shield statute excludes: "Evidence of specific instances of the victim's prior or subsequent sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct." The Court in Johnson found that based on the purpose and language, the rape-shield statute did not specifically prohibit the victim from testifying as to the lack of prior sexual activity.).

[46] Black's Law Dictionary (10th ed).

[47] Black's Law Dictionary (10th ed).

[48] The American Heritage Dictionary of the English Language (1973).

[49] The American Heritage Dictionary of the English Language (1973).

sexual conduct. Evidence of the victim's virginity, is *not* evidence of the victim's sexual conduct.[50] Therefore, the statute does not exclude this evidence.[51] The evidence, however, is still subject to the rules of evidence, MRE 402 and MRE 403.

Based on the plain language of the statute, evidence of the victim's virginity or lack of sexual conduct is not the evidence the Legislature intended to exclude when enacting the statute. This is further supported by the Legislature's purpose in enacting the statute. This Court summarized the Legislature's purpose in enacting this statute as follows:

> [W]e observe that this provision-an integral part of Michigan's criminal sexual conduct act-represents an explicit legislative decision to eliminate trial practices under former law which had effectually frustrated society's vital interests in the prosecution of sexual crimes. In the past, countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.
>
> Primarily, * * * [rape shield statutes] serve the substantial interests of the state in guarding the complainant's sexual privacy and protecting her from undue harassment. In line with these goals, they encourage the victim to report the assault and assist in bringing the offender to

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[50] See *People v Jackson*, 477 Mich 1019; 726 NW2d 727 (2007) (testimony that the complainant was previously induced by his father to make false allegations of sexual abuse does not implicate the rape-shield statute.). Compare *People v Jackson*, 477 Mich 1019; 726 NW2d 727 (2007), with *People v Piscopo*, 480 Mich 966; 741 NW2d 826 (2007) (Markman, J., dissenting) (In *Piscopo*, the defendant wanted to argue that the victim's questionnaire alleging that she was previously sexually abused was a false accusation, while in *Jackson*, it appeared undisputed that there were prior false allegations made by the victim.).

[51] See *People v Ivers*, 459 Mich 320, 326; 587 NW2d 10 (1998) ("The proffered testimony did not concern the complainant's past sexual conduct . . . It concerned statements made by the complainant to her friend showing that she had discussed birth control with her mother in anticipation of going away to college, that she believed that she was 'ready' for sex, and that she asked her friend to 'find her a guy.'").

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> justice by testifying against him in court. Insofar as the laws in fact increase the number of prosecutions, they support the government's aim of deterring would-be rapists as well as its interest in going after actual suspects. These statutes are also intended, however, to bar evidence that may distract and inflame jurors and is of only arguable probative worth. To the degree that they aid in achieving just convictions and preventing acquittals based on prejudice, they naturally further the truth-determining function of trials in addition to more collateral ends.[52]

Additionally, this Court has previously held that a victim's testimony regarding her lack of sexual conduct does not fall within the purview of the rape-shield statute. In *People v Hackett*, this Court held that the complainant's statement of her sexual dissatisfaction at home due to the physical condition of her husband "does not fall within the terms of the rape-shield statute since technically it is not evidence of prior sexual conduct."[53]

Interpreting the statute to exclude evidence of the victim's virginity is not only contrary to the plain language of the statute, but it does not comport with the purpose of the statute. Especially when, as here, the evidence is essential to prove a material fact against defendant regarding the specific instances of sexual conduct at issue.[54] The Court of Appeals correctly concluded that "[t]he plain statutory language does not bar evidence concerning a victim's lack of specific instances of sexual conduct."[55]

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[52] *Arenda*, 416 Mich at 9, quoting *People v Khan*, 80 Mich App 605, 613-614; 264 NW2d 360 (1978). *Arenda* also held that the rape-shield law does not violate a defendant's 6th Amendment right to confrontation. *Arenda,* 416 Mich at 11.

[53] *People v Hackett*, 421 Mich 338, 356; 365 NW2d 120 (1984).

[54] Cf. FRE 412 (The notes of advisory committee regarding the 1994 amendment, interpreted the exclusion of "evidence offered to prove that a victim engaged in other sexual behavior" to only apply to "all activities that involve actual physical conduct.")

[55] *Sharpe*, 319 Mich App at 168.

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C. Evidence of the victim's pregnancy and abortion, which occurred as a result of the victim's sexual abuse, is not excluded under the statute.

The People contend that, under the plain language of the rape-shield statute, without any other consideration, evidence of pregnancy and abortion may be subject to the statute. But the People argue that, in this case, the evidence of the victim's pregnancy and abortion is not subject to the statute, because the underlying sexual conduct relates to the underlying sexual abuse at issue.

An argument may be made that the victim's pregnancy and subsequent abortion are not "specific instances of sexual conduct." The problem with that argument is, with each of those occurrences–pregnancy or abortion–it assumes that sexual activity occurred, thereby revealing a specific instance of sexual conduct by the victim, which led to the pregnancy and/or abortion. Accordingly, the underlying sexual activity must also be admissible under the rape-shield statute. Here, because the underlying sexual activity is the basis for the charges against defendant, the rape-shield statute is not triggered.

Regardless, as argued in Argument II, *infra*, even if the evidence of the victim's pregnancy and abortion is within the rape-shield statute, it is admissible under the specified exceptions.

D. Response to defendant's argument.

Defendant, without any plain language analysis, contends that evidence of the victim's virginity is subject to MCL 750.520j. He argues that "'evidence of specific instances of sexual conduct' under the Statute encompasses the scenario where there are no such instances." It is unclear how "evidence of specific instances of sexual conduct" also means the lack of a specific instance. In support of his argument, defendant references Wisconsin's and Minnesota's rape-shield statutes and how the courts of those states have applied them. While looking at how other states have dealt

with an issue, especially one of first impression, is generally helpful, it is only helpful to the extent the statute addressed by the other state is substantively similar to the Michigan statute at issue.[56] Neither Wisconsin's nor Minnesota's rape-shield statutes are similar to Michigan's rape-shield statute. Therefore, there is no persuasive assistance in the comparisons.

In *Wisconsin v Gavigan*, the Wisconsin Supreme Court held that Wisconsin's rape-shield statute precludes the admission of "any evidence" pertaining to a complainant's prior sexual conduct or reputation.[57] *Gavigan* also held that "nothing in the statute limits its applicability to prior affirmative acts." *Gavigan* concluded that "a statement that a woman is a virgin is necessarily a comment on the woman's prior sexual conduct." The statute at issue in *Gavigan* is not sufficiently similar to Michigan's statute. Below is a side-by-side comparison:

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[56] *People v Thompson*, 477 Mich 146, n 9; 730 NW2d 708 (2007).

[57] *Wisconsin v Gavigan*, 111 Wis 2d 150, 159; 330 NW2d 571 (1983).

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Wisconsin Rape-Shield Statute	Michigan Rape-Shield Statute
(b) If the defendant is accused of a crime under . . . if the court finds that the crime was sexually motivated, as defined in §980.01(5), *any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury,* except the following, subject to §971.31(11): 1. Evidence of the complaining witness's past conduct with the defendant. 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered. 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness. (c) Notwithstanding s. 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b)1, 2 or 3.[58]	(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g1 unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value: (a) Evidence of the victim's past sexual conduct with the actor. (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Notably, one main difference between the Wisconsin statute and the Michigan statute, is that Wisconsin's encompasses "any evidence concerning the complaining witness's prior sexual conduct," whereas Michigan's statute states "[e]vidence of specific instances of the victim's sexual conduct." We have to assume that the words "specific instance" have some meaning; the words cannot just be read out of the statute.[59]

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[58] Wis. Stat. § 972.11(b).

[59] *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017).

But even a Wisconsin Court, construing the above stated rape-shield statute, held that a victim's virginity is admissible when it is admitted to show the source of her venereal disease.[60] The Wisconsin Supreme Court found that the victim's lack of sexual conduct (virginity) fits within the language of the statute's exception, which states: "Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered."[61]

Next, defendant cites to *Minnesota v Wenthe*.[62] In *Wenthe*, the Minnesota Supreme Court held that the rape-shield statute applies equally to evidence offered by the prosecution and the defense and that the statute also applies to "'negative' evidence– i.e., an assertion that the complainant does not have prior sexual experience." But Minnesota's rape-shield statute is substantially different than Michigan's statute.

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[60] *Wisconsin v Penigar*, 139 Wis 2d 569, 578; 408 NW2d 28 (1987), citing W.S.A. 972.11 ("This testimony was admissible because when it was given the charge was second degree sexual assault causing a venereal disease.").

[61] W.S.A. 972.11.

[62] *Minnesota v Wenthe*, 865 NW2d 293 (2015).

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Below is a side-by-side comparison:

Minnesota Rape-Shield Statute 609.347(3)	Michigan Rape-Shield Statute
In a prosecution under . . . *evidence of the victim's previous sexual conduct* shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order . . . The evidence can be admitted only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the circumstances set out in paragraphs (a) and (b). For the evidence to be admissible under paragraph (a), subsection (i), the judge must find by a preponderance of the evidence that the facts set out in the accused's offer of proof are true. For the evidence to be admissible under paragraph (a), subsection (ii) or paragraph (b), the judge must find that the evidence is sufficient to support a finding that the facts set out in the accused's offer of proof are true, as provided under Rule 901 of the Rules of Evidence. (a) When consent of the victim is a defense in the case, the following evidence is admissible: (i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated; and (ii) evidence of the victim's previous sexual conduct with the accused. (b) When the prosecution's case includes evidence of semen, pregnancy, or disease at the time of the incident or, in the case of pregnancy, between the time of the incident and trial, evidence of specific instances of the victim's previous sexual conduct is admissible solely to show the source of the semen, pregnancy, or disease.	(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g1 unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value: (a) Evidence of the victim's past sexual conduct with the actor. (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

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Both Minnesota's rape-shield statute and Wisconsin's rape-shield statute do not include the language "specific instances" as part of their general rule of exclusion. Minnesota's statute covers "evidence of the victim's previous sexual conduct," while Michigan's rape-shield statute applies to "evidence of specific instances of the victim's sexual conduct." To find that both the Minnesota's statute and Michigan's statute have the same meaning would completely read out "specific instances" from the statute. Defendant's cursory conclusion that the evidence in question is within the rape-shield statute is flawed and fails to acknowledge the plain language of the statute.

A helpful example of another State Court's interpretation of their rape-shield statute is *North Carolina v Stanton.*[63] North Carolina's rape-shield statute states in relevant part, the following:

> the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior (1) Was between the complainant and the defendant or (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by defendant.

In *Stanton*, the victim was raped by an intruder in her home, whom she recognized. At trial, the victim identified the defendant as her attacker and, over the defendant's objection, she testified that fourteen weeks after the rape she found out she was pregnant and she obtained an abortion. Without an objection, the victim testified that she did not have intercourse with anyone except the defendant during that time frame. The Court found that evidence of the victim's lack of sexual partners, pregnancy, and abortion were not excluded under the rape-shield statute, but instead analyzed the evidence under the general rules of relevance and admissibility.

[63] *North Carolina v Stanton*, 319 NC 180; 353 SE2d 385 (1987) (three Justices concurred in the result only).

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Also helpful is *Louisiana v Williams*.[64] There, the Court held that evidence regarding the DNA of an aborted fetus, when the prosecution's case rested on two acts of sexual intercourse, the second of which led to the impregnation of the victim and subsequent abortion, is not evidence relating to the victim's past sexual behavior, "but evidence relating to the charged criminal act(s) placed at issue and made directly relevant to the question of defendant's guilt or innocence by the state." Louisiana's rape-shield statute "generally precludes evidence of specific instances of the victim's past sexual behavior, defined as 'sexual behavior other than the sexual behavior with respect to which the offense of sexually assaultive behavior is alleged.'"[65]

Noticeably different from Louisiana's statute, compared to Michigan's rape-shield statute, is that Louisiana's statute defines "past sexual behavior." Michigan's rape-shield statute similarly states "evidence of the victim's *past sexual conduct* with the actor," but does not define "past sexual conduct." This Court should look to Louisiana's definition and read "past sexual conduct" to mean conduct other than the sexual conduct related to the underlying offense.[66] This most certainly suggests that the sexual behavior that is the subject of the underlying charge is not subject to the statute. Here, where we have evidence relating to the charged criminal acts at issue, a common sense reading of the statute and its purpose cannot exclude this evidence.

The statute was not meant to preclude the People from presenting evidence that proves the sexual conduct between the victim and defendant that gave rise to the charged offense. Therefore,

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[64] *Louisiana v Williams*, 927 So 2d 266 (2006).

[65] *Williams*,927 So 2d at 267, quoting La C E Art 412(F).

[66] See Adair, 452 Mich at 479 (this Court addressed the meaning of "past" but did not address whether "past sexual conduct" did not include the sexual conduct that gave rise to the underlying charge.).

evidence of the victim's pregnancy and abortion when they are the direct result of defendant's vaginal penetration of the victim are not precluded under the rape-shield statute. Additionally, the rape-shield statute only precludes evidence of specific instances of sexual conduct; therefore, lack of sexual conduct is not precluded under the statute. The People ask this Court to affirm the decision of the Court of Appeals.

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II.

When evidence is subject to the rape-shield statute, it may be admitted if it is material to a fact at issue and it is evidence of the victim's past sexual conduct with defendant or it is evidence of specific instances of sexual activity showing the source or origin of pregnancy. Here, the victim's lack of sexual partners other than defendant, pregnancy, and subsequent abortion established the victim's source of pregnancy, and is relevant to prove the victim's sexual conduct with defendant. Evidence of the victim's lack of sexual partners, pregnancy, and abortion are admissible under the rape-shield statute.

Standard of Review

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion.[67] To the extent the trial court's decision involves a question of law, this Court reviews the question of the admissibility of evidence de novo.[68]

Discussion

This Court has asked "if the evidence was within the scope of the rape-shield statute, whether it was nonetheless admissible under one of the exceptions set forth at MCL 750.520j(1)." The People answer, "yes." Evidence of the victim's virginity, pregnancy, and abortion are all material evidence,[69] admissible under the exceptions set forth in the rape-shield statute.

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[67] *Mardlin,* 487 Mich at 614.

[68] *Mardlin,* 487 Mich at 614.

[69] *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998) (citation omitted) ("'Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.'").

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A. Evidence of the victim's virginity is admissible.

Evidence of the victim's virginity prior to the sexual abuse perpetrated by defendant, and lack of sexual partners during the abuse by defendant, in light of her subsequent pregnancy, is evidence showing source of pregnancy and relates to the victim's past sexual conduct with defendant.

Assuming that specific instances of the victim's sexual conduct includes the lack of sexual conduct, then evidence of the victim's virginity would be admissible to show the source of her pregnancy.[70] Whether the victim was vaginally penetrated by defendant will be at issue at defendant's trial,[71] and, therefore, evidence of the victim's virginity is material evidence. As correctly stated by the Court of Appeals in this case: "Given the evidence of DM's pregnancy, her insistence that she never had sexual relations with anyone except defendant is highly relevant to her claim that defendant vaginally penetrated and impregnated her and, accordingly, committed the charged offenses."[72] Therefore, evidence of the victim's lack of sexual relations with anyone but defendant should be admitted at trial in the instant case.

B. Evidence of the victim's pregnancy is admissible.

Next, evidence of the victim's pregnancy is admissible as evidence of the victim's past sexual conduct with the actor and the evidence surrounding the pregnancy establishes the source of the pregnancy. The plain language of MCL 750.520j allows for the admission of evidence regarding

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[70] As argued in Argument I, *supra*, the People contend that the plain language of the statute does not cover the victim's lack of sexual conduct.

[71] *Crawford*, 458 Mich at 389, citing *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995) ("It is well established in Michigan that all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty").

[72] *Sharpe,* 319 Mich App at 169.

"the victim's past sexual conduct with the actor."[73] Evidence of the victim's pregnancy is evidence of past sexual conduct with defendant as it corroborates the victim's claim that defendant vaginally penetrated her with his penis.

Evidence of the victim's pregnancy is material to a fact at issue and its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of the victim's pregnancy corroborates the victim's allegations of vaginal penetration by defendant. The probative value of the evidence is not outweighed by prejudice. The prejudice of this evidence is that it objectively corroborates the victim's allegations that she was vaginally penetrated by defendant. The remaining question is whether the jury would believe the victim that it was defendant who committed the assault or believe defendant's denial that he committed the assault.[74] It is unclear how the natural prejudice arising from the probative nature of the evidence outweighs the probative value of the evidence.[75] The evidence is admissible and the inferences taken from the evidence directly relate

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[73] Here, as argued in Argument I, *supra*, it is arguable whether this evidence is even "past sexual conduct with the actor," because it relates to the sexual conduct at issue in the charged offenses.

[74] The People acknowledge that the Court of Appeals characterized the prejudice standard in the rape-shield statute as "unduly prejudicial." The People agree. The Court of Appeals did not use the words unfairly prejudicial but, instead, unduly prejudicial. As recognized by this Court, all relevant evidence is prejudicial, and in light of the Legislature's use of the word "inflammatory," it is clear that the Legislature was seeking to avoid undue prejudice that outweighs the probative value of the evidence. See *Sharpe*, 319 Mich App at 166 n 4.

[75] The People recognize that the statute does not use the words "unfair prejudice" but look to this Court's analysis of unfair prejudice for guidance. See *People v Musser*, 494 Mich 337, 356-357; 835 NW2d 319 (2013) (citation omitted) ("[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."). The only prejudice from the evidence is the actual prejudice the evidence intends to establish, defendant vaginally penetrated the victim that gave rise to the underlying charges. It cannot be said there is undue or preemptive weight to this evidence.

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to the facts at issue. Noticeably, defendant does not argue that the jury could draw unfair inferences from the evidence presented, likely because there are none.

C. Evidence of the victim's abortion is admissible.

Evidence of the victim's abortion and the surrounding circumstances of the abortion are admissible to show evidence of the victim's sexual conduct[76] with defendant and is relevant to show the source of the victim's pregnancy. Evidence of the victim's abortion provides further objective evidence that the victim was pregnant as a result of defendant's vaginal penetration of her.

Additionally, the surrounding circumstances of the abortion are also relevant. Defendant's financial contribution to the cost of the victim's abortion is evidence of defendant's consciousness of guilt and/or desire to dispose of the evidence of his vaginal penetration of the victim. Defendant argues that the lack of physical evidence connecting defendant to the victim's pregnancy and subsequent abortion requires the exclusion of this evidence. Defendant would have the trial court exclude both evidence of the pregnancy and subsequent abortion because there is no DNA preserved to confirm defendant's involvement. But defendant fails to accept responsibility for this lack of evidence, as defendant himself participated in destroying the evidence he claims is required, and now wishes to benefit from his actions.[77] Additionally, defendant's argument go to the weight and credibility of the victim's testimony not to its admissibility.

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[76] MCL 750.520j(1)(a).

[77] Defendant may claim that he paid for part of the abortion because he was a "father figure" or because he was helping RL. These are arguments that defendant can make to the jury at the trial and do not relate to the admissibility of the evidence, but only the weight the jury will give the evidence.

The materiality of the abortion evidence is not outweighed by prejudice. The prejudice from the abortion evidence is that it corroborates the victim's claim that defendant vaginally penetrated her, which caused her pregnancy and led to the abortion that defendant assisted in paying for. The prejudicial aspect of the evidence is the same as its probative qualities. It is true that the abortion in and of itself does not provide conclusive evidence that defendant was the source of the pregnancy that was terminated. But when considering the abortion, timing of the pregnancy, the fact that defendant paid for half of the abortion, and the victim's lack of sexual partners, it most certainly supports the finding that defendant vaginally penetrated the victim with his penis. It is unclear how this evidence is inflammatory or more prejudicial than any evidence admitted to directly prove the underlying charges.

D. Response to defendant's argument.

Defendant argues that the victim's virginity is not admissible under the exceptions to the rape-shield statute because her virginity says nothing about her prior sexual conduct with defendant and it does not "say anything" about "the source or origin of semen, pregnancy, or disease." Defendant contends that the victim's lack of sexual conduct is not admissible to prove that defendant, and not anyone else, is the source of the victim's pregnancy. Defendant plainly asserts that "absence of alternative sources" does not establish defendant's guilt. Defendant's argument goes to the weight and credibility of the victim's testimony, not its admissibility.

Evidence of the victim's source of pregnancy– lack of other sexual partners other than defendant– is an exception to the exclusionary rule set forth in the rape-shield statute. Evidence of the victim's lack of other sexual partners during the time of the sexual abuse that led to the victim's pregnancy is a specific instance of sexual activity showing the source of the victim's pregnancy and

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evidence of the victim's sexual conduct with defendant. The proposed evidence is material to a fact at issue in this case. Establishing that the defendant's sexual abuse perpetrated on the victim led to the source of the victim's pregnancy is evidence squarely on point to a material fact at issue in this case.

The inflammatory or prejudicial nature of the evidence does not outweigh its probative value. Defendant contends that, if the jury heard that the victim was a virgin, it would encourage jurors "to cling to age-old notions that women who were chaste deserved– more than others– to be protected." Defendant argues that, by allowing testimony of the victim's virginity, it would encourage jurors to focus on the victim's sexual history when they should be focusing on whether defendant raped the victim. But that's not the end of the analysis. The question is, does the prejudicial nature of the evidence outweigh its probative value? The answer is no. The probative value of the evidence of the victim's virginity is directly on point to prove a material issue, did defendant rape the victim? In proving this offense, the victim will likely testify that defendant vaginally penetrated her with his penis. To corroborate this testimony, the People intend to show that the victim became pregnant as a result of this assault and that the defendant is the person who impregnated her because she had no other sexual partners.

Plainly put, because defendant raped the victim, and she had no other sexual partners, defendant impregnated her. This directly makes more probable the fact that defendant raped the victim. The prejudice is minimal, other than its probative value in finding defendant's guilt. This is not the situation where consent is an issue and perhaps the jury would infer from the evidence of the victim's virginity that she would likely not consent to sexual conduct— because the victim had

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no prior sexual experience, she was less likely to have consented to sexual relations with defendant.[78] Instead, here, we have an underage victim, legally unable to consent, and evidence of her lack of sexual partners being introduced to establish that defendant was the source of her pregnancy.

Next, defendant argues that, if the People are permitted to introduce evidence of the victim's virginity, then defendant should be able to introduce evidence in rebuttal. As the People stated in its brief on appeal to the Court of Appeals: "If this Court and/or the trial court permits testimony of the victim's virginity and if defendant can set forth concrete evidence to rebut the victim's testimony, then he may be entitled to an evidentiary hearing to determine whether the evidence defendant offers is admissible at trial."[79] But it must still be admissible under the statute. For example, the People intend to introduce the victim's virginity and lack of sexual partners to show that she only had intercourse with defendant who then caused her to become pregnant. Defendant cannot then present testimony that, in general, the victim has had other sexual partners.[80] It must still be relevant to prove a material point. Accordingly, defendant would have to be able to show that the victim had

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[78] See *People v Bone*, 230 Mich App 699, 702; 584 NW2d 760 (1998) (The Court of Appeals held that MRE 404(a)(3) "precludes the use of evidence of the victim's virginity as circumstantial proof of the victim's current unwillingness to consent to a particular sexual act.").

[79] *Williams*, 191 Mich App at 273 (but the evidentiary hearing in this regard should not be utilized as a fishing expedition).

[80] *Adair,* 452 Mich at 488–489, quoting *Arenda*, 416 Mich at 8 ("'The right to confront and cross-examine is not without limits. It does not include a right to cross-examine on irrelevant issues.'"). See also *People v Khan*, 80 Mich App 605, 620; 264 NW2d 360 (1978) (evidence of the victim's sexual background was not relevant, because the evidence presented by defendant was "hewn in absolute terms and stemming from an uncertain source.").

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another sexual partner during the relevant time period and that person is the source of the victim's pregnancy, not defendant.[81]

Defendant argues that evidence of the victim's pregnancy establishes that she was penetrated by someone, but does not prove that it was defendant. True, the victim's pregnancy alone does not prove that defendant was the source, but the victim's pregnancy, in light of the time of the abuse committed by defendant on the victim does. Additionally, evidence of the victim's lack of other sexual partners before defendant and during the abuse committed by defendant, increases the probability that defendant caused the victim's pregnancy. Defendant also fails to recognize that the offer of proof at the trial court was that the victim's testimony would show that based on the timing of defendant's sexual abuse with the victim, defendant was the source of the victim's pregnancy. Defendant's reliance on the preliminary examination testimony to determine the admissibility of evidence at the trial court level is wholly misplaced, as the prosecutor will likely ask more detailed questions and provide more detailed evidence at the trial where she has a higher burden.[82] The victim's testimony at trial is not limited in scope by the testimony given at the preliminary examination.[83] Defendant argues that physical or demonstrative evidence is necessary, otherwise "it is anyone's guess whether a complainant's pregnancy is truly incident to an alleged rape." But defendant fails to read the entire exception which states: "evidence of specific instances of sexual

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[81] Of course this would be proffered during the in-camera review outside the presence of the jury. MCL 750.520j(2).

[82] MCR 6.110(E).

[83] The testimony at the exam does not make defendant as the source of the pregnancy impossible, the testimony is just not entirely clear.

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activity showing the source or origin of semen, pregnancy, or disease." No where in the statute does it require physical or demonstrative evidence.

Lastly, defendant claims that the evidence of the victim's abortion "says nothing about Sharpe's guilt." Defendant does not explain how this is true in light of defendant paying for half of the abortion. Also without evidence of the victim's abortion, there is only evidence of the victim's pregnancy, and the trier of fact left wondering why there is no DNA evidence.

E. Conclusion

Defendant's argument goes to the weight of the evidence not its admissibility. The trial court abused its discretion because it erroneously applied and found that the rape-shield statute excludes evidence of the victim's virginity and abortion. Therefore, this Court should affirm the Court of Appeals opinion finding that evidence of the victim's virginity, pregnancy, and subsequent abortion were admissible.

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III.

All evidence helpful on throwing light to a material point is relevant and admissible unless its probative value is outweighed by unfair prejudice. Here, evidence that the victim had no other sexual partners, was vaginally penetrated by defendant, became pregnant, and subsequently had an abortion, is relevant. The evidence the People intend to introduce at trial is relevant and not outweighed by unfair prejudice.

Standard of Review

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion.[84] To the extent the trial court's decision involves a question of law, this Court reviews the question of the admissibility of evidence de novo.[85]

Discussion

This Court has asked "if the evidence was not within the scope of the rape-shield statute, whether it was admissible under general rules governing admissibility." The People answer, yes.

Evidence that the 14 year-old victim, with learning disabilities, became pregnant during the time defendant sexually abused her by vaginally penetrating her vagina with his penis, that during this time she had no other sexual partners, and that she was able to abort her pregnancy through defendant's financial help, is highly probative evidence that makes more likely the fact that defendant was the perpetrator. The probative value of the evidence is not outweighed by unfair prejudice.

[84] *Mardlin,* 487 Mich at 614.

[85] *Mardlin,* 487 Mich at 614.

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A. The proffered evidence is relevant and admissible.

MRE 402 states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." MRE 401 defines relevant evidence as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." There are two aspects of relevant evidence, materiality and probative value.[86] "Materiality is the requirement that the proffered evidence be related to 'any fact that is of consequence' to the action."[87] To satisfy the requirement of probative force, the evidence need only show any tendency "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[88] Additionally, when the Rules of Evidence preclude the use of evidence for one purpose, that alone simply does not render the evidence inadmissible for other purposes.[89]

Evidence of the victim's lack of sexual partners is relevant to substantiate and corroborate the victim's claim and prove by process of elimination that defendant vaginally penetrated her and was the source of her pregnancy.[90] Evidence of the victim's pregnancy is relevant to corroborate the

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[86] *Crawford,* 458 Mich at 387.

[87] *Crawford,* 458 Mich at 388.

[88] *Crawford,* 458 Mich at 389-390 ("The threshold is minimal.").

[89] *People v Sabin* (After Remand), 463 Mich 43, 56; 614 NW2d 888 (2000).

[90] This case is distinguishable from *People v Bone,* 230 Mich App 699; 584 NW2d 760 (1998). Unlike in *Bone*, the purpose for admitting the evidence regarding the victim's virginity here is not to demonstrate the victim's lack of consent or to show that she acted in conformity with her

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victim's account of vaginal penetration by defendant. Evidence that the victim had an abortion is relevant to explain why DNA evidence does not exist. If evidence that the victim was pregnant is admitted and nothing else, the jury will wonder why the child's DNA was not tested. In order to resolve this glaring concern, testimony that the victim had an abortion is relevant on this material fact of consequence. Additionally, evidence of the victim's abortion will allow testimony that defendant paid for half of the abortion, which also shows defendant's consciousness of guilt.

The evidence at issue relates to a material point– did defendant vaginally penetrate the victim. And the evidence also has the tendency to make more probable the fact that defendant vaginally penetrated the victim. Therefore, the evidence is relevant and admissible, unless excluded by MRE 403.

B. The evidence is not excluded under MRE 403.

MRE 403 states the following: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Before a trial court can admit evidence, the trial court must evaluate the probative value of the evidence and the resulting prejudice.[91] Defendant cannot establish that the probative value of the evidence at issue is outweighed by "the danger of unfair prejudice."

The evidence is not unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."[92]

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character of being chaste by not consenting.

[91] *Musser*, 494 Mich at 356-357.

[92] *Musser*, 494 Mich at 356-357 (citation omitted).

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First, the evidence at issue is more than "marginally probative." The evidence directly relates to the sexual abuse at issue, and is highly probative as it relates to whether it tends to make the existence of a fact that is of consequence more probable.[93] Second, even if the evidence is "marginally probative," the only inferences that could be made by the jury are the actual inferences intended. Evidence that the victim had no other sexual partners while she was abused by defendant, then became pregnant, and had an abortion makes more probable the fact that defendant vaginally penetrated the victim. The prejudice in this testimony is no more than the prejudice of any evidence admitted against a party. Because the evidence at issue was relevant and not unfairly prejudicial, the trial court erred as a matter of law when it excluded relevant evidence.

C. Response to defendant's argument.

Defendant's claim that testimony that the victim is a virgin is prejudicial to him because the jury will afford the victim more protections is baseless. The jury would have to find the victim's testimony credible in the first place. The jury would only afford the victim sympathy if they believed the victim was a virgin and that defendant sexually abused her. It makes no sense that the jury would believe the victim solely because she testified that she was a virgin. And it cannot be said that the jury would give evidence that the victim was a virgin undue weight. Regardless, a jury instruction could cure any potential sympathy.

Defendant also argues that, because the testimony at the preliminary examination does not squarely show the exact timing of the sexual abuse that gave rise to the pregnancy, there is no

[93] See *Perkins*, 424 Mich at 309 (The issue at trial was whether there was an assault and evidence regarding the previous sexual conduct is relevant to that question, if they believe that testimony. The Court found that the jury may not believe the testimony relating to the previous sexual assault but that is for the jury to decide, not the trial court.).

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probative value in the testimony to be admitted at trial. As argued, *supra*, a trial prosecutor at trial, is not limited to the testimony it presents at a preliminary examination. The prosecutor's offer of proof was also not limited to the preliminary examination testimony. If, at trial, the victim is unable to identify the sexual abuse in connection with the pregnancy to defendant's satisfaction, then that is a matter for the weight of the victim's testimony, not the admissibility, and is subject to cross-examination.[94]

Lastly, defendant contends that he would be subjected to unfair prejudice by the admission of evidence of the victim's abortion and the fact that he paid for part of the cost because jurors who oppose abortions could show bias. This argument is nonsensical. If that is the case, then both defendant and the victim would be prejudiced by the evidence, and it cannot be said that one party is more at fault than the other for choosing the abortion. And if the jury believed that defendant vaginally penetrated the victim, it is unclear how bias from the abortion would change that. Evidence of the abortion solidifies the fact that defendant vaginally penetrated the victim only to the extent that it further corroborates the victim's claims and it establishes a consciousness of guilt, not because the jurors could have anti-abortion biases.

D. Conclusion

Evidence of the victim's virginity prior to the sexual abuse committed by defendant, her pregnancy as a result of the sexual abuse, and her subsequent abortion are admissible under MRE 402 and not excluded under MRE 403. This Court should affirm the Court of Appeals decision.

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[94] See *Ivers*, 459 Mich at 329 (*emphasis* added) ("The prosecutor argues that the proposed evidence did not *compel* a finding that the complainant consented to sex with the defendant on the night in question, suggesting explanations for the statements that could lead a factfinder (sic) to reject that conclusion. However, those arguments are misdirected. They are the sort of arguments that one would make to a jury in the fact of introduction of such evidence.").

Relief

WHEREFORE, the People ask that this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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