

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

RODNEY TERRANCE CARTER,)

Defendant-Appellant.)

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8-684
87-1789

Appeal from the Iowa District Court for Linn County
(No. CRF 10371), Paul J. Kilburg, Judge.

Defendant appeals his conviction by a jury of
third-degree sexual abuse. **AFFIRMED.**

William L. Wegman, State Public Defender, and B. John
Burns, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich,
Assistant Attorney General; and Jerry Vander Sanden,
Assistant Linn County Attorney, for plaintiff-appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

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Defendant-appellant Rodney Terrance Carter appeals his conviction by jury of third-degree sexual abuse contending the district court erred by (1) prohibiting cross-examination of the victim's prior sexual behavior and (2) denying his application for individual and sequestered voir dire. We affirm defendant's conviction, having found no error in the district court's findings.

At trial, A.W. testified that on her twelfth birthday, June 14, 1984, her aunt's boyfriend, the defendant, forced her to have sexual intercourse and perform oral sex upon him. Under cross-examination, A.W. admitted that when she first reported the incident in late 1986 and several times thereafter, she told only of having to perform the oral sex or of defendant fondling her breasts and did not mention having intercourse. In addition, at trial she testified she experienced bleeding after intercourse with Carter. In an early deposition and in an offer of proof out of the presence of the jury, A.W. admitted to a previous sexual encounter with a fourteen-year-old boy when she was eleven. A.W. did not testify she was a virgin, but defendant argues the testimony regarding the bleeding and other comments made by A.W. gave this impression, which he should have been allowed to negate by cross-examination regarding her previous sexual experience.

I. Iowa Rule of Evidence 412, known as the "rape shield statute" states:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual abuse is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is --

(1) admitted in accordance with subdivisions "c"(1) and "c"(2) [timely motion and offer of proof requirements] and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision "c" and is evidence of --

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual abuse is alleged.

The defendant contends the evidence of A.W.'s prior encounter was admissible to (1) protect his constitutional right to a fair trial, to present evidence and to confront witnesses and (2) prove he was not the source of the "injury" of bleeding which A.W. testified occurred.

The district court exercises its discretion regarding the admission of evidence, and we ordinarily will not reverse the decision unless defendant shows a clear abuse of discretion. State v. Clarke, 343 N.W.2d 158, 162-63

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(Iowa 1984). When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

The purpose of rule 412 is to protect the privacy of victims and to encourage the reporting and prosecution of sex offenses. Clarke, 343 N.W.2d at 161. Evidence that is irrelevant is not constitutionally required to be admitted. Id. Even relevant evidence is not constitutionally required to be admitted if the prejudicial effect outweighs the probative value. Id. Evidence of past sexual behavior of a victim in a sexual abuse case becomes admissible if "it is relevant to a material fact in dispute and its probative value is not outweighed by danger of unfair prejudice, confusion of issues, or unwarranted invasion of complainant's privacy" Clarke, 343 N.W.2d at 161 (citing State v. Ball, 262 N.W.2d 278, 281 (Iowa 1978)).

In this case, the defendant denied the incident A.W. described ever occurred. A.W. did not report the incident until almost two years after it occurred. Therefore, no supporting medical evidence was available. A.W.'s credibility was clearly an issue.

The record shows A.W. testified to the following facts which defendant believes left the jury with an impression she was a virgin: (1) defendant said he was going to "pop my cherry"; (2) she experienced some bleeding after sexual intercourse with the defendant; (3) she failed to say sexual intercourse occurred when she first reported the incident because she wanted her parents to think she was still a virgin.

Defendant contends he had a constitutional right to test the credibility of witnesses, which included introducing evidence A.W. was not a virgin at the time the incident with defendant occurred. We agree with the trial court that A.W.'s prior sexual experience is not relevant to test A.W.'s credibility in testifying to these facts. The victim here testified she understood certain sexual terms used by the defendant, having heard them in earlier discussions with friends. Clearly if the victim testifies she is a virgin, her status as such does become a credibility issue. But A.W. never actually testified she was a virgin. Further, A.W.'s truthfulness in making the above-listed statements is not even called into question by the fact she was not a virgin at the time. Her first statement refers only to a comment made by defendant who does not deny he thought A.W. was a virgin at the time of the incident. Second, defendant produced no evidence, nor does he argue, that A.W.'s bleeding could only be the

result of a ruptured hymen, thereby making her virginity an issue. See also, State v. Parsons, 401 N.W.2d 205 (Iowa App. 1986) (court found evidence of victim's prior sexual conduct properly excluded especially in light of the fact defendant had an alibi defense when defendant contended the evidence should have been admitted to prove any bleeding could not have been the result of a ruptured hymen). Third, if A.W. believed her parents thought she was still a virgin, proof to a jury she was not a virgin does not discredit her reason for not immediately reporting the details of the sexual intercourse. We note this part of A.W.'s testimony was the result of defense counsel's cross-examination. We find no objection or request to strike the answer. Any impression made to the jury by this answer was of counsel's own making. Admission of A.W.'s past sexual experience would not have discredited her testimony regarding these statements.

This was not a case where the victim's consent or sexually-suggestive conduct made her past experience an issue. State v. Gettier, No. 87-1849, slip op. at 7 (Iowa Mar. 22, 1989); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987); State v. Zaehring, 280 N.W.2d 416, 419-20 (Iowa 1979). A.W. testified the incident took place on her twelfth birthday. Defendant was tried on a theory of statutory rape in which case a victim is incapable of consent due to his or her young age. Iowa Code § 709.4 (1987); State v. Davis, 269 N.W.2d 434 (Iowa 1978).

Like the trial court, we conclude the prejudice of introducing such evidence, even if relevant in some way, would outweigh any probative value the evidence may have. The prior sexual experience had no relation to the act in issue. However, its admission may have caused the jury to conclude A.W. was a bad person for having a sexual experience at such a young age. See State v. Gettier, No. 87-1849 at 8. The trial court acted well within its discretion in excluding the evidence.

The evidence is also not admissible to prove defendant was not the source of the injury or bleeding under Iowa Rule of Evidence 412(b)(2)(A). Admissibility under this exception has been restricted to proof of a specific instance of intercourse so timed as to conceivably account for the physical evidence defendant wishes to rebut. State v. Davis, 269 N.W.2d 434, 439 (Iowa 1978); State v. McDaniel, 204 N.W.2d 627, 629 (Iowa 1973). Defendant made no offer of proof nor does he contend the victim's other sexual experience could possibly account for the bleeding A.W. testified occurred following sexual intercourse with the defendant.

II. Defendant contends the district court erred by refusing to allow individual voir dire of jury panel members. The scope and manner of conducting voir dire are within the discretion of the trial court, and we will not reverse unless there has been a clear abuse of discretion.

State v. Oshinbanjo, 361 N.W.2d 318, 321 (Iowa App. 1984) (citing State v. Windsor, 316 N.W.2d 684, 686 (Iowa 1982), discussing specific inquiry into racial prejudice during voir dire in certain cases). Defendant contends individual voir dire of jury panel members regarding possible sexual abuse experiences they may have had was critical due to the sensitive nature of the inquiry. The district court did not prohibit inquiry into such matters, but did deny defendant's request unless it became apparent during the regular voir dire process that a juror "is having trouble, is sensitive about this, then [the court would] take it up on an individual basis."

To be entitled to reversal on the ground that the district court refused to allow individual examination of prospective jurors, a defendant must show that prejudice resulted from collective examination. State v. Webb, 309 N.W.2d 404, 414 (Iowa 1981); State v. LeMatty, 263 N.W.2d 559, 562 (Iowa App. 1977). Defendant does not direct our attention to any evidence in the record or comments during voir dire which would indicate he was so prejudiced. He does not contend he requested recording of the voir dire or that if such a recording had been made it would reflect the problems anticipated by defendant actually developed. See Oshinbanjo, 361 N.W.2d at 321. Based on the record as it stands, we cannot assume defendant was prejudiced and the court abused its discretion. Defendant's conviction is affirmed.

AFFIRMED.