STATE OF MINNESOTA
IN COURT OF APPEALS
A09-781

State of Minnesota,
Respondent,

vs.

Jordan Michael Koloski,
Appellant.

Filed June 8, 2010
Affirmed
Willis, Judge[*]

Crow Wing County District Court
File No. 18-CR-07-4157

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

Donald F. Ryan, Crow Wing County Attorney, Rockwell J. Wells, Assistant County Attorney, Brainerd, Minnesota (for respondent)

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

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Willis, 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

WILLIS, Judge

On appeal from his conviction of third-degree criminal sexual conduct, appellant argues that the district court abused its discretion in excluding evidence of the complainant's prior sexual conduct. Appellant contends that the evidence was relevant because it showed a common scheme or plan by which the complainant would become intoxicated, engage in sexual intercourse with men whom she had just met, and later report the encounters as sexual assaults. Appellant argues that the evidence was directly related to his theory at trial that the complainant consented to sexual contact with him and that the exclusion of the evidence precluded him from presenting a complete defense. Because the evidence of the complainant's prior sexual conduct did not establish a common scheme or plan, we affirm.

FACTS

At approximately 9:00 a.m. on November 1, 2007, 17-year-old S.K. told a Brainerd community service officer that she had been sexually assaulted during the preceding night. Investigator Chad Kleffman of the Brainerd Police Department responded and drove S.K. to a hospital to have a sexual-assault examination. While in the hospital parking lot, S.K. told Kleffman that she had consumed a large amount of alcohol on Halloween night and had become extremely intoxicated. S.K. reported that she "somehow" ended up in an apartment above a bar and that she woke up to find a man she did not know having sex with her.

Appellant Jordan Koloski was identified as S.K.'s assailant. During an interview with Investigator Kleffman, Koloski stated that he had been out drinking with a group of friends and acquaintances on Halloween night. At about the time the bars closed, Koloski and his friends encountered S.K., who was in the back seat of a car. According to Koloski, he and one of his friends helped S.K. out of the car and assisted her to an apartment. The apartment, to which one of Koloski's friends had access, had three bedrooms and was located above a bar. Koloski stated that shortly after entering the apartment, his friends went into two of the bedrooms, and he went into the third bedroom where S.K. had been placed. Koloski admitted that he then took off S.K.'s clothes, performed oral sex on her, and had sexual intercourse with her. Koloski also acknowledged that he had not met S.K. before that night and described her as "wasted" and "in and out of being passed out." Koloski further acknowledged that it was wrong to have sex with S.K. when she was so intoxicated.

After interviewing Koloski, Investigator Kleffman obtained a formal statement from S.K., who explained that she visited a number of bars in Brainerd with her friends on Halloween night. According to S.K., she became very intoxicated, and the last thing she remembered was sitting in the back seat of a car with a friend. S.K. claimed that she woke up naked--in a cold, dark room--lying under a man she did not know, who was having sex with her. S.K. then rolled out from under the man, gathered her clothes, and left the apartment. Although S.K. thought that her assailant said that his name was Brandon, he refused to tell her his last name.

Koloski was charged with third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(d) (2006) (victim physically helpless). Shortly before trial, Koloski moved to admit evidence of S.K.'s prior sexual conduct under Minn. R. Evid. 412 and Minn. Stat. § 609.347, subd. 3(a)(i) (Supp. 2007). Koloski claimed that the "previous sexual conduct tend[ed] to establish a common scheme or plan of similar conduct under circumstances similar to the case at issue, relevant and material to the issue of consent." Koloski also filed a written offer of proof in an attempt to show a common scheme or plan. Attached to the offer of proof was a report prepared by Investigator Gary Fagerman of the Crow Wing County Sheriff's Department. Included with the report was a transcript of a statement that Investigator Fagerman took from S.K. on May 21, 2007.

According to Investigator Fagerman's report, S.K. claimed that about two months earlier, she and a couple of friends went to a 37-year-old man's house to use alcohol and cocaine. S.K. claimed that she returned to the man's house two days later, hoping to get more cocaine. After again using alcohol and cocaine with the man, she went with him into a hot tub where the man had sexual intercourse with her. S.K. then went upstairs to the man's room, where he again had sexual intercourse with her. The man had sexual intercourse with S.K. a third time after S.K. took a shower. According to S.K., she "didn't fight it" because she "was just like so out of it." S.K. also indicated that she did not leave until the next morning because she had no gas in her car and her cell-phone battery was dead. Approximately two months later, S.K. reported the incident to her mother after her mother had asked her why she was depressed and "doing bad at school."

S.K.'s mother reported the incident to the police. The state, however, declined to press charges, citing insufficient evidence.

On September 16, 2008, Koloski filed an amended motion and offer of proof containing additional information supporting his request to admit evidence related to S.K.'s prior sexual conduct. The additional information consisted of the transcript of a statement that an investigator for the public defender's office took from Koloski's employer on May 19, 2008. The employer had been drinking with Koloski throughout the evening of the alleged sexual assault and was present in the apartment during the incident.

In his May 19, 2008 statement, the employer stated that he attended a party in February or March 2008 at which S.K. was present. According to the employer, S.K. "talked about how she'd been raped before and all this crap and how it went to court you know and whatever I don't know what happened that's all she really said the cops had her wearing wires and she was working for the cops."

The district court denied Koloski's motion on the ground that Koloski's offer of proof neither established a common scheme or plan nor showed that S.K. had fabricated sexual-assault allegations. A jury trial was then held, at which S.K. testified consistently with the statement she had given to Investigator Kleffman. Koloski testified in his own defense and admitted having sexual intercourse with S.K. But Koloski testified that S.K. was not physically helpless or unconscious while they had sex. Instead, Koloski claimed that he and S.K. started kissing as soon as they entered the apartment and that they eventually went into a bedroom, where they had consensual sex. Koloski also claimed

that his testimony was inconsistent with the story he had previously given to Investigator Kleffman because at that time, he "was a little freaked out," "wasn't thinking clearly," and was "confused."

The jury found Koloski guilty of the charged offense. The district court sentenced him to the presumptive sentence of 69 months in prison, and this appeal follows.

D E C I S I O N

Koloski argues that his offer of proof established a common scheme or plan and that S.K.'s prior sexual conduct was relevant because it addressed the sole fact issue of whether she consented to having sexual intercourse with him. Thus, Koloski argues that the district court abused its discretion by denying his motion to admit the evidence and that the denial of his motion precluded him from presenting a complete defense.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted). Even when a defendant alleges a violation of his constitutional rights because of an evidentiary ruling, this court reviews the ruling for an abuse of discretion. *State v. Profit*, 591 N.W.2d 451, 463 (Minn. 1999).

Evidence of a victim's sexual conduct is not admissible in criminal-sexual-conduct cases except in limited circumstances:

> (A) When consent of the victim is a defense in the case,

> (i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent [is admissible].

Minn. R. Evid. 412. Minn. Stat. § 609.347, subd. 3(a) (Supp. 2007), contains language similar to Rule 412, but adds the following requirement: "In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated." In the event of a conflict between a 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.").

The rape shield law emphasizes the general irrelevance of a victim's sexual history but does not remove it from the jury's consideration if it is relevant. *State v. Crims*, 540 N.W.2d 860, 867 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). When there is a conflict, the defendant's constitutional rights require admission of evidence excluded by the rape shield law. *Id.* at 866. Fundamental fairness requires that every criminal defendant be afforded a meaningful opportunity to present a complete defense. *Id.* at 865 (quotation omitted). The right to present a defense provides a defendant with the opportunity to develop his or her version of the facts, so that the jury may determine the truth. *Id.* A defendant has a right to confront adverse witnesses to reveal bias or a disposition to lie. *Id.* To assure that these rights are protected, courts must allow defendants to present evidence that is relevant and favorable to their case theories. *Id.* at 866. But a defendant does not have the right to introduce irrelevant evidence, or

evidence the probative value of which is outweighed by its prejudicial effect. *Id.* Generally, rape shield provisions do not affect the right to present a defense because they are based on the principle that a person's character is generally irrelevant to a specific case. *State v. Davis*, 546 N.W.2d 30, 34 (Minn. App. 1996), *review denied* (Minn. May 21, 1996).

Koloski argues that S.K.'s prior sexual conduct was relevant and admissible because it established a common scheme or plan by which S.K. would become intoxicated, engage in sexual intercourse with men whom she had just met, and later report the encounters as sexual assaults. We disagree. A victim's sexual history does not establish a common scheme or plan unless there is a pattern of clearly similar behavior constituting habit or modus operandi. *Davis*, 546 N.W.2d at 34. To be clearly similar behavior, "the sexual conduct must occur regularly and be similar in all material respects." *Id.*; *see Crims*, 540 N.W.2d at 868 (concluding that victim's history of trading sex for drugs not so similar to alleged trading of sex for money to buy drugs that exclusion would violate defendant's constitutional rights). Courts have found that a single previous instance of sexual conduct does not constitute a common scheme or plan. *See State v. Booker*, 348 N.W.2d 753, 754 (Minn. 1984) (determining that sexual conduct one week before the incident did not establish a common scheme or plan); *see also State v. Cassidy*, 489 A.2d 386, 392 (Conn. App. 1985) (holding that a single instance of similar conduct does not constitute a pattern), *cert. denied* (Conn. Apr. 24, 1985); *Hodges v. State*, 386 So. 2d 888, 889 (Fla. App. 1980) (same).

Here, the prior sexual conduct at issue occurred once. Because a single incident does not constitute a pattern, S.K.'s conduct does not establish a common scheme or plan. And importantly, the prior incident was different in several distinct ways from the charged offense. In the prior incident, S.K. had previously met the man and later returned to his house to use more cocaine. By contrast, the allegations here are that S.K. passed out in the back seat of a car and woke up being sexually assaulted in a strange apartment by a man she did not know. Also, in the prior incident, S.K. did not report the alleged assault until some two months later--and then to her mother--but in the present case, S.K. immediately reported the assault to the police after leaving the apartment where the incident occurred. Finally, in the charged offense, S.K. reported that she was passed out when the sexual contact was initiated, but in the prior incident, S.K. reported that she was aware of the situation with the man, but that she "didn't fight it" because she was "so out of it." Therefore, the district court did not abuse its discretion in concluding that Koloski failed to show that S.K.'s actions showed a common scheme or plan of similar sexual conduct under circumstances similar to the charged offense.

Even if we were to conclude that the district court abused its discretion in excluding the evidence, the error was harmless beyond a reasonable doubt. *See State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986) (stating that constitutional error is not reversible when the error is harmless beyond a reasonable doubt). Several witnesses testified that S.K. was extremely intoxicated, that she was passed out in the back seat of a car, and that she had to be helped to the apartment where she was put in an empty bedroom. Moreover, S.K. testified that she was extremely intoxicated, that she did not

remember parts of the evening of the alleged sexual assault, and that she was being sexually assaulted when she woke up. Although Koloski testified that S.K. consented to the sexual intercourse, Koloski's credibility was seriously damaged by his statement to the police in which he (1) admitted that he had not met S.K. before the night of the alleged incident; (2) admitted that S.K. was "wasted" and "in and out of being passed out"; (3) admitted that he took off S.K.'s clothes and had oral sex and intercourse with her; and (4) acknowledged that it was wrong to have sex with S.K. when she was so intoxicated. Therefore, in light of the strength of the state's case, any error was harmless beyond a reasonable doubt, and Koloski is not entitled to a new trial.

Affirmed.