STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1545

State of Minnesota,
Appellant,

vs.

Mitchell Ray Gerold,
Respondent.

Filed March 15, 2011
Reversed
Crippen, Judge[*]

Isanti County District Court
File No. 30-CR-09-447

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

Jeffrey R. Edblad, Isanti County Attorney, Stacy A. St. George, Assistant County Attorney, Cambridge, Minnesota (for appellant)

Peter B. Wold, Aaron J. Morrison, Peter B. Wold, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Crippen, 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

CRIPPEN, Judge

The state contends that the district court's admission of DNA evidence was prohibited under Minn. R. Evid. 412 and was not required to satisfy the defendant's constitutional rights. Because respondent on the pretrial record failed to show that the DNA factor was sufficiently probative to overcome its prejudicial effects, we reverse.

FACTS

The state charged respondent Mitchell Gerold with first- and third-degree criminal sexual conduct. The complaint states the allegations of 18-year-old K.J.H. that appellant engaged in unlawful touching, vigorous rubbing, and digital penetration without her consent. Respondent claims that the sexual contact was consensual.

Before going to the hospital to report respondent's assault, K.J.H. changed out of her jeans and underwear because of swelling and pain. Hospital staff confirmed that she suffered extreme swelling, with a tear and body bruising and abrasions.

During the investigation, officers recovered the underwear that K.J.H. was wearing during the assault, and the Bureau of Criminal Apprehension determined that K.J.H.'s underwear contained semen. DNA testing excluded respondent as a contributor to the DNA obtained from the sperm cells found in K.J.H.'s underwear.

Before trial, respondent moved the court for an order allowing him to admit at trial the DNA evidence obtained from K.J.H.'s underwear. Although his motion acknowledged that the DNA evidence did not meet the requirements of Minn. R. Evid. 412 for admission of a victim's prior sexual conduct, respondent claimed that it was

admissible because of his rights of due process, confrontation, and presenting evidence in his defense. He argued that because the charge of first-degree criminal sexual conduct requires the state to prove that he caused injury to K.J.H., the DNA evidence was relevant to show that K.J.H. was likely engaged in sexual contact before the alleged assault and that the previous sexual conduct may explain her injuries.

In support of his argument, respondent relied on offer of proof that a purported expert witness, Linda Ledray, with the titles, RN, SANE-A, PhD, LP, FAAN, would state her opinion that the DNA evidence indicates that K.J.H. "likely had vaginal sexual contact with another male prior to [respondent's alleged assault], likely that same day as she had not changed her underwear." Respondent further offered to prove the conclusion of witness Ledray, based on this information, that K.J.H. had already suffered irritation as a result of her previous sexual contact and thus was "more sensitive to [respondent's] digital rubbing."

The district court granted respondent's motion to admit the DNA evidence based on its finding that the "evidence is admissible and relevant as to the injury element alleged in the first degree criminal sexual conduct" charge. The state now argues that the court's pretrial ruling was erroneous and will have a critical impact on the prosecution.

D E C I S I O N

The state brings this appeal under Minn. R. Crim. P. 28.04, subd. 1(1), which allows the state to appeal "any pretrial order." *State v. Underdahl*, 767 N.W.2d 677, 682 (Minn. 2009). "To prevail, the state must 'clearly and unequivocally' show both that the [district] court's order will have a 'critical impact' on the state's ability to prosecute the

defendant successfully and that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quoting *State v. Joon Kyu Kim*, 398 N.W.2d 544, 547 (Minn. 1987)).

"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) (citation omitted). "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).

In Minnesota, admission of evidence of prior sexual conduct of the victim in a criminal sexual-conduct case is governed by Minn. R. Evid. 412. *State v. Crims*, 540 N.W.2d 860, 866 (Minn. App. 1996), *review denied* (Minn. Jan. 23, 1996). 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). But at pretrial the district court agreed with respondent's assertion that admission of the evidence was appropriate by reason of his constitutional due process and confrontation rights.

1.

A pretrial order has a critical impact on the prosecution when it "significantly reduces the likelihood of a successful prosecution." *Zanter*, 535 N.W.2d at 630 (quoting *Joon Kyu Kim*, 398 N.W.2d at 551). Critical impact is a demanding standard. *Id*. As in

Zanter, the critical impact standard is often applied to suppression of evidence, but the same standard applies in a pretrial appeal of an order admitting evidence. *Id.*; *State v. Barsness*, 473 N.W.2d 828, 828 (Minn. 1990); *State v. Skapyak*, 702 N.W.2d 331, 335 (Minn. App. 2005) (citing *Barsness* and concluding that critical-impact analysis applies to appeal of pretrial order allowing admission of evidence), *review denied* (Minn. Oct. 18, 2005).

We observe that the meaning and effect of the rape shield law is that evidence of a victim's previous sexual conduct tends to demean the credibility of the victim's critical testimony and have a highly prejudicial impact on the jury. *See Crims*, 540 N.W.2d at 868 (declaring, absent special circumstances, that prejudicial impact of victim's prior sexual history outweighs its probative value). The impact on the state is enlarged by its inability to appeal from a judgment of acquittal after a finding of not guilty. *See* Minn. R. Crim. P. 28.04 (providing prosecutorial right of appeal). The state's evidence against respondent is based solely on K.J.H.'s testimony. Presumably, respondent will testify that the sexual contact was consensual. The record provides no indication that the state's case is so strong that it significantly diminishes the impact of the DNA evidence.

Because the state's evidence at this point is not strong and the disputed evidence is highly prejudicial, the ruling will have a critical impact on the prosecution.

2.

Although the rape shield laws establish the "general irrelevance" of a victim's sexual history, they do not preclude all relevant evidence. *Crims*, 540 N.W.2d at 867. Accordingly, 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)).

Criminal defendants have the right to fundamental fairness and to present a complete defense. *Crims*, 540 N.W.2d at 865. "The Due Process Clauses of the Federal and Minnesota Constitutions require no less." *Id.* Although the defendant must be given the opportunity to support his theory of the case, he does not have the right "to introduce evidence that either is irrelevant, or whose prejudicial effect outweighs its probative value." *Id.* at 865-66.

The district court found the DNA evidence to be relevant to the injury element alleged in this case, thus accepting respondent's offer of the evidence as part of his constitutional right to present this defense.[1] The court's finding is prompted solely by respondent's offer to prove the conclusion of witness Ledray that it was "likely" a previous sexual contact of K.J.H. made her "more sensitive" to respondent's digital rubbing. The offered conclusion of hyper-sensitivity is not supported by an offer of any evidence indicating when K.J.H.'s previous sexual contact occurred, other than the speculation that it occurred the same day as respondent's alleged assault because K.J.H.

[1] Proof of injury of the victim is not admissible under Minn. R. Evid. 412, despite the provision of rule 412(1)(B) that permits evidence proving a disease of the victim at the time of the incident. *State v. Carpenter*, 459 N.W.2d 121, 126 (Minn. 1990) (observing clear omission of "injury" from disease provision). Because respondent does not claim the right under the rule to admit the DNA evidence he offers, the injury issue in this case is confined to the topic of respondent's constitutional rights.

"had not changed her underwear." Also, the offered opinion states no cause to conclude that respondent did not cause K.J.H. any swelling, injury, or pain.

As the state correctly asserts, the proposed expert's opinion is insufficient to demonstrate the degree of relevancy required to show that the probative value of the DNA evidence outweighs the prejudicial nature of K.J.H.'s prior sexual conduct. Generally, the prejudicial effect of a victim's prior sexual history will outweigh its probative value "unless special circumstances enhance its probative value." *Crims*, 540 N.W.2d at 868. "Such circumstances include situations in which the evidence explains a physical fact in issue at trial." *Id.*

The offer of witness Ledray's conclusion, aimed at explaining a physical fact at issue in trial, rests on assumption and speculation. On this offer alone, the probative value of the DNA evidence does not outweigh its potential for unfair prejudice, which is suggested in our previous examination of critical impact. The order admitting the evidence, premised only on this offer, is clearly erroneous. Our decision rests on the present record of evidence favoring respondent's motion to admit the DNA evidence and does not preclude a later district court decision premised on evidence more strongly establishing the probative value of the DNA evidence.[2]

3.

Respondent argues that this court lacks jurisdiction because the state failed to explain in its statement of the case how the district court's error will have a critical

[2] The district court correctly stated that the evidence would only be admissible at trial upon a showing of foundation, which we assume goes to the qualifications of respondent's expert witness.

impact on the outcome of the trial. When the state appeals a pretrial order, Minn. R. Crim. P. 28.04, subd. 2(2)(b), requires the statement of the case to "include a summary statement by the prosecutor explaining how the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." But rule 28.04, subd. 2(2), provides that "[f]ailure to serve or file the statement of the case . . . does not deprive the Court of Appeals of jurisdiction over the prosecutor's appeal." The insufficiency of appellant's statement of the case is not jurisdictional.

Reversed.