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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1602**

State of Minnesota,
Respondent,

vs.

Josue Hernandez,
Appellant.

**Filed August 10, 2010
Affirmed
Wright, Judge**

Watonwan County District Court
File No. 83-CR-08-334

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

LaMar Piper, Watonwan County Attorney, St. James, Minnesota (for respondent state)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and
Muehlberg, Judge.*

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

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant was charged with three counts of fifth-degree criminal sexual conduct, a violation of Minn. Stat. § 609.3451, subd. 1(1) (2006). The state dismissed the third count of the complaint and, following a jury trial, appellant was found guilty of one count of fifth-degree criminal sexual conduct. Appellant challenges the conviction, arguing that the district court committed prejudicial error by excluding his expert's testimony. We affirm.

FACTS

At the time of the offense, appellant Josue Hernandez, age 18, and R.L.E., age 16, attended the same high-school study hall. Although R.L.E. did not interact with Hernandez outside of study hall, she occasionally helped him with his homework during study hall. In late April 2008, Hernandez began to make comments to R.L.E. that were sexual in nature. For example, Hernandez told R.L.E. that he would like it if she “gave him a blow job and a hand job and would do other sexual things.” He also told her that he wanted to see her in more revealing clothing and that he would like to touch R.L.E.'s breasts and private areas.

According to R.L.E., on April 29, 2008, Hernandez touched her buttocks and asked her questions regarding “how far [she] would go with somebody.” R.L.E. testified at trial that Hernandez touched her in the chest area and demonstrated for the jury the location where Hernandez touched her.

According to R.L.E., on April 30, 2008, Hernandez touched her inner thigh area, untucked her shirt, tried to touch her buttocks, and began to rub her back and abdomen. When Hernandez touched her inner thigh, he also tried to touch her vaginal area. But R.L.E. pushed his hand away and told him to stop. Hernandez responded that he would not do it again and asked R.L.E. not to report him. According to R.L.E., Hernandez did not stop. R.L.E. reported the incident to the school's dean of students.

On May 1, 2008, St. James Police Officer Rochelle Hanson interviewed both R.L.E. and Hernandez. Hernandez told Officer Hanson that he massaged R.L.E.'s legs and "then other places." Hernandez reported that R.L.E. told him his actions bothered her and, in response, he apologized and stopped. Hernandez also admitted touching R.L.E.'s buttocks to which R.L.E. responded by giving him a look that caused him to stop. Although Hernandez initially denied touching R.L.E.'s vaginal area, he admitted touching her vaginal area "a little bit" one time. Later during the interview, Hernandez said that he could have accidentally touched R.L.E.'s vaginal area three times. Officer Hanson asked Hernandez if he touched R.L.E. after she told him to stop; Hernandez responded that he did.

Hernandez gave notice of his intent to present expert testimony from a school psychologist at trial. The state moved to preclude the expert from testifying. At a hearing on the motion, the state argued that the psychologist's testimony should be excluded because the defendant was offering it in support of a diminished-capacity defense. In his offer of proof, Hernandez presented the school psychologist's educational evaluation report, arguing that the report demonstrates that he has a chromosomal defect

that can cause problems with communication and social interaction. Hernandez maintained that the testimony would permit the jury to understand him as a whole person. Specifically, Hernandez argued that this testimony was admissible to establish whether Hernandez understood that R.L.E. did not consent to his actions. The district court excluded the psychologist's testimony, reasoning that it was evidence of diminished capacity and would not be helpful to the finder of fact.

After a trial, the jury found Hernandez guilty of fifth-degree criminal sexual conduct for Hernandez's acts on or about April 30, 2008, and not guilty of criminal sexual conduct for Hernandez's acts on or about February 1, 2008, through April 29, 2008. This appeal followed.

D E C I S I O N

The constitutional right to due process requires a person accused of an offense to "be treated with fundamental fairness" and "afforded a meaningful opportunity to present a complete defense." *State v. Quick*, 659 N.W.2d 701, 712 (Minn. 2003) (citing U.S. Const. amend. XIV, § 1, Minn. Const. art. 1, § 7). Hernandez argues that the district court violated his constitutional right to present a complete defense by excluding the proffered expert testimony. Whether an evidentiary ruling violates a criminal defendant's rights under the constitution presents a question of law, which we review de novo. *State v. Peterson*, 764 N.W.2d 816, 821 (Minn. 2009).

To analyze whether exclusion of expert psychiatric testimony violates the right to due process, we apply the rules for admissibility set forth in *State v. Provost*, 490 N.W.2d 93, 104 (Minn. 1992). First, psychiatric opinion testimony on the ultimate question of

whether the accused acted with the requisite subjective mens rea is inadmissible. *Provost*, 490 N.W.2d at 104. Second, psychiatric opinion testimony on whether the accused had the capacity to form the requisite subjective mens rea also is inadmissible. *Id.*; see also *State v. Mills*, 562 N.W.2d 276, 285 (Minn. 1997) (stating that Minnesota does not recognize the defense of diminished capacity or diminished responsibility). Third, other psychiatric opinion testimony generally is inadmissible in a criminal case except in rare circumstances, such as to explain a particular mental disorder characterized by a specific intent different from the requisite mens rea or when aspects of the accused's history of mental illness are relevant to explain the whole person as the accused was before the offense. *Provost*, 490 N.W.2d at 104. To determine admissibility under this third rule, the district court should require an offer of proof on the admissibility of the expert testimony and carefully weigh the relevancy and probative value of the proffered evidence against the likelihood of prejudice or confusion. *Id.*

That the expert testimony was not being offered to demonstrate that Hernandez did not have the requisite subjective mens rea is undisputed. The first *Provost* rule, therefore, does not apply.

As to the second *Provost* rule, Hernandez challenges the district court's ruling that the testimony was evidence of diminished capacity to form the requisite mens rea and inadmissible on that basis. See *id.* Analysis of this issue requires identification of the requisite mens rea for the offense. Hernandez was convicted of fifth-degree criminal sexual conduct, a violation of Minn. Stat. § 609.3451, subd. 1(1). A person is guilty of fifth-degree criminal sexual conduct if that person engages in nonconsensual sexual

contact. Minn. Stat. § 609.3451, subd 1(1). The requisite mens rea for this offense is intent to touch the complainant's intimate parts or the clothing covering the complainant's intimate parts. *Id.*, subd. 1, Minn. Stat. § 609.341, subd. 11(a)(i), (iv). (2006). The act also must be committed with sexual or aggressive intent. Minn. Stat. §§ 609.3451, subd. 1, 609.341, subd. 11(a) (2006). In his offer of proof, Hernandez indicated that the school psychologist would testify that Hernandez suffers from receptive language problems that were relevant to the jury's consideration of whether Hernandez understood that R.L.E. did not consent to sexual contact. But because the mens rea requirements for fifth-degree criminal sexual conduct do not include knowledge or understanding that the complainant does not consent, the proffered testimony was not relevant to the requisite mens rea for the offense. The second *Provost* rule also does not apply.

The third *Provost* rule states that expert psychiatric testimony not addressed by the first two rules generally is inadmissible except in rare occasions. 490 N.W.2d at 104. To determine whether the proffered psychiatric opinion testimony falls within the exception to inadmissibility under the third *Provost* rule, we review the district court's consideration of the relevance and probative value of the evidence as compared to the likelihood of prejudice or confusion. *Id.* The district court found that the proffered evidence was not relevant to the consideration of whether Hernandez engaged in nonconsensual sexual contact.

Hernandez argues that the testimony was relevant to the jury's evaluation of him as a whole person because it would have permitted the jury to assess whether his

“limitations impacted his ability to understand R.L.E.’s verbal and nonverbal actions as resistance or lack of consent.” But as the district court correctly concluded, Minn. Stat. § 609.3451, subd. 1(1), requires only that the accused engage in nonconsensual sexual contact. Pursuant to the plain language of the statute, the state was required to prove only that R.L.E. did not consent. The state was not required to prove that Hernandez *had knowledge or understood* that R.L.E. did not consent. See Minn. Stat. §§ 609.3451, subd. 1, 609.341, subd. 11(a)(i), (iv) (describing fifth-degree-criminal-sexual-conduct mens rea requirements). Testimony as to Hernandez’s understanding of the absence of consent has no probative value because it does not tend to prove or disprove an element of the charged offense. See Minn. R. Evid. 401 (defining “[r]elevant evidence” as that which has “any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable” (emphasis added)).¹

We next consider the likelihood of prejudice or confusion. Here, the proffered testimony could invite the jury to improperly consider the irrelevant question of whether Hernandez understood that R.L.E. did not consent when Hernandez’s understanding of R.L.E.’s lack of consent is not an element of fifth-degree criminal sexual conduct.

¹ We also observe that, even if the state needed to prove that Hernandez understood that R.L.E. did not consent, Hernandez’s understanding of R.L.E.’s verbal or nonverbal communication was uncontroverted. Hernandez’s theory of the case was not that R.L.E. consented or that her verbal and nonverbal signals were confusing regarding consent. Rather, Hernandez’s theory of the case was that, although his conduct was “socially inappropriate,” it was not a criminal offense because he did not engage in sexual contact as defined by the statute. Indeed, Hernandez acknowledged that he understood that R.L.E. did not consent. In the videotaped interview by police, which was played for the jury, Hernandez stated that, when he touched R.L.E.’s buttocks, she gave him “a look . . . like for [him] to stop so [he] did” and that he also asked R.L.E. if his touching bothered her and stopped when she said that it did.

Consequently, the potential for the proffered evidence to unduly influence and confuse the jury is high. The district court correctly concluded that the potential for unfair prejudice outweighs the probative value, if any, of the proffered expert testimony. Accordingly, the district court did not violate Hernandez's constitutional right to present a complete defense by excluding the proffered evidence.

Affirmed.