STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0966

State of Minnesota,
Respondent,

vs.

Dominic Lee Jones,
Appellant.

Filed July 7, 2009
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-07-100405

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Earl P. Gray, Mark D. Nyvold, Suite W-1610, 332 Minnesota Street, St. Paul, MN 55101 (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction and sentence for fourth-degree criminal sexual conduct, arguing that the district court abused its discretion by (1) making various evidentiary rulings, (2) allowing a video to be taken into the jury room, and (3) imposing a double durational departure in appellant's sentence. We affirm.

FACTS

Respondent State of Minnesota charged appellant Dominic Lee Jones with third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2006), sexual penetration with a person when the actor knows or has reason to know that the person was physically helpless. The charge was based on an incident that occurred on the evening of April 3, 2007. The complaint alleged that victim P.J. and her friend, Laquisha Malone, went to the apartment of Robert McField, Keith Massey, Alex Daniels, and E.J. Jones,[1] where P.J. consumed seven to eight shots of vodka. Malone and McField then went to McField's room, and Massey, Daniels, and Jones took turns having sexual contact with P.J. When Malone emerged from McField's room, she helped P.J. to the bathroom and then to a couch, where P.J. lost consciousness. McField left the apartment for a short time, and P.J. was on the couch unconscious when he left and returned. Later, McField heard a noise and looked into Daniels's room, where he saw appellant engaged in a sexual act with P.J. that was videotaped on Daniels's cell phone. The complaint

[1] In this opinion, "Jones" refers to E.J. Jones, not to appellant.

alleged that the video had been deleted from the phone but recovered by police and that appellant's DNA profile matched DNA in semen found on P.J.'s clothing.

On April 4, 2007, P.J. underwent a sexual assault exam. P.J. reported that she and a friend went to an apartment at the University of Minnesota and "Alex," "E.J.," and another male, whose name she could not remember, forced her to engage in sexual penetration and that one of them had ejaculated on her face. On April 6, 2007, P.J. reported the sexual assault to the police. In the course of investigating the report related to Massey, Daniels, and Jones, the police discovered the cell-phone video.

Before trial appellant moved for permission to admit evidence of "the entire night/morning of the incident," including evidence of any sexual contact by Massey, Daniels, and Jones with P.J. The district court denied the motion, concluding that the rape-shield rule and statute prohibit admission of the evidence. Appellant also moved to prohibit Dr. Stephen Smith, an emergency-room physician, from testifying to certain issues. The district court ruled that Dr. Smith's testimony regarding: (1) alcohol concentration and burn-off rates was admissible; (2) stages of intoxication, P.J.'s stage of intoxication, the observed effects of alcohol on P.J., and P.J.'s consciousness was admissible; and (3) whether P.J. could have given informed consent for a medical procedure was inadmissible.

At trial the state offered several forms of evidence related to Daniels's cell-phone video. Erin Schaefer, an investigator with the University of Minnesota Police Department, testified that the Minneapolis Police Department recovered a deleted video file that was time-stamped 2:50 a.m. on April 4, 2007. Investigator Schaefer testified

about what she observed on the video, but the video was not shown to the jury at that time. The Secret Service analyzed and enhanced the video, and Investigator Schaefer testified about what she observed on the video after enhancement, stating that the enhanced video had sound and was much clearer visually.

The enhanced video was admitted into evidence as Exhibit 3 during the testimony of Secret Service Agent Michael Piper, who worked on the video enhancement. The jury was then shown Exhibit 3, which depicts appellant stroking his penis and kneeling on P.J., with his penis near her face. The cell-phone camera pans toward appellant's face, capturing him smiling and speaking to the camera, but appellant's words are hard to decipher. The video reveals a white substance on P.J.'s face that enters her nose, touches one of her closed eyes, and pools on and around her mouth. The video reveals no response by P.J. to the stimuli.

At trial, McField testified that on the night in question, P.J. had seven shots of vodka in a 20 to 30 minute period. McField and P.J. then went downstairs and outside to smoke. When McField and P.J. returned to the apartment, McField went to his room with Malone for 10 to 15 minutes. McField then went to the bathroom and, afterwards, stayed in his room with Malone for 50 to 60 minutes. When McField emerged from his room, he saw P.J. stumbling. Malone and P.J. went into the bathroom and when they emerged, Malone and McField placed P.J. in a living-room chair. McField got P.J. a pillow and a cover and put her on the couch. Shortly afterward, McField went to McDonald's. When he returned, P.J. was still on the couch sleeping. He ate and went to his room with Malone for "15 minutes max."

When McField emerged from his room, P.J. was no longer on the couch. McField heard a "boom, boom, boom" noise that he thought was a "headboard noise." He was curious, wondered where P.J. had gone, and went into Daniels's room, where he saw appellant "on top of [P.J.] on the bed," positioned between her legs, "going back and forth in a sexual motion." Daniels sat on a couch, watching. While appellant was on top of P.J., he asked McField if he wanted "a hit," which McField understood to mean "[h]ave sex with her." McField said no. McField initially testified that P.J. was not saying anything, but then testified that she said, "Oh, God," but in a way that McField was unable to describe. Appellant "said that he was going to come, and he sort of came from between [P.J.'s] legs." Someone said, "get the phone, meaning videotape it," and appellant "scurried up, and put one knee over [P.J.]" and "started ejaculating on her face." McField told the police that appellant had removed a condom before ejaculating. Daniels used his phone to videotape part of appellant's sexual contact with P.J. McField testified that P.J. did not respond in any way—"She just laid there." McField next saw P.J. in the morning, around 8:00 a.m., lying on the couch with "white crust all over her face." The white substance was on "her face, cheeks, under her nose, on her nose, around her eyes, you know, basically almost everywhere." P.J. went into the bathroom and "looked surprised it was on her face."

Malone testified regarding the timeline of events as well. The timeline, according to her testimony, was mostly consistent with McField's testimony, except that Malone testified P.J. consumed her shots in 15 minutes and that she and McField went to his room for 20-30 minutes.

P.J. testified that, prior to trial, she had never met nor seen appellant. P.J. testified that she thinks she did not eat dinner the night of the incident and that she did not eat anything at the apartment. P.J. is 5'3'' tall and, on April 3, 2007, weighed 117 pounds. She did not remember being put on the couch, but did remember being on the couch. After being on the couch, the next thing P.J. remembered was waking up in the morning with her pants halfway down and her underwear in her pocket. She discovered a white substance on her face when she went to the bathroom. She initially thought the substance could be vomit or drool, but later determined it was ejaculate. P.J. testified that she thought that she had been sexually assaulted and that she sought an exam. P.J. did not specify during her testimony that she thought Massey, Daniels, and Jones had assaulted her, stating rather that she reported an assault by "someone other than [appellant]." P.J. admitted in her testimony that during the exam, she lied to the nurse and said that she had not been drinking that night. P.J. explained that she lied to the nurse out of concern that she would get into trouble for underage alcohol consumption. The nurse who conducted the sexual assault exam also testified about P.J.'s statements regarding alcohol consumption.

Steven Swenson of the Bureau of Criminal Apprehension (BCA) testified that semen was found on seven of nine condoms found in the apartment, on P.J.'s shirt, and on the crotch area of P.J.'s jeans. Alyssa Bance of the BCA testified that: (1) appellant was excluded as a source of semen from six of the seven condoms found to have semen on them; (2) the seventh condom contained a mixture of DNA from three or more individuals; (3) neither appellant nor P.J. could be excluded as contributors to the mixture

of DNA on the seventh condom; and (4) 80% of the general population could be excluded as contributors to the DNA mixture. The DNA from the semen on P.J.'s jeans was a mixture from two or more people of which appellant could not be excluded. The DNA found in the semen on P.J.'s shirt matched appellant's DNA.

Investigator James Nystrom testified about what he saw in the video before and after it was enhanced by the Secret Service and that P.J. told him that the last thing she remembered that night was the drinking game.

Dr. Smith testified about P.J.'s alcohol concentration, basing his testimony on P.J.'s statement about how much alcohol she consumed, the time period in which she consumed it, and that she had not eaten in many hours. Dr. Smith calculated P.J.'s alcohol concentration to be .43 at 1:00 a.m. and .39 at 2:50 a.m. An alcohol concentration of .43 put P.J. in the "coma level with complete unconsciousness, coma, anesthesia, and possible death." An alcohol concentration ranging from .25-.40 put her in "the stupor level" with "general inertia, approaching loss of motor functions, marked muscular incoordination, inability to stand or walk, vomiting, sleep or stupor." But in Dr. Smith's experience, "many young people who get intoxicated, a young college student who is not a daily drinker, is stuporous above .20, often above .15, but above .20, they're unable to function, incapacitated." Dr. Smith opined that a person who is in "the stupor or coma range" at 2:50 a.m., when the person would typically be asleep, is "much more likely to have a depressed level of consciousness than if it's 2:50 p.m."

During his testimony, Dr. Smith was shown the video admitted as Exhibit 3 and testified about his observations and their significance to his opinion. He noted that he

could not see if P.J. was trying to breathe with her nose and mouth obstructed with semen, that she fell off the bed without an apparent response, that semen was in P.J.'s eye and that semen in the eye is painful, and that P.J. showed no response to "vigorous prodding and shaking." Dr. Smith informed the jury that "[w]hat we see is consistent with coma" and is not consistent with "any lighter level of consciousness than stupor or coma." He testified that it was his "firm opinion that [P.J.] was not conscious of her surroundings or actions" at 2:50 a.m., and that it was his "firm opinion that [P.J.] was not able to provide or revoke consent for sexual intercourse or fellatio at 2:50 a.m. on the morning of April 4, 2007."

Appellant testified in his own defense. He testified that P.J. was awake when he arrived at the apartment and agreed that he could ejaculate on her face. Appellant testified that he did not know that P.J. had consumed alcohol. During cross-examination, the prosecutor played the video, showed still frames from the video, and asked appellant questions based on the images.

At the close of the trial, the defense objected to Exhibit 3 being allowed in the jury room during deliberations. The district court overruled the objection. The district court also overruled the objection by the defense to the jury being given instructions, at their request, about how to watch the video frame-by-frame.

The jury found appellant not guilty of the charged offense, but guilty of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd 1(d) (2006), sexual contact with a physically helpless person while knowing or having reason to know of the helplessness. As an aggravating factor, the jury found that appellant treated P.J. in

a particularly demeaning and humiliating manner, but declined to find that appellant treated P.J. in a particularly cruel manner.

The state moved for an upward dispositional departure or an upward durational departure from the presumptive guidelines sentence of 24 months stayed. The district court denied the motion for a dispositional departure and granted the motion for durational departure. The court sentenced appellant to 48 months stayed and imposed a $6,000 fine with $5,000 stayed. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by: (1) excluding evidence related to P.J.'s sexual incident with Massey, Daniels, and Jones; (2) allowing Dr. Smith to testify as to an ultimate issue; (3) allowing the state to play the enhanced video multiple times and allowing the video in the jury room during deliberations; and (4) imposing an upward durational departure.

I.

"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 district court abuses its discretion when it acts "arbitrarily, capriciously, or contrary to legal usage." *State v. Profit*, 591 N.W.2d 451, 464 n.3 (Minn. 1999) (quotation omitted).

Admission of evidence of a victim's prior sexual conduct in a criminal sexual conduct case is governed by rule and statute. Under Minn. R. Evid. 412, commonly

known as the rape-shield rule, 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). Under Minn. Stat. § 609.347, subd. 3 (2006), Minnesota's rape-shield statute, evidence of a victim's prior sexual conduct shall not be admitted or referred to except by court order. In the event of conflict between the rule and statute, the rule controls. Minn. Stat. § 480.0591, subd. 6 (2006) ("If a rule of evidence is promulgated which is in conflict with a statute, the statute shall thereafter be of no force and effect.").

"[T]he rape shield statute serves to emphasize the general irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration." *State v. Crims*, 540 N.W.2d 860, 867 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). In particular circumstances in which a victim's prior sexual conduct is relevant, evidence of a victim's sexual history may be admissible. *Id.* at 868. Prior false allegations of sexual abuse are relevant to test the victim's credibility. *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993); *State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *review denied* (Minn. Apr. 19, 1991). A victim may also be impeached with prior allegations if the victim testifies that no prior allegations were made. *Kobow*, 466 N.W.2d at 751. A victim's sexual history may also be relevant and admissible when consent of the victim is a defense and evidence of the victim's previous sexual conduct tends to establish a common scheme or plan of similar sexual conduct by the victim under similar circumstances. Minn. R. Evid. 412(1)(A)(i); *see also* Minn. Stat. § 609.347, subd. 3(a)(i) (requiring a district court to find prior

allegations were fabricated before admitting prior conduct to show a common scheme or plan); *State v. Davis*, 546 N.W.2d 30, 34 (Minn. App. 1996) (stating that a victim's sexual history may also be relevant where it demonstrates a pattern of clearly similar behavior constituting a habit or modus operandi), *review denied* (Minn. May 21, 1996).

"In the event of a conflict, the defendant's constitutional rights require admission of evidence excluded by the rape shield law." *Crims*, 540 N.W.2d at 866 (citing *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992)). "Every criminal defendant has a right to fundamental fairness and to be afforded a meaningful opportunity to present a complete defense." *Id.* at 865 (quotation omitted). "The right to present a defense includes the opportunity to develop the defendant's version of the facts, so the jury may decide where the truth lies." *Id.* A defendant has a right to confront adverse witnesses to reveal bias or disposition to lie. *Id.* "To vindicate these rights, courts must allow defendants to present evidence that is material and favorable to their theory of the case." *Id.* at 866. "However, a defendant has *no* right to introduce evidence that either is irrelevant, or whose prejudicial effect outweighs its probative value." *Id.* "Rape shield provisions usually do not affect the right to present a defense because they rest on the premise that a person's character is generally irrelevant to a specific case." *Davis*, 546 N.W.2d at 34.

Appellant apparently argues that P.J.'s sexual contact with Massey, Daniels, and Jones was relevant and admissible to show that: (1) P.J. made prior false allegations of sexual assault; (2) P.J. consented by demonstrating a common scheme or plan; and (3) P.J. was not as intoxicated as the state claimed by contradicting a suggestion that P.J. passed out immediately after drinking. Appellant also argues that the exclusion of

evidence about P.J.'s prior sexual contact with Massey, Daniels, and Jones improperly limited his ability to cross-examine P.J. and Investigator Nystrom.

Appellant's argument that P.J.'s prior sexual conduct was relevant to show that she made prior false allegations is not supported by a sufficient showing of falsity. Appellant argues that P.J.'s lie about drinking alcohol on the night in question suggests possible lies about other aspects of the evening. But the state argues persuasively that cases dealing with prior false allegations used to test credibility require a stronger showing of falsity. For example, in *State v. Caswell*, a case in which the supreme court concluded that refusal to admit prior allegations of sexual abuse was error because the allegations showed a predisposition to fabricate a charge of rape, the complainant admitted that her prior report was false. 320 N.W.2d 417, 419 (Minn. 1982). And in *Goldenstein*, the district court found that prior allegations of sexual abuse by a social worker were "probably not true." 505 N.W.2d at 340. Here, P.J. made no admission that her allegations of being coerced into sexual contact with Massey, Daniels, and Jones were false and appellant offered no evidence to support a conclusion by the district court that they were false.

The real test of P.J.'s credibility, under appellant's argument, is P.J.'s prior lie about her alcohol consumption, and P.J testified at trial about this lie. Appellant's argument that P.J.'s prior allegations of sexual coercion should also be admissible to test her credibility seems dangerously close to an argument that the mere utterance of allegations is relevant to test credibility. We reject this contention; relevance in terms of credibility stems from the falsity of prior allegations, not the mere utterance of prior

allegations. *See Kobow*, 466 N.W.2d at 751 (ruling that prior allegations were not relevant to the question of fabrication where there was no showing that the prior allegations were fabricated).

Appellant argues that P.J.'s common scheme was to engage in sexual behavior while intoxicated and later deny its consensual nature, and that evidence that P.J. allowed a male to ejaculate on her face earlier in the evening would have bolstered appellant's claim that P.J. consented to the same conduct by him. But appellant's characterization of the common scheme of sexual activity fails to account for significant distinctions between the prior and subsequent incidents. The prior incident occurred shortly after P.J. consumed alcohol, when Malone and McField went to McField's bedroom; the incident with appellant occurred much later. P.J. was conscious during the first incident and thus was able to report the incident to the sexual assault examiner and the police. To the contrary, substantial testimony supports a conclusion that P.J. lost consciousness well before her incident with appellant. And the nature of P.J.'s claimed lack of consent differed between the incidents. In the first incident, P.J. reported that she was physically coerced into sexual penetration; in the later incident, P.J. was physically unresponsive and has no recollection of the incident. In fact, P.J. did not report sexual abuse by appellant—she had no awareness that appellant existed let alone that he sexually abused her.

Appellant's argument that P.J.'s prior sexual incident with Massey, Daniels, and Jones is relevant because of its probative value on the question of P.J.'s consent to the incident with appellant is weak and misplaced. The state charged criminal sexual

conduct in the form of penetration with a physically helpless person, not penetration accomplished by force or coercion. *See* Minn. Stat. § 609.344, subd. 1(c) (2006) (defining as third-degree criminal sexual conduct sexual penetration accomplished with coercion or force); Minn. Stat. § 609.345, subd. 1(c) (2006) (defining as fourth-degree criminal sexual conduct sexual contact accomplished with coercion or force). The state argued that P.J. was physically helpless because she was unconscious. *See* Minn. Stat. § 609.341, subd. 9 (2006) (stating a person is "physically helpless" when they are "asleep or not conscious"). The critical question in this case was not whether P.J. was forced into sexual contact with appellant against her will; the question was whether she was conscious. Appellant has failed to show that the prior incident between P.J. and Massey, Daniels, and Jones was relevant to demonstrate her later consciousness during the incident with appellant.

Appellant also argues that evidence of P.J.'s prior sexual contact with Massey, Daniels, and Jones would have countered the suggestion that she passed out right after drinking and thus would have shown that she was less intoxicated than the state argued. But the state's evidence did not, as a whole, suggest that P.J. passed out right after consuming the alcohol. P.J. testified that she remembered being on the couch later in the evening, not that she did not remember anything after the drinking occurred. Malone and McField also testified that P.J. was conscious and moving around when they emerged from McField's room, and that she was helped to the bathroom and placed on a chair for a period of time before she was placed on the couch where she passed out. Investigator Nystrom did testify that P.J. told him the last thing she remembered was the drinking

contest, but this testimony contradicted P.J.'s testimony; it did not create a false timeline such that appellant needed to show that P.J. engaged in the earlier sexual incident to demonstrate her consciousness and level of intoxication during the earlier sexual incident.

Appellant also argues that he was denied the right to cross-examine P.J. and Investigator Nystrom. With respect to P.J., appellant has not demonstrated that the evidence of the prior sexual incident was relevant either as probative on a fact at issue in the case or to test credibility. A defendant has no right to introduce evidence that is irrelevant. *Crims*, 540 N.W.2d at 866. Appellant's argument with respect to Investigator Nystrom is essentially that Investigator Nystrom lied when he said P.J. told him that her last memory was of the drinking contest and that appellant was not able to cross-examine Investigator Nystrom to demonstrate that he lied. Appellant has not demonstrated that facts of the sexual incident needed to be admitted into evidence for him to cross-examine Investigator Nystrom to assess whether he lied about what P.J. told him. And, as already noted, the evidence was not needed to demonstrate that P.J. remembered events after the drinking game because P.J.'s own testimony established that fact, and, as already discussed, the state's evidence as a whole did not create a false timeline.

We conclude that the district court did not abuse its discretion in refusing to admit the prior sexual incident between P.J. and Massey, Daniels, and Jones because it was not relevant to a material fact in the case, it was not necessary to test P.J.'s credibility, and it was not necessary to vindicate appellant's right to cross-examine witnesses.

II.

Appellant argues that the district court erred in allowing Dr. Smith to opine that P.J. was unconscious and could not give or revoke consent at 2:50 a.m. on April 4, 2007. Appellant argues that by this testimony Dr. Smith improperly gave an expert opinion on ultimate issues in the case—whether the elements of P.J.'s helplessness and appellant's awareness of her helplessness were met.

A district court has broad discretion to admit expert testimony. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). "A reviewing court will not reverse a trial court's determination unless there is an apparent error." *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984). To be admissible, expert testimony must be helpful to the finder of fact. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980). Minn. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"Expert opinion testimony is not helpful if 'the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience.'" *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005) (quoting *Helterbridle*, 301 N.W.2d at 547).

Expert testimony should not give a legal conclusion, address mixed questions of fact and law, or merely tell the jury what result to reach. *Id.*; *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982). Expert opinion that reaches a legal conclusion or tells

the jury what result to reach based on the evidence is not helpful to the jury and covers matters the jurors are as able to determine as the witness. *Saldana*, 324 N.W.2d at 230. But an expert's opinion is not objectionable merely because it embraces an "ultimate issue." *Id.* (citing Minn. R. Evid. 704, which provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). Appellant argues that by telling the jury that P.J. was unconscious and unable to consent, Dr. Smith essentially told the jury that the elements of physical helplessness and knowledge of physical helplessness were met. But Dr. Smith did not testify that the legal definition of helplessness was met or that appellant knew of the helplessness. Because of his education and experience, Dr. Smith was in a better position than the jurors to evaluate what level of consciousness would be expected in light of P.J.'s characteristics and the circumstances of the evening. Dr. Smith did not offer opinions about matters which lay jurors were as able to determine as the expert, and his opinions were therefore likely to be helpful to the jury. The district court did not abuse its discretion in allowing Dr. Smith's testimony.

III.

Appellant argues that the district court abused its discretion in "how it allowed the State to use the video" taken by Daniels on his cell phone. Appellant argues that it was an abuse of discretion to allow the state to repeatedly play the video admitted as Exhibit 3 during trial and to allow the jury to play the video during their deliberations with instructions on how to view still frames. Appellant also seems to argue that the images had high potential for prejudice that was not outweighed by their probative value.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *Amos*, 658 N.W.2d at 203. 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).

The district court did not abuse its discretion in allowing the state to repeatedly show the video. The video was played during relevant points in the testimony of Agent Piper, Dr. Smith, and appellant. Agent Piper was asked if the video accurately reflected what he recovered. Dr. Smith was shown the video, as well as individual frames, because Dr. Smith based his opinions in part on P.J.'s response to stimuli as depicted in the video. In the frame-by-frame analysis, Dr. Smith pointed out particular things apparent in the video that were relevant to his opinion, such as semen in P.J.'s eye and her lack of response to ejaculate in her nose. During the state's cross-examination of appellant, the video was played and individual frames were shown so that the state could ask appellant about particular matters depicted on the video. This allowed both the state and appellant to address the video's consistency and inconsistency with appellant's version of events. Because the video, when shown during trial, was relevant to the testimony of each witness, the district court did not abuse its discretion in allowing the state to show the video multiple times.

Citing Minn. R. Crim. P. 26.03, subd. 19(2), appellant argues that the district court abused its discretion by allowing the jury to play the video during their deliberations in

the jury room, rather than in open court. "The materials that may go to the jury room and jury requests for review of evidence are governed by Minn. R. Crim. P. 26.03, subd. 19(1) and (2)[.]" *State v. Kraushaar*, 470 N.W.2d 509, 514 (Minn. 1991). Subdivision 19(1) provides: "The court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room." Minn. R. Crim. P. 26.03, subd. 19(1). Subdivision 19(2) provides in part:

> If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence.

Id., subd. 19(2). Appellant relies on the above paragraph of subdivision 19(2) as support for his argument that the jury's review of the video should have taken place in the courtroom rather than in the deliberation room. But, as the state points out, the supreme court's conclusion in *Kraushaar* is directly contrary to appellant's argument. 470 N.W.2d at 515. The supreme court in *Kraushaar* held that the district court had discretion to allow a video that is admitted into evidence to be taken into the jury room. *Id.*

In *Kraushaar*, the defendant argued that a video admitted as an exhibit should not have been sent to the jury room, arguing it was a deposition and that the jury should have been required to conduct its review in open court. *Id.* at 514. The supreme court rejected that argument, concluding that a video of an interview with a child was not a deposition

within the meaning of subdivision 19(2), and that, while the trial court might have allowed the jury to see and hear a video only once, it was "doubtful that the trial court abused its discretion in letting the jury review the tape" in the jury room. *Id.* at 515, 516. While the court noted that "it would have been preferable for the review to have taken place in the courtroom rather than in the jury room," it ultimately concluded that any error was not prejudicial, noting, among other things, that it was "extremely unlikely that the replaying of the tape by the jury affected the verdict as by prompting the jury to convict where it otherwise would not have done so." *Id.*

Under *Kraushaar*, when a jury makes a request to review a video, a district court "should" consider (1) whether the material will aid the jury in proper consideration of the case, (2) whether any party will be unduly prejudiced by submission of the material, and (3) whether the material may be subjected to improper use by the jury. *State v. Everson*, 749 N.W.2d 340, 345 (Minn. 2008) (citing *Kraushaar* for rule that court should consider these factors). The court's analysis of these factors should be done on the record because absence of the analysis "makes appellate review difficult." *Id.* at 346. Appellant does not argue that the district court failed to analyze the *Kraushaar* factors or failed to place its analysis on the record. Appellant argues only that the district court erred in its application of the factors in this case.

In this case, the district court did not abuse its discretion in allowing the video to be taken into the deliberation room. As in *Kraushaar*, the video was admitted as an exhibit and the video allowed in the jury deliberation room was the same video the jury would have watched in the courtroom. Viewing the video multiple times likely aided the

jury in assessing exactly what the video depicted because the video, even after enhancement, is grainy, not entirely clear, and very short in length. We conclude that it is extremely unlikely that, even if the jury viewed the video multiple times during their deliberations, the video viewings affected the verdict by prompting the jury to convict where it otherwise would not have done so.

Appellant argues that the video images of P.J. with ejaculate on her face were highly prejudicial and lacked probative value because they did not show that sexual contact occurred. Appellant seems to be arguing that the probative value of the images was outweighed by the prejudicial effect and that the district court therefore should have prevented repeated use of the images under Minn. R. Evid. 403, which provides that relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. We reject this argument. Appellant focuses on the relevance of the images to show sexual contact, ignoring their relevance on the question of P.J.'s consciousness. The video images are highly probative on the question of P.J.'s physical helplessness, which was a critical question in the case. *See State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005) (noting that evidence is relevant when it advances the inquiry or assists with determination of the issue in question). Appellant is therefore incorrect in arguing that the images lacked probative value. Although the video images are obviously prejudicial to appellant, their probative value is not substantially outweighed by their danger for unfair prejudice under rule 403. *See id.* (noting that prejudice must be unfair for evidence to be excluded under rule 403, and unfair prejudice

comes from the tendency of evidence to persuade by illegitimate means, not the highly damaging nature of evidence).

IV.

Appellant argues that the district court erred in its double upward durational departure of appellant's sentence based on the aggravating factor found by the jury, that appellant treated P.J. in a particularly demeaning and humiliating manner.

We review a sentence to determine "whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2006). Review is under the abuse-of-discretion standard. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). "Departures are warranted only when substantial and compelling circumstances are present." *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008). "Substantial and compelling circumstances are those demonstrating that 'the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question.'" *Id.* (quoting *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002)). An upward durational departure should ordinarily not exceed double the presumptive sentence. *State v. Jackson*, 749 N.W.2d 353, 359 (Minn. 2008).

Appellant argues that the district court abused its discretion in departing because ejaculating on P.J.'s face, laughing, and having it recorded did not "so aggravate" the offense "as to make doubling of the length of his presumptive stayed term proportional to the offense's severity." While admitting that a person can "undoubtedly be humiliated on

learning after-the-fact what was done to him or her," appellant argues that such an experience "differs markedly from being conscious of and experiencing the humiliating conduct as it takes place, and being aware that others are present."

Appellant's argument is not persuasive. In *Ture v. State*, the supreme court affirmed a double durational departure, which was justified in part by the defendant's ejaculation into the victim's mouth and the victim's intoxication. 353 N.W.2d 518, 522 (Minn. 1984). And *State v. Griffith* provides additional support for the district court's sentencing authority. 480 N.W.2d 347, 350 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). In *Griffith*, this court concluded that ejaculating on a victim's face was "particularly demeaning and humiliating, and went beyond the inherent humiliation a victim of third-degree criminal sexual assault must experience." *Id.* The jury was persuaded that appellant's ejaculation on P.J.'s face, while other persons not only watched the activity but videotaped it, increased the demeaning nature of the conduct and P.J.'s humiliation that resulted from the experience. The district court did not abuse its discretion in concluding that the aggravating factor found by the jury justified a double durational departure.

Affirmed.