FILED
FEB 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-636 / 92-1825

**STATE OF IOWA,**

Plaintiff-Appellee,

**vs.**

**ADAM RILEY,**

Defendant-Appellant.

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Appeal from the Iowa District Court for Woodbury County, Robert C. Clem, Judge.

Defendant appeals from his conviction of third-degree sexual abuse, in violation of Iowa Code § 709.4(1) (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Karrie J. Kelly, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*, but decided en banc.

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

**SACKETT, J.**

Defendant-appellant Adam Riley appeals his conviction following a jury trial of sexual abuse in the third degree. Defendant contends the trial court (1) erred in refusing to compel disclosure of the identity of the victim's counselor; and (2) abused its discretion in allowing the State to introduce expert testimony it was not unusual for a perpetrator of sexual abuse to have a significant other. Defendant also contends he was denied effective assistance of trial counsel because his attorney failed to cross-examine the physician who examined the victim. We affirm.

The victim and defendant were with friends when they met in a bar. Defendant and the victim and the friends subsequently returned to the apartment of one of them. There is conflicting evidence concerning the relationship of defendant and the victim at the apartment. The victim testified defendant tried twice to kiss her in the apartment and was rejected both times. Defendant testified he kissed the victim several times in the apartment and she did not object. The victim agreed to give defendant a ride home. One witness testified the victim offered defendant a ride home. Another testified defendant asked the victim for a ride home.

The victim testified on the way home defendant directed her to park in an alley and when she asked to leave he took her car keys. She testified he kissed her; she tried to get away and there was a struggle; he removed her clothing and began to have intercourse with her. She told him she had a pelvic infection. The victim said defendant then forced her to perform oral sex after she told him she had a vaginal infection.

Defendant contended the two kissed as they drove and she parked in the alley and, as he prepared to have intercourse with her, she told him she had an infection and they had consensual oral sex.

After the encounter, the victim took defendant home and called her cousin, who called the police. Later the victim was taken to the hospital where an examination revealed she had bruises on her arms and a tear on her vaginal opening. Seminal fluids and blood consistent with defendant's blood type were found on the victim's blouse.

When confronted by officers on January 10, 1992, defendant admitted he and the victim had oral sex but that it was consensual. Defendant said he had a girlfriend and they had recently had a baby, and he was happy in this relationship.

The pivotal issue at trial was not whether the sexual contact took place, but whether the sexual contact that did take place was consensual.

Prior to trial, defendant filed a motion to compel the disclosure of the victim's counselor. The motion was denied and defendant contends, in overruling his motion, the trial court violated his Sixth Amendment right to confront witnesses. Because a constitutional issue is raised, we review de novo. State v. Davis, 446 N.W.2d 785, 787 (Iowa 1989).

Before making the motion, defendant received information from a witness that the victim was to have had received psychiatric and/or psychological counseling for a long period of time. That the focus of the counseling was her relationships with men and the counseling was addressing her feelings of being misused by boyfriends and her anger about the relationships.

The witness had also reported the victim had on two other occasions had sexual relationships with men other than her boyfriends to make the boyfriends jealous. The witness also reported at the time the victim was dating a man who was at the apartment when the victim left with defendant.

Defendant argues he sought the evidence for impeachment purposes. The State advances the trial court was correct and the information defendant sought was protected by Iowa

Code section 622.10[1] and Iowa Rule of Evidence 412[2], and the information would not have been admissible if it had been available to defendant.

The State makes a compelling argument against admission of the evidence and relies on the argument that the

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1. Iowa Code section 622.10 (1991), in relevant part, provides:

A practicing attorney, counselor, physician, surgeon, physician's assistant, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

2. RULE 412. SEXUAL ABUSE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR

(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) 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 and 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.

information sought to be discovered would not be admissible at trial.

The issue defendant has raised is whether the evidence is discoverable. This is a discovery issue, not an issue of the admission of evidence.

We are dealing with a request by the defendant for the name of a mental health professional such as would be within the category of "mental health professionals" referred to in Iowa Code section 622.10 See McMasters v. Iowa Bd. of Psychology Examiners, No. 92-1904 (Iowa Dec. 22, 1993). However; section 622.10 does nothing to prevent discovery of the name of a mental health professional. The privilege granted mental health professionals in section 622.10 is limited to disclosure of confidential communications by the giving of testimony. McMasters, No. 92-1904 (Iowa Dec. 22, 1993). (Emphasis supplied). Iowa Code section 622.10 bars disclosure of confidential communications by giving testimony. Id. The privilege granted in section 622.10 does not apply to an attempt to secure records of the professional. Id. Seeking discovery of the information does not compel disclosing confidential communications by the giving of testimony. Chidester v. Needles, 353 N.W.2d 849, 851-52 (Iowa 1984). All defendant was attempting to do was secure the name of the victim's counselor. Contrary to the State's argument, section 622.10 does not apply. See McMasters, No. 92-1904 (Iowa Dec. 22, 1993).

Iowa Rule of Evidence 412, that the State also relies on to support its position, does not apply to discovery either. Rule of Evidence 412 only deals with the admission of evidence, not the discovery of evidence. The rule provides under most circumstances evidence of a victim's past sexual behavior is not admissible but carves narrow exceptions when such evidence may be admitted in evidence and provides procedural safeguards for its admission under those narrow exceptions.

The trial court should have sustained defendant's motion to divulge the name of the counselor.

We do not find the defendant suffered prejudice on this issue. The only request raised at the trial court level was that the defendant should have the name of the counselor. The difficulty with a discovery issue is not knowing what the discovery would have revealed. We must be careful in making any assumption of what the discovery may have revealed. The court in McMasters,[1] No. 92-1904 (Iowa

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1. In McMasters, the Iowa court addressed a constitutionally protected privacy issue, McMasters, No. 92-1904 (Iowa Dec. 22, 1993); see also Head v. Colloton, 331 N.W.2d 870, 876 (Iowa 1983), that was not advanced here and provided a mechanism to allow the board the opportunity to make a showing of the need for records by an in camera hearing with a protective order prohibiting disclosure of evidence presented. The rights of the victim here require similar protection.

McMasters is also distinguishable because it deals with the subpoena power of a licensing board and Iowa Code section 258A.6(3) provides subpoena power to the board for the production of professional records whether or not privileged or confidential under the law. Iowa Code section 258A.6(3) is not involved here to provide the statutory direction for admission provided in McMasters.

Dec. 22, 1993), appeared to struggle with a similar issue when it recognized the relevancy of the records sought is a critical issue and said, "If the district court determines there is no relationship between the records sought and the allegations of the complaint, that should end the matter."

Defendant's request was very narrow. We cannot find he was prejudiced in the trial court's refusal to sustain his motion to divulge the counselor's name.

The second issue is whether the trial court abused its discretion in allowing the State's expert witness to testify that most persons he has dealt with that are suspected of sexual abuse have a significant other sex partner or girlfriend. The evidence was defendant had a girlfriend and he had fathered her child.

Defendant advances it was apparent the purpose of introducing the testimony was to show the jury defendant's conduct in having a girlfriend is consistent with sexual abusers, and the jury was free to use the testimony as evidence of defendant's guilt.

The State argues the testimony does not purport to place the behavior at issue into a scientifically recognized "syndrome"; the evidence would not convince the jury defendant is guilty of sexual abuse; and, lastly, even if the evidence were improperly admitted, it is harmless because there was substantial evidence of defendant's

guilt. We agree with defendant that such evidence went to the issue of a profile of a sexual abuser and the fact he had a girlfriend was consistent with the profile of a sexual abuser. We also recognize it is normal for an unmarried young man to have a girlfriend. We have said use of normal behavior to prove guilt is not proper. State v. Dodson, 452 N.W.2d 610, 612 (Iowa App. 1989). We agree with the defendant that the trial court abused its discretion in admitting the evidence.

The State says, even if the evidence was not admissible, it is evidence of a relatively mundane concept and is distinguishable from Dodson as it does not attempt to place the behavior into a scientifically recognized and specifically named "syndrome". We do not find the evidence so prejudicial as to justify a new trial.

Defendant's last challenge is his trial counsel was not effective because he did not cross-examine at trial the doctor who examined the victim after the incident. The victim testified she had scratches from her encounter with defendant. At trial, the physician testified to recent bruising the victim had received and to the fact that at the 6 o'clock position of the introitus he observed a superficial mucosal tear with some bright red bleeding that appeared to be recent trauma. Defendant advances, at a deposition, the examining doctor testified he did not note in his report he had found any scratches on the victim and, if he had detected scratches, he would have included those

findings in his report. The deposition was not used to cross-examine the doctor and his testimony in this regard was not put in evidence. Defendant contends, because the deposition was not put in evidence, he is not able to address this issue on direct appeal and asks it be reserved for a postconviction relief proceeding. The State agrees this claim should be so reserved.

**AFFIRMED.**

Oxberger, C.J. concurs; Critelli, S.J., specially concurs.

**CRITELLI, S.J.** (specially concurring)

I concur specially with the majority opinion. I agree with the affirmance, but reach that decision in a different way.

Without question, the only issue in these proceedings is whether or not the sexual activity that admittedly took place between the defendant and the victim was voluntary on the part of the victim.

Discovery issues were raised by defendant and decided by the majority opinion. I do not necessarily agree with those opinions and decisions; however, in my view, the record made relative to the lack of voluntary participation on the part of the victim obviates the necessity of deciding the discovery issues.

In almost all sexual abuse fact situations, the intimate events between the alleged perpetrator and alleged victim are not accomplished in a public setting. It almost always boils down to the word of the victim against the word of the defendant. That is, to a great extent, true in this case.

It is necessary for the trier of fact to gauge the credibility of at least the victim because the defendant is not required to testify or to prove his innocence. However, in some cases, there are other facts and circumstances that support the oral testimony of the victim. Such is the case in these proceedings.

As indicated in the majority opinion, there is conflicting testimony as to what took place between the victim and the defendant prior to the time she agreed to drive him to his home. The important period of time and the important events, however, are what took place once she was directed by the defendant to pull her car into an alley so that defendant could leave and go to his residence.

The jury, of course, was allowed to consider the testimony of the victim as to what then transpired in the vehicle. This included testimony that she saw blood on the hand of the defendant because she had shoved him into the rearview mirror; he broke the mirror and cut his hand. That testimony would be consistent with someone struggling against one who was sexually assaulting such person.

The jury also had the benefit of consideration of a number of photographs and diagrams that were offered and admitted into evidence. These exhibit-photographs included State's Exhibit 5, which shows bruise marks on the victim's left wrist and hand, State's Exhibit 6, which shows additional bruises and scratches on the victim's left wrist, State's Exhibit 7, which shows bruising on the victim's right wrist and hand, and State's Exhibit 8, which shows bruising on the inside of the victim's left upper arm.

State's Exhibit 10 was a diagram of the front and back of a human body and also identified thereon the places where bruising was identified.

All of these exhibits would independently support a finding of forced sex and would corroborate the victim's version of what happened in the car.

State's Exhibit 9 was another diagram showing the female sexual anatomy, and it more particularly showed a place where there had been a tear in the tissue.

Dr. Vlach, the State's medical expert, had examined the victim only hours after the alleged assault. He said this tear area was still actually bleeding and oozing. He said this tissue could be torn if a lot of force was placed on it.

This exhibit and the indicated testimony would also support the victim's version of the events in question.

In summary, the referred-to photographs and the other diagrams and information depicted thereon are all consistent with the oral testimony of the victim as to how her hands and arms were grasped tightly and the sex was forced upon her. I find that the evidence is overwhelming that the victim was sexually assaulted and that she did not voluntarily engage in sexual activity with the defendant.

For these reasons, I concur with the majority's opinion that the defendant's conviction should be affirmed. I concur with the remainder of the majority opinion.