STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2222

State of Minnesota,
Appellant,

vs.

Jeffrey Charles Birman,
Respondent.

Filed June 4, 2012
Reversed and remanded
Crippen, Judge[*]

St. Louis County District Court
File No. 69DU-CR-10-630

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Gary W. Bjorklund, Assistant County Attorney, Duluth, Minnesota (for appellant)

Keith G. Shaw, Duluth, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Chutich, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

Appealing from the district court's pretrial order, the State of Minnesota challenges the court's decision to admit evidence of the alleged victim's disclosures to her psychologist that she had been previously sexually abused by others when she was younger. Because respondent's offer of proof does not disclose the relevance of this evidence, and because the erroneous order admitting the evidence critically impacts the state's case, we reverse and remand for further proceedings.

FACTS

The state charged respondent Jeffrey Birman with criminal sexual conduct in the first, second, third, and fourth degree against S.L.R. in violation of Minn. Stat. §§ 609.342, subd. 1(e)(i), .343, subd. 1(e)(i), .344, subd. 1(c), .345, subd. 1(c) (2008). The complaint alleges that on April 23, 2009, respondent followed S.L.R. into a bathroom stall and forcefully engaged in sexual contact with her. The state's evidence includes S.L.R.'s testimony, her reports to others, and scientific evidence from a saliva sample that confirms respondent's alleged contact with S.L.R.

Before trial, the district court granted respondent's motion for an in camera review of S.L.R.'s psychological records. The state had disclosed that the current incident "brought up" past trauma for S.L.R., and respondent asserted that the records might reveal relevant evidence on S.L.R.'s emotional state. When examined, S.L.R.'s psychological records included statements that she made to her therapist about a series of incidents of her being the victim of sexual abuse at many stages of her life, including

childhood and continuing until age 29. S.L.R. was 48 years old when respondent allegedly committed criminal sexual conduct against her and when she reported it; the earliest of the prior-abuse reports concerned an event before S.L.R. was age four.

Based on S.L.R.'s psychological records, respondent moved to admit 25 offers of proof pursuant to Minn. Stat. § 609.347 (2010) (rape-shield statute) and Minn. R. Evid. 412, arguing that they were "evidence of prior accusations of sexual assault" and "fit with [respondent's] theory of the case, that the encounter was consensual, and S.L.R. fabricated allegations and claimed rape." Respondent further noted that S.L.R.'s credibility was the central issue in the case. The district court on December 5, 2010, admitted 16 of the 25 offers of proof of "past allegations of sexual assault that pertain directly to past allegations of rape." The court based its decision on respondent's constitutional rights to due process, confrontation, and evidence presentation.

D E C I S I O N

The state may appeal a pretrial order arising from an alleged district court error if it can show that "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial," Minn. R. Crim. P. 28.04, subds. 1(1), 2; *see State v. Underdahl*, 767 N.W.2d 677, 682 (Minn. 2009), including orders admitting evidence, *State v. Skapyak*, 702 N.W.2d 331, 335 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005). "Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction." *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009). Consequently, the state must show "clearly and unequivocally" first that "the district court's ruling will have a 'critical impact' on the State's ability to prosecute

the case" and second that "the district court's ruling was erroneous." *State v. Zais*, 805 N.W.2d 32, 36 (Minn. 2011) (quotation omitted).

1. Critical Impact

Asserting critical impact of the district court's order, the state asserts that its case "rests almost entirely on S.L.R.'s testimony"; evidence of S.L.R.'s sexual abuse allegations would "demean S.L.R.'s credibility"; and the saliva sample that implicates respondent is insufficiently strong to "overcome the highly prejudicial impact" of the jury hearing about S.L.R.'s previous history of sexual abuse. This argument has merit.

The critical-impact test is "intended to be a demanding standard" and requires the state to show that the district court's ruling "significantly reduces the likelihood of a successful prosecution." *State v. Rambahal*, 751 N.W.2d 84, 89 (Minn. 2008) (quotation omitted). The meaning and effect of the rape-shield statute, limiting the admissibility of a victim's sexual history, is that evidence of a victim's previous sexual conduct tends to demean the credibility of the victim's critical testimony and has a highly prejudicial impact on the jury. *See State v. Crims*, 540 N.W.2d 860, 868 (declaring, absent special circumstances, that prejudicial impact of victim's prior sexual history outweighs its probative value). The impact on the state of admitting such evidence is enlarged by the state's inability to appeal from a judgment of acquittal after a finding of not guilty. *See* Minn. R. Crim. P. 28.04 (providing limited prosecutorial right of appeal).

Respondent conceded in the district court that "this is a case with no other witness [other than S.L.R.], and comes down to a strict credibility determination." He argued both to the district court and to this court that the evidence of S.L.R.'s previous sexual

abuse allegations is relevant to his defense theory that S.L.R. is a "serial accuser." As the language of respondent's theory implies and as he confirmed in argument to this court, he hopes to use the evidence to demean S.L.R.'s credibility by arguing that she fabricated her previous sexual abuse allegations. The evidence of respondent's saliva on S.L.R.'s body would at best have no effect on S.L.R.'s credibility and possibly further harm her credibility because respondent plans to argue that S.L.R. consented to their sexual encounter.

Respondent argues that S.L.R.'s credibility will not be demeaned if the jury believes that she has not fabricated her prior experiences and is a repeated victim, not promiscuous. This argument recites the possible failure of respondent's efforts to argue S.L.R.'s fabrications, but it does nothing to diminish his aim to severely damage S.L.R.'s credibility with the evidence. Respondent adds arguments on efforts the state could make to enhance S.L.R.'s credibility, but these arguments conflict with the record, including his concession that there are no other witnesses to the conduct of respondent that is the subject of her complaint.

In sum, the district court's admission of evidence of S.L.R.'s previous sexual abuse allegations, unless reversed, would have a critical impact on the trial's outcome. Consequently, this court has jurisdiction to hear this appeal under Minn. R. Crim. P. 28.04, subd. 2. *See Zais*, 805 N.W.2d at 36 (concluding that state satisfied critical-impact test where district court suppressed appellant's wife's testimony and appellant's wife was "the only eyewitness to [appellant's] conduct, and her testimony [bore] directly on whether the State [could] establish the elements of disorderly conduct").

2. District Court Ruling

"Evidentiary rulings of the district court will not be overturned absent a clear abuse of discretion, even when constitutional rights are implicated." *State v. Pendleton*, 706 N.W.2d 500, 510 (Minn. 2005).

The rape-shield statute and rule 412 render evidence of a victim's previous sexual abuse allegations inadmissible unless, among other requirements, "consent of the victim is a defense in the case," the evidence "tend[s] to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue," and "the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature." Minn. Stat. § 609.347, subd. 3(a)(i); Minn. R. Evid. 412(1)(A)(i); *see State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991) ("[T]he term 'sexual conduct" as used in Minn. Stat. § 609.347 includes 'allegations of sexual abuse.'").[1]

In some circumstances, a defendant's constitutional rights to due process, confrontation, and evidence presentation may require the admission of evidence otherwise excluded by the rape-shield statute, *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992), or rule 412, *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982). But, even if the evidence is otherwise admissible under the rape-shield statute, rule 412, or a defendant's constitutional rights, the "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

[1] The rape-shield statute, unlike rule 412, further provides that "[i]n order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated." Minn. Stat. § 609.347, subd. 3(a)(i).

presentation of cumulative evidence." Minn. R. Evid. 403; *see State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986) (confirming that the court's prior declaration on the admissibility of evidence required by the defendant's due process rights does not diminish the trial court need "to balance the probative value of the evidence against its potential for causing unfair prejudice.").

Absence of Fabrication and Relevance

Despite his intent to assert fabrication of S.L.R.'s reports to her psychologist, respondent acknowledges that his offer includes no evidence that the reports were fabricated; he discloses in argument that he intends to explore the fabrication during trial and to claim fabrication in trial argument.[2] Because of respondent's acknowledged failure to offer evidence the reports were fabricated, the district court concluded that the evidence was not permitted by the rape-shield statute, and the court relied instead upon respondent's constitutional rights to due process, confrontation, and evidence presentation.[3] Relevant to respondent's constitutional rights, the district court observed

[2] Respondent has not disclosed his designs for lawful impeachment of S.L.R.'s reports at trial. Because the case comes to us on a pretrial order, we have no occasion to explore limits on respondent's impeachment rights.

[3] The district court also correctly stated: "Notably, Minn. R. Evid. 412 does not contain the requirement that a judge must find the victim fabricated prior sexual assault allegations to find a common plan or scheme . . . ." But the court does not claim the authority of rule 412 for admitting evidence of S.L.R.'s prior-abuse reports to her therapist; neither the district court nor respondent disclose relevance of the reports for any reason other than a showing of fabrication.

Respondent argues that rule 412 supports the district court's decision and argues that rule 412 prevails when in conflict with the rape-shield statute, relying on section 480.0591, subdivision 6. *See* Minn. Stat. § 480.0591, subd. 6 ("Present statutes relating to evidence shall be effective until modified or superseded by court rule. If a rule of evidence is promulgated which is in conflict with a statute, the statute shall thereafter be

that S.L.R.'s previous sexual abuse reports "are both highly probative of the alleged victim's credibility and critical to the jury's ability to assess that credibility." This is true, the district court observed, because respondent claims consent and claims that S.L.R. is a "serial accuser," not a serial victim.

Central to the district court's analysis of the issue is its acknowledgment, despite its observation on the relevance of the prior-abuse evidence, that respondent's offer of proof contained "[in]sufficient information to evaluate" if the prior sexual assault reports to a therapist were "fabricated." Respondent confirms this acknowledgment. The state argues that, because of the absence of evidence that S.L.R. fabricated her previous sexual abuse allegations, the evidence is insufficiently probative to overcome the danger that it would unfairly prejudice S.L.R.'s credibility. This argument has merit.

"[T]he rape shield statute serves to emphasize the general irrelevance of a victim's sexual history." *Crims*, 540 N.W.2d at 867. As the district court observed, sexual history evidence is admissible under the rape-shield statute only to show fabrication. Similarly, this court has previously stated that a determination of relevance of prior accusations of

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of no force and effect."). Respondent does not address the effect of subdivision 7 of the rape-shield statute (Minn. Stat. 609.347, subd. 7), which declares that section 609.347 supersedes "Rule 412 of the Rules of Evidence"; *cf. State v. Gianakos*, 644 N.W.2d 409, 416 n.10 (Minn. 2002) ("While we acknowledge that the legislature has taken steps to limit the power of the court with respect to certain evidentiary issues, including privileges (*see, e.g.*, Minn. Stat. § 480.0591, subd. 6(a) (2000); Minn. R. Evid. 501), it is clear that the judicial branch has ultimate and final authority in such matters."). Because neither the district court nor respondent contends that S.L.R.'s prior-abuse reports have any relevance other than as a showing of fabrication, and the district court acted on respondent's constitutional rights independent of statute, we have no occasion to further examine or resolve the suggested conflict between the statute and the rule.

sexual misconduct depends on evidence that the accusations might have been fabricated. *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993); *see State v. Gerring*, 378 N.W.2d 94, 96-97 (Minn. App. 1985) (affirming district court's refusal to admit evidence that victim made "prior accusations of rape" because it was irrelevant to her character for truthfulness because it "did not prove that [she] had made a prior *false* accusation of rape" (emphasis added)).[4] Enlarging the importance of this precedent, respondent concedes in his argument to this court that S.L.R.'s previous incident reports have no relevance other than to show a pattern of fabrication. Respondent's offer of proof is deficient as a matter of law. There is no showing that the offered evidence is probative sufficient to overcome its highly prejudicial nature.

Perhaps explaining the district court's contrary conclusion, the court declares in its order admitting proof offered by respondent that S.L.R's allegations to her therapist "themselves do establish a pattern of clearly similar behavior, be that victimization or accusation, which will ultimately be a determination for the jury." Respondent similarly suggests that the sheer number of prior reports constitutes evidence of fabrication. But this conclusion rests on speculation as to the explanation for S.L.R.'s reported history,

[4] This determination diminishes the importance of the fact, previously observed, that rule 412, contrasts with the rape-shield statute by excluding the express requirement that other-incident evidence show evidence of fabrication. Critically, both the statute and the rule require a showing that the evidence is probative. As once again is evident in this case, other-incident evidence that does not show fabrication may not be otherwise probative.

which also permits speculation on other explanations. Leaving this determination to the jury, as to each incident offered in evidence, suggests the need to speculate on the reliability of each report. Moreover, the danger of determining the relevance of each incident, even if additional evidence is produced, prompted the Eighth Circuit Federal Court to observe the risk of "trigger[ing] mini-trials concerning allegations unrelated to [a defendant's] case, and thus increas[ing] the danger of jury confusion and speculation." *Tail*, 459 F.3d at 861. "Before evidence of prior false accusations is admissible . . . the trial court must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." *Goldenstein*, 505 N.W.2d at 340.

The district court clearly abused its discretion by admitting evidence of S.L.R.'s previous sexual abuse allegations because the district court found insufficient evidence that she fabricated her allegations.

Absence of Clearly Similar Behavior Pattern

The state argues that S.L.R.'s previous sexual abuse allegations are insufficiently similar to her conduct in this case because they do not constitute a "signature." This argument also has merit, further reducing the relevance of the prior allegations.

"[E]vidence of sexual activity with third persons cannot withstand a rule 403 weighing unless special circumstances enhance its probative value," such as "situations in which the evidence explains a physical fact in issue at trial, suggests bias or ulterior motive, or establishes a pattern of behavior *clearly* similar to the conduct at issue." *See Crims*, 540 N.W.2d at 868 (emphasis in original). Proof of a *clearly* similar behavior pattern to the conduct at issue requires "evidence of modus operandi," which includes

"only those activities so unusual, so outside the norm, and so distinctive as to constitute a signature." *Id.* (quotation omitted). The insights noted in rule 403 cases enlarge our holding that respondent's offer of proof does not show the relevance of the proffered items of evidence. And in terms of the rape-shield statute and rule 412, there must be a showing of a common scheme or plan of similar sexual conduct under circumstances similar to current accusations.

The district court admitted the following 16 offers of proof from respondent's 25 offers of proof because they "pertain directly to past allegations of rape." S.L.R. stated that she was "raped frequently between the ages of four and 29"; "her first memory is of being raped at age 4"; a neighbor "molested" her when she was four; someone's dad "molested her when she had hitchhiked at 12 years old"; a "supervisor . . . raped her when she was 15"; a person "raped her after hitchhiking" when she was 15 or 16; a person "raped her when she was 17"; "she finds it very difficult to walk past [a certain] jewelry store" because "the owner of that store . . . raped her on her 18th birthday"; "a pizza delivery male . . . raped her when he gave her a ride home"; "she feared that [a man who walked her home] would rape her sister and instead she experienced it herself"; S.L.R. "believes that she has had chronic sexual abuse from boyfriends and significant others as well as her husband." The offers of proof also included S.L.R. stating that "a group of neighborhood boys hauled [S.L.R.] into a tree house" and assaulted her when she was four; a neighbor "pinned her against [a] garage" and "tried to kiss her"; and that she was "assaulted multiple times in cars." The offers of proof also included S.L.R.'s

retelling of the sexual encounter in this case, that respondent "attacked" her and "raped [her] in the bathroom of a billiard hall."

No doubt, the evidence appears to show a remarkable set of experiences, but neither respondent nor the district court have pointed to any evidence that the allegations are "so distinctive as to constitute a signature." It is important to observe, initially, that S.L.R.'s criminal-sexual-conduct allegation against respondent is materially different from her previous allegations because her allegation against respondent is the only one that she made to the police; the remainder she only made to her therapist.

The probative value of the evidence of S.L.R.'s previous sexual abuse allegations is further diminished by the fact that she alleges that respondent committed criminal sexual assault against her when she was 48, and she reported it to the police when she was 48, almost 20 years after the last sexual-abuse incident that she alleged to her therapist. And three of the incidents—the tree house assault, the garage kissing, and the car assaults—do not "pertain directly to past allegations of rape," which the district court stated as part of its rationale for admitting incident reports.

The district court clearly abused its discretion by admitting the evidence of S.L.R.'s previous sexual-abuse allegations, both because it was not generally probative and because its probative value was further reduced by the absence of evidence of a

pattern of behavior clearly similar to the victim's accusation in this case. We reverse and remand for further proceedings.[5]

Reversed and remanded.

[5] The district court asserted that much of the evidence regarding S.L.R.'s previous sexual-abuse allegations is "the type of evidence as that which was admitted in *Carroll*." But this analysis misstates the significance of *Carroll.* In that case, we held that, based upon appellant's due process and confrontation rights, the district court erred by "deny[ing] appellant the right to cross-examine a witness whose inconsistent statements had been admitted as evidence and shown to the jury," noting that "a court must allow attorneys to comment on and use *admitted evidence*." *State v. Carroll*, 639 N.W.2d 623, 629 (Minn. App. 2002) (emphasis in original). In this case, the district court had not yet admitted the evidence of S.L.R.'s previous sexual-abuse allegations before doing so in the order from which the state appeals.