STATE OF MINNESOTA
IN COURT OF APPEALS
A10-336

State of Minnesota,
Respondent,

vs.

Carl Alexander Hunter,
Appellant.

Filed February 8, 2011
Affirmed; motion granted
Schellhas, Judge

Scott County District Court
File No. 70-CR-08-11668

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

SCHELLHAS, Judge

On appeal from his conviction of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(c) (Supp. 2007), appellant argues that the district court

(1) erred in its application of the rape-shield statute when it excluded his testimony about his prior consensual sexual relationship with the victim and (2) violated his constitutional right to present a full defense and to confront his accuser. Appellant also moves to strike a portion of the state's brief. We grant appellant's motion to strike and affirm.

FACTS

Respondent State of Minnesota charged appellant Carl Alexander Hunter with third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(c), sexual penetration using force or coercion. The state charged Hunter after the complainant, M.R., alleged that, in the early morning of May 9, 2008, while she and K.P. were visiting Hunter at the apartment he shared with his uncle, Hunter became angry and physically prevented M.R. from leaving, grabbed M.R.'s neck, pushed her against a wall, put his hand down her pants, and penetrated her vagina with his fingers. Hunter then threw M.R. out of the apartment, and she called 911.

Before trial, Hunter notified the district court that he planned to testify that he and M.R. had previously engaged in consensual sexual conduct. Hunter's counsel informed the court that he intended to introduce the evidence "to show a pattern of behavior as it relates to [Hunter]." The court ruled that Hunter could testify that he and M.R. had a previous dating relationship but not that they had a sexual relationship because the rape-shield law prohibited such testimony.

At trial, K.P. testified that she was drinking heavily the night of the incident and has no recollection of that night. M.R. testified that she met Hunter at the Oasis Market where she worked as a clerk and he frequently shopped. The Oasis Market was located

across the street from Hunter's apartment. M.R. would see Hunter at the store nearly every time she worked, and the two would talk about common interests. M.R. testified that on one occasion prior to May 8, she went to Hunter's apartment after work to smoke marijuana. M.R., Hunter, and his uncle sat in Hunter's bedroom for an hour or an hour and a half and smoked marijuana, and then M.R. went home.

On May 8, M.R. and K.P. drove to Hunter's apartment where they smoked marijuana and drank Jack Daniel's whiskey with Hunter and his uncle. M.R. testified that Hunter told her that he wanted to speak with her in the bedroom. Once in the bedroom, Hunter closed the door. M.R. began to feel uncomfortable and told Hunter that she was going to leave. Hunter became angry, grabbed her by the throat, picked her up off the bed, and threw her against the closet door. Hunter asked M.R. if she was going home to "screw around with other guys," said, "I bet you're wet too," and put his hand down the front of her pants, penetrating her vagina with his finger. M.R. was scared, did not want Hunter to touch her, and asked him to stop. Hunter then let go of M.R. and told her to leave. He pushed her towards the front door and threw her belongings at her. M.R. went to her car and called 911.

Following the 911 call, Officer Pearson was the first to arrive at the scene. M.R. told her that she had been sexually assaulted by a man named Carl. Officer Zauhar arrived at the scene and observed M.R. crying uncontrollably. M.R. gave a recorded statement at the police station, and the prosecution played the statement in front of the jury. In the statement, M.R. alleged that she went into Carl's bedroom, he picked her up by the throat, shoved his hand down her pants, and put his fingers in her vagina.

Officer Zauhar testified that he and another officer went to the apartment identified by M.R. and, as he approached, he heard two males arguing. Officer Zauhar heard one say, "[T]hat's not how you act. You know better than that." Once in the apartment, the officers identified Hunter as Carl and the other male, whom Officer Zauhar heard speaking, as Hunter's uncle. Hunter's uncle told one of the officers that he heard some noise when M.R. was in Hunter's bedroom, and M.R. then came out of the bedroom crying and scared. He said that M.R. came to him for safety because Hunter was "going crazy," and "[M.R.] thought the man was going to kill her." Hunter's uncle told the police that he said to Hunter, "[Y]ou crazy . . . you don't put your hand on no woman."

When questioned by Officer Zauhar, Hunter at first denied knowing M.R. or K.P. and that they were in his apartment. Then he admitted that he did know the women, stating that they approached him in the parking lot and were intoxicated, and he tried to shoo them away. Eventually, Hunter stated that, while he tried to sleep, the women were in his apartment drinking with his uncle. He claimed that he asked them to quiet down several times before telling them to leave. He initially denied that either of the women was in the bedroom but then admitted that he talked with M.R. in the bedroom. He also admitted that he and M.R. argued, and he asked her to leave.

At trial, Hunter testified that, on May 8, M.R. arrived at the apartment around 4:00 p.m. She drank malt liquor and smoked marijuana with Hunter and his uncle, left, and then returned with K.P. M.R. and K.P. drank Jack Daniel's whiskey with Hunter's uncle. M.R.'s eyes were bloodshot. M.R. and K.P. went into the bathroom together for

approximately 15 minutes; Hunter smelled a strong chemical odor coming from the bathroom. When M.R. came out of the bathroom, she was wasted and staggering. In the bedroom, Hunter and M.R. discussed what M.R. was smoking in the bathroom. M.R. told Hunter that she was smoking crystal methamphetamine. Hunter asked M.R. to leave because he did not want that type of drug in his house. Hunter denied picking up M.R. by her throat and throwing her against the wall. He denied shoving his finger into her vagina and stated, "I never violated [M.R.] like that. I never even violated her ever in my life. And I wouldn't violate her like that. Anything that me and [M.R.] had is done. . . . It was consensual. Everything that was done it was to—it was to her liking. It was consensual."

The jury found Hunter guilty of third-degree criminal sexual conduct. This appeal follows.

D E C I S I O N

Hunter's Motion to Strike

Hunter moves this court to strike the first paragraph on page 15 of the state's brief on the grounds that it pertains to matters outside the record. The paragraph attempts to contradict Hunter's testimony that he was a U.S. marine serving in Iran. The state asserts in the paragraph that "[t]he last Marines to serve in Iran were part of the failed attempt to rescue the 52 American hostages held at the Iranian embassy in 1980" when Hunter was age seven. For this proposition, the state cites a 2006 article from *The Atlantic*. The state also asserts that Camp Juno, where Hunter claimed to have been stationed, does not exist in America. The state also asserts that Hunter likely did not serve in Austria in the

Marines as he claimed because the only Marines in Austria are guards at the U.S. embassy.

"The record on appeal . . . consist[s] of the papers filed in the district court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. Generally, this court will not consider arguments based on evidence outside the record, and matters that are not part of the record will be stricken. *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001).

The state does not contend that the 2006 article is in the record. Instead, the state seems to request that the court take judicial notice of America's history in Iran and the names, locations, and natures of various Marine Corps posts. But judicial notice is generally not appropriate in criminal cases, especially of disputed facts. *State v. Pierson*, 368 N.W.2d 427, 434 (Minn. App. 1985); *see also* Minn. R. Evid. 201(a) 1989 comm. cmt. (stating that judicial-notice rule is now applicable only to civil cases, that the status of the law governing judicial notice in criminal cases is unsettled, and that courts should rely on case law to determine its appropriateness). The record does not support the state's assertions. We therefore grant Hunter's motion to strike the first paragraph on page 15 of the state's brief.

Application of Rape-Shield Statute

Hunter argues that the district court erred in its pretrial ruling that the rape-shield statute prohibited the admission of evidence about Hunter's prior consensual sexual relationship with M.R. The court ruled that the probative value of the evidence was substantially outweighed by the prejudicial nature of the testimony.

"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 appellant has the burden of establishing that the district court abused its discretion and that the appellant was prejudiced. *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 Minnesota's rape-shield statute, "evidence of the victim's previous sexual conduct 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 [section 609.347,] subdivision 4." Minn. Stat. § 609.347, subd. 3 (Supp. 2007).

"[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* (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.

Under the rape-shield statute, evidence of an alleged victim's previous sexual conduct with the accused is admissible when consent of the victim is a defense in the

case. Minn. Stat. § 609.347, subd. 3; *see also* Minn. R. Evid. 412(1). But the evidence is admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature. Minn. Stat. § 609.347, subd. 3; Minn. R. Evid. 412(1).

In this case, Hunter testified at trial that he had no sexual contact with M.R. on the evening of May 8. But Hunter argues in his brief that, rather than his defense being "purely one of consent," his defense "had more of a hybrid nature: He denied the occurrence of the particular sexual contact alleged by [M.R.], but the nature of their prior consensual relationship was essential to his explanation of why she would fabricate such a report." As such, Hunter argues that "[b]ecause the evidence was not barred by the rape-shield law and was required by due process, its exclusion was error." In his reply brief, Hunter argues:

> Not only was consent *a* defense to the charge against appellant, it was part of *the* defense offered to the jury. To be sure, appellant testified that no sexual conduct occurred on the night in question. But appellant's [trial] attorney, recognizing that the jury was free to disbelieve that testimony if it chose to do so, argued in the alternative that any sexual activity between appellant and [M.R.] on the day in question was consensual. Hunter's [trial] attorney argued that any such conduct was "of a consensual nature," that [M.R.] had probably committed "adultery," and that [M.R.] was "playing" while her husband was away. Because the consent of the alleged victim was not only "a defense in the case," Minn. Stat. § 609.347, subd. 3(a), but it was a large part of the defense in the case, the rape-shield statute did not bar admission of evidence of appellant's and [M.R.'s] prior sexual encounters.

(other citations omitted). The state argues that Hunter did not present consent as a defense, and therefore the prior sexual conduct is irrelevant. We agree. Hunter's revisionist characterization of his trial defense is unpersuasive. At trial, Hunter's attorney merely mentioned consent in his opening statement. Opening statements do not constitute evidence. *See State v. Kline*, 266 Minn. 372, 382, 124 N.W.2d 416, 423 (1963) (providing that statement made in opening statement is not evidence). And although Hunter testified that "[e]verything that was done [with M.R.] . . . was consensual," he denied that he had any sexual contact with M.R. on the evening in question.

Mere mention of consent in an opening statement is not enough to circumvent the rape-shield law nor is Hunter's apparent alternate defense that he did not have sexual contact with M.R., but if he did, it was consensual. We conclude that the district court did not err in its application of the rape-shield statute and exclusion of Hunter's proffered testimony.

Constitutional Right to Present Defense and Confront Witnesses

Hunter also argues that the district court's pretrial exclusionary ruling violated his constitutional right by "unfairly limit[ing] [his] ability to give a full account of his version of the story and therefore denied him his right to a fair trial and to present a defense." "Every criminal defendant has a right to fundamental fairness and to be afforded a meaningful opportunity to present a complete defense." *Crims*, 540 N.W.2d at 865. "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. "In the event of a conflict, the defendant's constitutional rights require admission of evidence excluded by the rape-shield law." *Id.* Citing *Crims*,[1] Hunter argues that he is entitled to a new trial because the district court violated his "federal and state constitutional rights to present a defense and confront the witnesses against him." We disagree.

Hunter testified at length about his relationship with M.R. He testified that he met her in February 2008 at the Oasis Market, where he frequently shopped before and after work. M.R. flirted with Hunter and they talked about their kids and whether there was anyone significant in their lives. M.R. told Hunter that her child's father was in the military. M.R. gave Hunter a hug when he won $50 playing lottery tickets. After hugging Hunter, M.R. asked him if he smoked marijuana and invited him to the back room at the market to smoke with her. They smoked marijuana in the back room for approximately 45 minutes and exchanged numbers the next day. They started dating and M.R. came over to his home three or four times per week.

The district court also allowed Hunter to testify that: M.R. listened to music with him in his bedroom; M.R. stayed in the bedroom with him until 1:00 or 2:00 in the morning; and he considered that he and M.R. were "boyfriend and girlfriend." Additionally, Hunter's uncle testified that M.R. and Hunter dated, M.R. came over

[1] The defendant in *Crims* agreed that the rape-shield statute prohibits introduction of the victim's history of prostitution but argued (unsuccessfully) that the law unconstitutionally prohibited him from "presenting his theory of consent to prostitution and, thus, from confronting his accusers." 540 N.W.2d at 866.

periodically, M.R. went to the bedroom with Hunter, and the uncle heard rocking noises, like the bed bouncing against the wall, while M.R. and Hunter were in the bedroom. Notwithstanding this testimony, Hunter claims that the district court's pretrial exclusionary ruling prevented him from "explain[ing] the nature of his relationship with [M.R.]," and that by sustaining objections to testimony suggesting a sexual relationship, "the court's rulings must have indicated to the jury that the court was also ruling that there was no [sexual] relationship." Hunter's argument is unpersuasive.

Hunter denied any sexual contact with M.R. on the evening of May 8. Unless offered to show consent, Hunter's proffered testimony about his previous sexual relationship with M.R. is irrelevant. *See State v. Davis*, 546 N.W.2d 30, 34 (Minn. App. 1996) (noting that character is generally irrelevant), *review denied* (Minn. May 21, 1996). And "a defendant has no right to introduce evidence that either is irrelevant, or whose prejudicial effect outweighs its probative value." *Crims*, 540 N.W.2d at 866. Hunter argues that the testimony would explain his relationship with M.R. and why she would fabricate the story. But the testimony that the district court allowed amply explained Hunter's relationship with M.R. And even if Hunter's proffered testimony "crossed the threshold of relevance," like in *Crims*, Hunter "enjoyed no constitutional right to its admission because the evidence's prejudicial effect outweighs its probative value." *Crims*, 540 N.W.2d at 868–69. Hunter's proffered testimony would add little to the evidence of record and is highly prejudicial, and we conclude that the district court did not commit constitutional error by excluding it.

Affirmed; motion granted.