

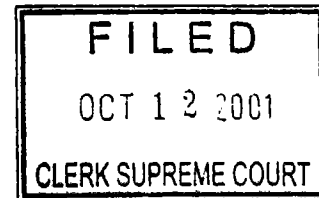
IN THE COURT OF APPEALS OF IOWA

No. 1-326 / 99-1989
Filed October 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEO PAUL PREAT, II,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

On appeal from his conviction for third-degree sexual abuse, defendant contends: (1) the trial court erred in denying his motion for judgment of acquittal; (2) the trial court erred in excluding testimony under Iowa Rule of Evidence 412; (3) counsel was ineffective in a number of respects; and (4) the cumulative effect of the trial court's errors deprived him of his right to a fair trial. **AFFIRMED.**

Ivy Ross Rivello of Parrish, Kruidenier, Moss, Dunn, Montgomery, Boles &
Gribble, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, John P. Sarcone, County Attorney, and Michael T. Hunter and Darrin
Page, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Leo Paul Preat II appeals his judgment and sentence for third-degree sexual abuse. He contends: (1) the evidence was insufficient to support his conviction; (2) the district court should not have excluded evidence of the victim's prior sexual conduct; (3) his trial attorney was ineffective in failing to insist that opening and closing statements and the hearing on evidence of the victim's prior sexual conduct be reported; and (4) the cumulative errors denied him a fair trial. We affirm.

I. Background Facts and Proceedings

A young woman named Kathy reported to friends that Preat sexually assaulted her at the home of a mutual friend, Donna Barnes. The State charged Preat with third-degree sexual abuse. Iowa Code §§ 709.1; 709.4(1) (1997).

Preat notified the court of his intent to elicit evidence of the victim's past sexual conduct to establish an alternate source of the semen found following the incident. See Iowa R. Evid. 412(b)(2)(A). Prior to trial, the court held an unreported hearing on Preat's notice. At trial, defense counsel summarized the import of that hearing, including the first judge's verbal ruling that the evidence would not be admitted. He asked the trial judge to reconsider the issue. The trial judge agreed with the hearing judge that evidence of Kathy's prior sexual behavior should not be admitted.

A jury convicted Preat of third-degree sexual abuse and the district court adjudged him guilty and sentenced him to a prison term not exceeding ten years. This appeal followed.

II. Sufficiency of the Evidence

Preat contends there was insufficient evidence to support his conviction. We review challenges to the sufficiency of the evidence on error, upholding a finding of guilt if substantial evidence supports the verdict. *State v. Atkinson*, 620 N.W.2d 1, 3 (Iowa 2000).

The State was required to prove that Preat performed a sex act with Kathy by force or against her will. Iowa Code §§ 709.1; 709.4(1). There is sufficient evidence from which a jury could have concluded that the State satisfied its burden.

Kathy testified Preat raped her. Two police officers who interviewed her on the day of the incident corroborated key aspects of her testimony, as did a friend who picked her up that day. The State also called a DNA specialist who testified that, after performing seven tests on a sample of Preat's DNA, she estimated only 1 in 1.4 million Caucasians would have the same group of test results as was developed in the sample.

In arguing this evidence is insufficient, Preat points to significant inconsistencies between Kathy's testimony and the testimony of defense witness Donna Barnes. He points to Barnes' testimony that she and others were in the home at the time Kathy alleged the assault occurred and Kathy never reported the assault to Barnes. Preat also highlights internal inconsistencies in Kathy's trial testimony and inconsistencies between her trial testimony and her earlier statement to the police.

On our review of the record, we agree with Preat that Barnes' version of the timing of events that day is almost diametrically opposed to Kathy's.

However, Barnes conceded there was a forty-five minute period during the day when she was away from the home and was unaware of what transpired. The jury could have considered this concession in conjunction with Kathy's admission that she sometimes had trouble remembering and telling times. Kathy's admission is supported by her friend's testimony that Kathy had a learning disability.

We also agree with Preat that there are certain minor discrepancies between Kathy's rendition of events at trial and the statements to the police officers. However, the key portions of Kathy's story were consistent. Additionally, it is the jury's role, not ours, to resolve any inconsistencies. See *State v. Mitchell*, 568 N.W.2d 493, 504 (Iowa 1997); *State v. Knox*, 536 N.W.2d 735, 743 (Iowa 1995). As our highest court has stated "[t]he very function of the jury is to sort out the evidence presented and place credibility where it belongs." *State v. Capper*, 539 N.W.2d 361, 365 (Iowa 1995) (quoting *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984)). We decline to second-guess the jury on these credibility issues.

We conclude there was sufficient evidence to support the conviction.

III. Victim's Prior Sexual Conduct

Iowa Rule of Evidence 412, known as the rape shield rule, prohibits admission of opinion or reputation evidence relating to a victim's past sexual behavior. Iowa R. Evid. 412(a). Evidence other than reputation or opinion evidence, however, may be offered to show: (1) the accused was not the source of the semen (identity exception) or (2) the victim consented to the sexual behavior (consent exception). Iowa R. Evid. 412(b). If the court determines the

evidence is relevant and the probative value outweighs the danger of unfair prejudice, the evidence is admissible as directed by the court. Iowa R. Evid. 412(c)(3). Preat argues evidence of Kathy's prior sexual conduct was admissible to (a) establish consent; (b) challenge the identity of the assailant; and (c) impugn Kathy's credibility.

A. Consent Exception. Preat's principal argument is that the district court should not have excluded evidence of Kathy's prior sexual conduct because the evidence bore on the question of whether Kathy consented to sex with him. This argument, however, was not preserved for review. At trial, the court asked defense counsel whether he was relying on the identity or consent exception. Counsel unequivocally asserted he was only relying on the identity exception. Accordingly, we need not address counsel's consent argument raised for the first time on appeal. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997).

B. Identity Exception. We next examine the question of whether the victim's past sexual conduct should have been admitted to show Preat was not the source of the semen or injury. Our review of this issue is for abuse of discretion. *Mitchell*, 568 N.W.2d at 497.

Defense counsel stated he wished to elicit testimony from Donna Barnes that "she picked up Kathy at a motel and Kathy made some admissions to her about being in the motel apartments, some apartments behind the motel, with

¹ The State argues defense counsel did not preserve error on this issue because he did not file a written offer of proof as required by Iowa Rule of Evidence 412(c)(2) and did not make an offer of proof at the recorded hearing before the trial judge. Although we agree defense counsel did not comply with the Rule 412(c)(2) and did not submit a formal offer of proof at the recorded hearing, we believe the record made before the trial judge is sufficient to apprise us of the nature of the evidence counsel sought to introduce. Therefore, we will bypass this error preservation argument and proceed to the merits. See *State v. Schutz*, 579 N.W.2d 317, 318-19 (Iowa 1998).

male friends or male people" The trial court noted that the evidence would have "no probative value whatsoever" if one removed the inference of companionship associated with the testimony. The court excluded the evidence, stating:

A sexual assault case should be tried not on the basis of besmirching the character of the putative victim, and other sexual behavior is truly only probative in situations where as 412 points out, scientific evidence might--might be gleaned that would indicate that the Defendant may not have been depositor of the fluid.

We believe the proffered evidence was nothing more than inadmissible reputation evidence of Kathy's past sexual behavior. Iowa R. Evid. 412(a). However, assuming without deciding that the evidence could be construed as something other than inadmissible reputation evidence, we agree with the district court that it was only marginally relevant on the question of whether Preat was the source of the semen. See *State v. Alvey*, 458 N.W.2d 850, 852-3 (Iowa 1990) (noting quality of evidence factor to be weighed in view of the rape shield law). We further agree with the district court that it is precisely this type of evidence that our courts have deemed highly inflammatory. See *Mitchell*, 568 N.W.2d at 499 (noting evidence of venereal disease inflammatory because it could brand victim promiscuous and not worthy of belief). Therefore, we conclude the marginal probative value of this evidence did not outweigh the danger of unfair prejudice. The district court did not abuse its discretion in excluding this evidence.

C. Credibility. Preat finally suggests the evidence described above together with other claimed evidence of Kathy's prior sexual conduct was relevant to rebut Kathy's pre-trial statements that she was not sexually active. Our court has stated that a defendant would have the right to rebut evidence of chastity

proffered by a victim. *State v. Jeffries*, 417 N.W.2d 237, 239 (Iowa Ct. App. 1987). The prosecution here agreed to steer clear of any such testimony to avoid opening the door on cross-examination to questioning of Kathy's sexual proclivities. Therefore, even if the evidence could be construed as something other than prohibited reputation evidence under Rule 412(a), we conclude Kathy's truthfulness concerning her past sexual activity was not at issue and was not an appropriate subject of cross-examination. See *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994).

IV. Ineffective Assistance of Counsel

Preat next claims his trial attorney was ineffective in failing to have opening and closing statements and the first Rule 412 hearing recorded. We reject his claim relating to the prosecutor's opening statement, as Preat has not alleged any error in that statement. See *State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000).

As for the Rule 412 hearing, we note that although the first hearing was not reported, defense counsel summarized the hearing on the record and obtained a second ruling from the trial judge. Therefore, counsel did not breach an essential duty by failing to have the first hearing recorded, and we also reject this ineffective assistance of counsel claim. See *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982).

With respect to the prosecutor's closing argument, Preat alleges the prosecutor referred to evidence Preat could have but did not present, creating an impermissible inference that Preat had a burden to prove himself not guilty. See *State v. Poppe*, 499 N.W.2d 315, 319 (Iowa Ct. App. 1993). On this record, we

cannot determine precisely what the prosecutor said, whether it was within the permissible range of inferences that could be drawn from the evidence, and whether defense counsel had strategic reasons for not seeking to have this statement memorialized. Accordingly, we preserve this issue for postconviction relief. See *Oetken*, 613 N.W.2d at 689; *State v. Brokaw*, 342 N.W.2d 864, 866-67 (Iowa 1984).

V. Cumulative Error

Having found no errors, we reject Preat's cumulative error claim.

VI. Conclusion

We affirm Preat's judgment and sentence. We preserve for postconviction relief his allegation that defense counsel was ineffective in failing to have closing arguments reported.

AFFIRMED.