STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1330

State of Minnesota,
Respondent,

vs.

Brian Lee Shabaiash,
Appellant.

Filed August 4, 2009
Affirmed
Shumaker, Judge

St. Louis County District Court
File No. 69DU-CR-08-54

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Melanie S. Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North Fifth Avenue West, Suite 501, Duluth, MN 55802-1279 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Lansing; Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

In his appeal from a conviction of third-degree criminal sexual conduct, appellant contends that it was plain error for the district court to permit a physician to testify that vaginal penetration was nonconsensual. Because appellant's defense was not consent but rather a complete denial of penetration, and because, in the context of the evidence, we are unable to conclude that plain error occurred, we affirm.

FACTS

A jury found Brian Lee Shabaiash guilty of one count of third-degree criminal sexual conduct and a second count of an attempt of that same crime. At sentencing, the district court dismissed the charge of the attempted crime. Thus, this appeal relates only to the conviction of the first count which, Shabaiash contends, was based on an inadmissible expert medical opinion that nonconsensual sexual penetration had occurred.

As charged here, third-degree criminal sexual conduct required proof that Shabaiash sexually penetrated a person while that person was impaired, incapacitated, or helpless. The state alleged that Shabaiash penetrated L.G.'s vagina while she was asleep—and therefore incapacitated—after she had drunk a substantial amount of alcohol. Shabaiash contended that L.G. was awake; that she pulled him toward her; that they began kissing and prepared to have intercourse, but, before they could do so, L.G.'s son woke up and they stopped. He denied that he ever sexually penetrated L.G.

The facts, most of which Shabaiash does not dispute, show that L.G. and J.D., Shabaiash's girlfriend, had been drinking at various bars and that Shabaiash met the

women at the last bar they visited. He and L.G. had an argument and a physical altercation, but eventually all three ended up at J.D.'s house for the night. L.G.'s son was also at the house.

Shabaiash and J.D. went to bed in a bedroom while L.G. and her son slept on a mattress on the floor of another room. Shabaiash wanted to have sex with J.D. but she refused, so he left the bedroom.

Although Shabaiash did not testify, his version of the events came in through a statement he had given to a sheriff's deputy. Shabaiash claimed that L.G. initiated contact with him, and they started kissing. She removed her clothes and tried to pull him on top of her. He pulled his pants down to his thighs and knelt in front of her. Then L.G.'s son woke up, and L.G. told Shabaiash to stop. He did so.

L.G. testified that she woke up and could feel Shabaiash penetrating her vagina. She told him to get off her, and he tried to persuade her to let him continue. She then kicked him off.

A physician who examined L.G. testified at trial without objection and stated that, in his medical opinion, an abrasion he found at the opening of L.G.'s vagina was consistent with nonconsensual sexual penetration. It is this testimony, which defense counsel addressed extensively in cross-examination, that Shabaiash claims was plain error entitling him to a new trial.

D E C I S I O N

We begin our analysis by noting that Shabaiash's claim of error does not relate to his defense. At trial, he claimed that L.G. consented to have sex with him, but the sex

never took place. Thus, his consent defense related to the charge of attempted third-degree criminal sexual conduct, the charge the district court dismissed. As to the crime of criminal sexual conduct in the third degree—the only crime relevant to this appeal—Shabaiash does not claim that L.G. consented to sexual penetration. His defense is that there was no sexual penetration at all. With the sole defense being a complete denial of the criminal act, the consent defense is not relevant. It becomes relevant only if sexual penetration occurred. If the act did not occur, consent is a non sequitur. Although we could properly end our analysis here, we will comment briefly on Shabaiash's argument on the irrelevant issue.

Because Shabaiash did not object to the physician's opinion that the abrasion he found on the opening of L.G.'s vagina was consistent with nonconsensual penetration, the plain-error standard applies. "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id*. (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

"The admission of expert testimony is within the broad discretion accorded a trial court, and rulings regarding materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence may be reversed only if the trial court clearly abused its discretion." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (quotation and citations omitted). Expert testimony is admissible if it will assist the jury in understanding the

evidence or determining a fact at issue. Minn. R. Evid. 702; *State v. Grecinger*, 569 N.W.2d 189, 194-95 (Minn. 1997). Expert witnesses are allowed to give testimony in the form of opinion or inference if it is helpful to the fact-finder. Minn. R. Evid. 704; *State v. Chambers*, 507 N.W.2d 237, 238-39. However, opinion testimony involving a legal analysis or mixed questions of law and fact is deemed to be of no use to the jury. *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982).

Shabaiash concedes that it was proper for the physician to describe his findings upon examining L.G., but he claims that the testimony that those findings were consistent with nonconsensual penetration and unlikely consistent with anything else was improper because "an expert cannot testify regarding whether a sexual encounter was consensual."

This emergency-medicine physician, with experience in diagnosing sexual assaults of women, testified that the primary concern with a woman who has reported a sexual assault is to identify possible injuries. L.G.'s introitus, or vaginal opening, was red and irritated. The normal appearance is pink and smooth. In the physician's experience, the condition that he observed in L.G. was consistent with nonconsensual penetration.

On cross-examination, defense counsel explored this opinion:

> Q. So this irritation, you have described it as consistent with nonconsensual penetration. Could it be consistent with something else?
> A. Anything is possible. It's unlikely, but anything is possible.

The physician acknowledged that other things, such as an infection, could cause the irritation he observed in L.G. But he stated that "an infection would usually be a much more uniform irritation . . . ." The cross-examination colloquy continued:

Q. Are you saying, then, that any time there is a vaginal abrasion that it would be because of nonconsensual penetration?

A. I'm saying that it is an unusual finding and that it's consistent with nonconsensual penetration. Obviously, that's the most I can tell you.

Q. Can you say it's consistent with consensual penetration?

A. It would be an extremely unusual finding. I am not sure I've ever seen that with consensual penetration. I mean, if one had consensual penetration that went on for, who knows, hours, or multiple times, I guess it's possible. It's unlikely. I don't know if I've ever seen it.

. . . .

I am saying it's most consistent with nonconsensual penetration. And if you want to exercise an act of imagination, you could say that with very prolonged consensual, perhaps—and I am also telling you that I don't think I have ever seen that.

Q. So is it your testimony this could have only happened as a result of nonconsensual penetration?

A. No. It is my testimony that it is consistent with that and that, in my medical opinion, that is by far the most likely cause.

Expert testimony may be improper if it merely tells the jury "what result to reach." *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003). This did not happen here. The physician never testified that nothing but nonconsensual penetration could account for his findings, even though he assessed the likelihood of other causes as low. Furthermore, the phrase "consistent with" is not tantamount to "sole cause" or even "the" cause. That phrase fairly leaves open other possibilities. "Consistent with" can serve the function of narrowing the possibilities and even circumscribing possibilities so as to guard against mere speculation. Thus, in the district court's discretion and considering the factual

context of the case, the physician's opinion can reasonably be seen as helpful to the jury. As such, there was no plain error in the admission of the opinion.

Finally, Shabaiash notes that there was no detailed foundation for the opinion. Although the expert described his experience in sexual-assault examinations, it certainly would have been useful had there been foundation to show how a physician can distinguish nonconsensual penetration from other possibilities. But the evidentiary rule is clear: "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Minn. R. Evid. 705.

Affirmed.