STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0595

State of Minnesota,
Appellant,

vs.

Robert Charles Cook, Jr.,
Respondent.

Filed October 21, 2008
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Steele County District Court
File No. K0-06-384

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Douglas L. Ruth, Steele County Attorney, Daniel A. McIntosh, Assistant County Attorney, 303 South Cedar, Owatonna, MN 55060 (for appellant)

Mary M. McMahon, Special Assistant State Public Defender, McMahon & Associates Criminal Defense, Ltd., 670 Commerce Drive, Suite 110, Woodbury, MN 55125 (for respondent)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, 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

SCHELLHAS, Judge

Appellant State of Minnesota appeals from a pretrial ruling allowing admission of a prior incident of sexual abuse against the victim of charged criminal sexual conduct. The prosecution argues that (1) the district court's ruling will have a critical impact on the prosecution; (2) the district court abused its discretion by allowing admission of the prior incident as source-of-knowledge evidence where sexual knowledge is not an issue in the case; and (3) the district court abused its discretion by refusing to treat the evidence as reverse-*Spreigl* evidence. We conclude that critical impact has been demonstrated and affirm the district court's refusal to treat the evidence as reverse-*Spreigl* evidence. But because sexual knowledge on the part of the victim has not been raised as an issue, we reverse the district court's ruling admitting the incident as source-of-knowledge evidence.

FACTS

Respondent Robert Charles Cook, Jr. is charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2006). The complaint alleges that the then-11-year-old victim, T.A.C., reported to a school social worker that on the night of March 15, 2006, she awoke to find her father in bed with her, that he put his arm under her night shirt and bra and touched her breasts and put his hand "down [her] pants" under her underwear and touched her vagina.

Respondent was interviewed the day after the incident and made incriminating statements, which he later moved to suppress. On the night of the incident, respondent

consumed 18 cans of beer. He said that it was possible that he mistook his daughter for his wife. He said that he went upstairs, laid down, "snuggled or cuddled," and woke up later in a bedroom that could have been his or could have been T.A.C.'s, but was probably T.A.C.'s. Respondent said his wife awakened him and "I was standing there, and I go was I in here? I thought that was my wife . . . ." Later, in the interview room, respondent told his wife that he was sorry and that the night before he thought it had been her. Respondent also asked her to tell T.A.C. that he was sorry. The interviewing officer then informed respondent that he was going to arrest him based on probable cause. The district court ruled that respondent's statements made before and during the discussion with his wife would be admitted, but the later statements would be excluded.

T.A.C.'s statements about what happened to her during the incident have changed over time. Her initial statements are found in a child-maltreatment report prepared by a social worker who interviewed her. This interview occurred on March 17, 2006, during "a follow up to a referral from [T.A.C.'s] classroom teacher following a number of notes with sex content that [T.A.C.] had generated in her classroom. [T.A.C.] claimed responsibility for some of [the notes], saying she had written them with a friend."[1] According to the social worker's report, after the discussion about the notes, "[T.A.C.] began sharing information about an incident which she said occurred at her home last evening at 10:00 p.m." T.A.C. said that her father "sexually harassed" her the previous

[1] The social worker attached to her report "several notes written by [T.A.C.] which were the reason for her teacher's referral to me for school social work services. The sexual content of these notes is very unusual for a fifth grade student." Upon the prosecution's motion, the district court ordered that the notes be removed from the report admitted during the Rasmussen hearing as Pretrial Exhibit 2.

night, that she awoke and found him in bed with her and he was nude, that he touched her breasts and between her legs underneath her clothing, and that he asked her to have sex with him and said, "Just pretend I'm Deion," who was T.A.C.'s boyfriend at the time of the incident. The report also describes T.A.C.'s disclosure that two to three years earlier, "[J.D.], a woman who flirted with her dad, had touched her breast area under her clothing."

Later, during the child-protection interview, when asked about the previous night, T.A.C. said,

> I was sleeping and then I woke up, cause I felt something. I was my, I saw someone laying by me, but I didn't know. Then they started touching me. I rolled onto the floor to see who it was, I couldn't tell, so I ran and they tried getting me, so I ran in my mom's room.

T.A.C. said that she did not find her mother in her mother's room. She said,

> [S]o I was looking for the phone, to call, but I couldn't find the phone. So I looked out of the door, and no one was there, so I ran into my brother's room, and locked the door. And I was by him, and then someone was unlocking the door, and they were nude and they just had a towel on their head.
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> . . .
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> And then they came in. They were trying to grab me, and they said, "pretend I'm Deon,[2] and lets have sex." And I said no. I'm too young and I don't want to. So I kicked him, so I grabbed my brother and I started screaming, and then my little brother tried getting me from the person, and he was yelling mom, and [my brother] was helping me find mom, and then, my mom called my dad's cell, but my dad didn't answer, so he, she called the house, and she picked up and I

[2] The spelling of this person's name differs between the social worker's report and child-protection interview, but both refer to the same person.

> told her to come home, and she came home right away. She came home right away, and then, my mom was trying to figure out, my dad said it was, a robber and stuff, but I said I remember his face and stuff. And right after I came out of my brother's room, the person ran into my dad's room, and right after that my dad came out of his room with his house coat on.

T.A.C. also spoke of her father's drinking, and said that when he drinks, he does "[w]eird stuff." When asked, "Like what?" T.A.C. responded, "Like sexual harassment. Like talks weird, and does stuff weird, and grounds me for no reason."

The child-protection investigator asked T.A.C. if anyone else had ever touched her like this and T.A.C. said yes, a person named [J.D.] had touched her. T.A.C. explained: "I was sleeping . . . and [J.D.] was sleeping in my bed and I was sleeping in my brother's bed. And she was touching me, and I woke up and ran to the bathroom."

The child-protection investigator also asked T.A.C. about the sexual content of letters and of speech used by T.A.C. at school. T.A.C. said a kid at school had pushed her to "do it" but she said no because she was too young, that she has talked about it with "Deon," who was her boyfriend at the time, and that it comes up with her friends at school.

When interviewed by defense counsel on March 25, 2008, at age 13, T.A.C. indicated that she was not sure of the perpetrator's identity. She reported: "I told the social worker that someone was in my house and she asked who was in the house, I said my dad and so she thought it was him." The following exchange took place as well:

> INTERVIEWER: Do you feel there was some steering by anyone?
> T.A.C.: (Nods) Yeah.

INTERVIEWER: Can you explain why you feel that way?
T.A.C.: No.
INTERVIEWER: Do you believe your dad did this?
T.A.C.: No.
INTERVIEWER: Why?
T.A.C.: Because it happened before. With [J.D.]. It happened twice before.

The interviewer also asked if T.A.C. had been mad at her father at the time of the incident:

INTERVIEWER: When this happened, did anything happen, were you mad at your dad?
T.A.C: Yeah.
INTERVIEWER: About what?
T.A.C.: Housework.
INTERVIEWER: Did he ground you?
T.A.C.: Yeah.
INTERVIEWER: When you got mad at him did you want to get back at him in any way?
T.A.C.: I think so.
INTERVIEWER: When you talked to people about that night, did you understand someone in his position could get in trouble?
T.A.C.: Yes.
INTERVIEWER: Did you want him to get in trouble?
T.A.C.: Kind of.
INTERVIEWER: Why?
T.A.C.: Cuz I was mad at him.
INTERVIEWER: Because he did something wrong or because you were mad at him?
T.A.C.: Because I was mad.

T.A.C. also reported that she did not remember any of the prior incidents of sexual abuse:

INTERVIEWER: Honestly don't remember that night?
T.A.C.: Yes.
INTERVIEWER: Do you remember the incident with [J.D.] more or less clearly than the incident with your dad?
T.A.C.: Less.

Respondent moved the district court to introduce evidence of the past incident of sexual abuse of T.A.C. by J.D. as past sexual-conduct evidence. Respondent advised the district court that he would seek to inquire of T.A.C. about the incident with J.D. and that the purpose of this information would be to suggest the possibility of an alternate explanation for T.A.C.'s knowledge of any type of sexual contact other than the alleged conduct of respondent. The prosecution moved the district court to prohibit the defense from inquiring of a witness or otherwise introducing evidence of any sexual activity of T.A.C., arguing that the information is barred by Minn. R. Evid. 412 and Minn. Stat. § 609.347, subds. 3, 4 (2006).

The parties also moved the district court regarding the admissibility of the social worker's report and child-protection interview. The district court deferred ruling on the admissibility of the social worker's report and child-protection interview until it heard all of the prosecution's evidence, reasoning that its analysis as to admissibility might change based on the testimony. The prosecution also moved separately to exclude T.A.C.'s notes that were attached to the social worker's report. Without objection by the defense, the district court granted the motion with the caveat that the notes could be used for impeachment purposes if T.A.C.'s testimony contradicted the notes.

As to the motion to admit evidence of prior sexual conduct, the district court ruled that it would admit information about the past abuse, if it tended to show T.A.C.'s source of knowledge or familiarity with sexual matters, and the jury would otherwise conclude that the defendant was the source of the knowledge. The district court noted that it

needed to balance the probative value of the information with the potential for unfair prejudice, concluding that the past abuse had some probative value because it would show a source of knowledge of sexual matters. The district court also concluded that allowing the defense to show an alternate source of knowledge was constitutionally required under the defendant's right to confront accusers and offer his own defense. The district court explained its reasoning as follows:

> In looking at this case, the facts do show that there is, you know, an issue as to the identity of the perpetrator. In looking at the interview, Exhibit 3, the alleged victim does discuss this situation with [J.D.], that this [J.D.] had touched her previously, so that would certainly be a source of knowledge of sexual conduct of somebody other than the accused alleged conduct, so it is some probative evidence.
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> . . .
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> And although it probably is going to be embarrassing for the child, and the Court is concerned about that, in reading what I can from this file, you know, there are some identification problems here, and so it's a somewhat unusual case factually in that there isn't a clear positive identification at least initially, although then there is some statements the defendant makes that would lead you to conclude that he was aware of the situation.
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> But at least for purposes of this motion, I've balanced it, thought about it, and just think that in this type of case, the defendant has the right to present a defense, and if part of it is that the child had knowledge of a sexual matter outside of what occurred in this situation, the defense should at least be allowed to inquire into that and argue that in front of the jury.

The prosecution reacted to the district court's ruling by repeating its objection to the admissibility of the evidence, and the court responded:

> Just–I don't want to sit here and debate this point, but the oddity of this case is she's sleeping. She feels this, you know, that's what's actually going on. I mean, I think those are legitimate questions to ask in this type of case. I'm not sitting here trying to argue the case for the defense, but the reality is she was sleeping and she perceived something. In the past, she was sleeping and this [J.D.] woman touched her, you know, and then kind of the chaotic situation of how people were running around the house, and then dad comes in and says some things that are a little odd or peculiar, but, you know, that's the factual scenario that we have to deal with, so that's kind of what goes into the analysis. Factually, each one is real unique, these cases here, but I have to deal with what I have here. And I understand your argument, but I think I'm [going to] stick to my ruling.

Then the prosecution argued that the defense would use the evidence as reverse-*Spreigl* to identify an alternative perpetrator. The district court asked defense counsel if the defendant was pursuing an alternative-perpetrator theory, and defense counsel said:

> In the sense–I'm not going to claim or argue that she was touched by another person. I would like to question her about it, and I may argue she was confused about what happened, in part because she did have some previous experience, and maybe this brought back some memories. Maybe that's why she's saying–you know, or she said what she said about her dad this time. But I'm not going to claim to the jury, look, she was touched, but she was touched by this other person, it's a different person that did it. That's not our defense in this case.

The district court ruled that it would not address the past-sexual-abuse evidence as reverse-*Spreigl* or alternative-perpetrator evidence. This appeal follows.

D E C I S I O N

I.

The state brings this appeal under Minn. R. Crim. P. 28.04, subd 2, which allows the state to appeal pretrial orders in felony cases. *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). "To prevail, the state must 'clearly and unequivocally' show both that the trial court's order will have a 'critical impact' on the state's ability to prosecute the defendant successfully and that the order constituted error." *Id.* (quoting *State v. Kim*, 398 N.W.2d 544, 547 (Minn. 1987)). The critical-impact standard is often applied to *suppression* of evidence. *See id.* (addressing critical impact of suppression of evidence). The same standard applies in an appeal of a pretrial order denying a prosecution's motion to exclude evidence. *State v. Barsness*, 473 N.W.2d 828, 828 (Minn. 1990). To fully appreciate the impact, appellate courts must consider the state's evidence as a whole. *Zanter*, 535 N.W.2d at 631. Critical impact is necessarily a demanding standard. *Id.* at 630. A suppression ruling has a critical impact on the prosecution when it significantly reduces the likelihood of a successful prosecution. *Id.*

We are persuaded that the ruling will have a critical impact on the prosecution in this case. First, the evidence as a whole is not strong. Although respondent has made incriminating statements, the totality of the state's evidence is weak without admission of the victim's early statements implicating her father. The district court has deferred ruling on the admission of the early statements.

Second, admission of the prior incident of sexual abuse is highly prejudicial because it is sexual-conduct evidence, and it has a tendency to confuse the issues.

Respondent argued that "[w]e're entitled to present a defense that it was not Mr. Cook, and there's been a very unclear identification in the alleged victim's previous statement about who that person may have been." Respondent also asserted that "in terms of being able to inquire about the identity of this person, the defense's position is that [it] is relevant" and that "[o]ur position is it's constitutionally required to be able to inquire about this previous encounter if it is very similar to the type of claim that the victim is making in this case and she is confused about who her assailant may have been." The district court's ruling reflects a similar concern about T.A.C.'s possible confusion regarding the circumstances of her abuse. As stated in respondent's brief, "[i]t is obvious that the district court believed the child could have awakened from a dream and was confusing that with reality."

Respondent's arguments on appeal suggest that confusion exists about the intended purpose in introducing the sexual-conduct evidence, which the district court's ruling does not eliminate. Respondent emphasizes the fact that when asked in the child-protection interview, "How long would you say he touched you on your chest?", T.A.C. responded "I don't know, *she*, he did it a couple of times." (Emphasis added.) Respondent also argues that "[t]his limited type of questioning does not destroy T.A.C.'s credibility of who was in bed with her, it only seeks to clarify exactly what happened." The state argues that none of respondent's arguments reflect concern with sexual knowledge being apparent in the evidence that could be attributed to respondent unless an alternate source of knowledge were demonstrated to the jury.

Respondent's arguments and the district court's ruling demonstrate that admission of the prior-sexual-conduct evidence tends to confuse the issues. Respondent's arguments and the district court's reasoning deal primarily with confusion about the identity of the attacker and the circumstances of the abuse rather than a concern that T.A.C. possessed sexual knowledge that a jury could infer originated from sexual abuse by respondent.

We conclude that the state has demonstrated that the district court's source-of-knowledge ruling will have a critical impact on the prosecution.

II.

Because we have determined that the district court's ruling will have a critical impact, we now consider the state's argument that the district court erred in ruling the evidence admissible as source-of-knowledge evidence. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The appealing party has the burden of establishing that the district court abused its discretion. *Id.* "A court abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Admission of prior sexual conduct of the victim in a criminal-sexual-conduct case is governed by Minn. R. Evid. 412, which is commonly known as the rape-shield rule. Under rule 412, evidence of prior sexual conduct of the victim "shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court

order under the procedure provided in rule 412." Minn. R. Evid. 412(1). Prior sexual conduct includes sexual abuse. *State v. Kobow*, 466 N.W.2d 747, 751 (Minn. App. 1991).

There are exceptions to the rape-shield rule. A victim's past sexual conduct can be admitted "in all cases in which admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986) (citing *State v. Caswell*, 320 N.W.2d 417 (Minn. 1982)). Applying this rule in *Benedict*, the supreme court held that "[d]espite the prohibition of a rape-shield law or rule, a trial court has discretion to admit evidence tending to establish a *source of knowledge* of or familiarity with sexual matters in circumstances where the jury otherwise would likely infer that the defendant was the source of the knowledge." *Id.* (emphasis added). When considering prior sexual conduct as source-of-knowledge evidence, "as in ruling on the admission of other kinds of evidence, the trial court ought to balance the probative value of the evidence against its potential for causing unfair prejudice." *Id.*

The state argues that admission of prior sexual conduct as source-of-knowledge evidence is only probative where the knowledge held by the victim could tend to incriminate the defendant. *Benedict* supports this view. The ruling of *Benedict* is not simply that source-of-knowledge information is admissible, it is that the information is admissible "*in circumstances where* the jury otherwise would likely infer that the defendant was the source of the knowledge." *Id.* (emphasis added). Here, evidence has been presented to show that T.A.C. had sexual knowledge unusual for a child her age.

For example, the comment at the end of the social worker's report states that T.A.C. was responsible for notes with sexual content unusual in a child her age. The notes themselves, which were originally attached to the report, are another example. But the district court has delayed ruling on the admissibility of the social worker's report and has granted a motion to exclude the notes, ruling that the notes will be admitted as evidence only for impeachment purposes if T.A.C. testifies inconsistently with the notes. Because the evidence that suggests that T.A.C. has unusual sexual knowledge arguably attributable to appellant is the subject of motions currently under advisement with the district court, we do not know whether that evidence will be admitted. Without knowing if or how T.A.C.'s sexual knowledge will be demonstrated to the jury, we cannot conclude that sexual knowledge will be shown "in circumstances where the jury otherwise would likely infer that the defendant was the source of the knowledge." At this stage in the litigation, the probative value of evidence showing an alternate source of sexual knowledge is minimal.

As discussed above, the disputed evidence is also highly prejudicial because it is sexual-conduct evidence and tends to confuse the issues. Because at this point in the case, the probative value of the evidence is low and the potential prejudicial effect high, the prejudicial effect of the sexual-conduct evidence outweighs any probative value. Therefore, we conclude that the district court abused its discretion in its ruling that the sexual-conduct evidence is admissible, and we reverse the district court's ruling.

This case is analogous to *State v. Higgins*, 376 N.W.2d 747, 749 (Minn. App. 1985), in which we considered a pretrial ruling admitting evidence and concluded that

without a factual record, we could not determine whether defense exhibits were relevant or whether the state would be highly prejudiced. *Id.* In *Higgins*, we remanded, stating that the trial court would not be bound by its earlier ruling and that it could make a new ruling "after hearing testimony." *Id.* As in *Higgins*, if on remand evidence is admitted that demonstrates sexual knowledge by T.A.C. that the jury would likely infer came from sexual abuse by the respondent, the district court is free to reconsider admission of the sexual-conduct evidence under *Benedict*.

III.

The state argues additionally that the evidence will function as reverse-*Spreigl* evidence and that the district court erred in refusing to address it as reverse-*Spreigl* evidence. The district court's evidentiary ruling will not be reversed absent a clear abuse of discretion. *Amos*, 658 N.W.2d at 203.

"A defendant may present evidence of other crimes, wrongs, or bad acts committed by an alternative perpetrator in order to cast reasonable doubt upon the identification of the defendant as the person who committed the charged crime." *Huff v. State*, 698 N.W.2d 430, 438 (Minn. 2005). "This evidence is known as reverse-*Spreigl* evidence." *Id.* Reverse-*Spreigl* evidence is subject to a number of particular foundational requirements, including first connecting the alleged alternative perpetrator to the commission of charged crime, and then showing "(1) by clear and convincing evidence that the alleged alternative perpetrator participated in the reverse-*Spreigl* incident, (2) that the reverse-*Spreigl* incident is relevant and material to the defendant's

case, and (3) that the probative value of the evidence outweighs its potential for unfair prejudice." *Id.*

The state argues that respondent intends to use the sexual-conduct evidence to cast doubt on the identification of respondent as the perpetrator, and that to do so with evidence of a prior bad act by a third party is reverse-*Spreigl* evidence. The state argues that the district court erred when it refused to require that the sexual-conduct evidence meet the foundational requirements of reverse-*Spreigl* evidence.

The state's argument is inviting because, as noted above, defense counsel told the district court that respondent's position was that T.A.C. is confused about the identity of her assailant. Using evidence of a bad act of a third party to suggest confusion in the identity of an assailant sounds like reverse-*Spreigl* evidence. But respondent points out that his defense is *not* "look, she was touched, but she was touched by this other person." Defense counsel explained to the district court that the argument was that T.A.C. was confused because "maybe this brought back some memories" and "maybe that's why she said what she said about her dad this time." The argument appears to be not that T.A.C. was confused about *who* attacked her, but that she was confused about *whether* she was attacked at all on the night in question. Evidence casting doubt on *whether* T.A.C. was attacked is not reverse-*Spreigl* evidence. We therefore conclude the district court did not abuse its discretion in refusing to treat the evidence as reverse-*Spreigl* evidence.

Affirmed in part, reversed in part, and remanded.