

FILED

FEB 22 1990

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-642 / 88-1704

STATE OF IOWA,

Appellee,

306

vs.

WILLIAM JOSEPH ALVEY,

Appellant.

Appeal from the Iowa District Court for Sioux County,
Terry L. Huitink, Judge.

The defendant appeals his conviction, following a jury
trial, for sexual abuse in the third degree. **REVERSED.**

Raymond E. Rogers, State Appellate Defender, for
appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich,
Assistant Attorney General; and Mark Schouten, County
Attorney; for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

307

The defendant, William Alvey, was accused of sexually abusing a woman. He acknowledged sexual contact with the woman, but he alleged that she had consented. A jury found Alvey guilty of sexual abuse in the third degree. He has appealed the resulting conviction.

Alvey contends the district court should have allowed him to present evidence that the victim had previously complained to friends of rape following a consensual sexual encounter. He argues the exclusion of this proposed evidence was error entitling him to a new trial. He bases this claim on the sixth amendment right of confrontation and the fourteenth amendment due process right to a fair trial.

Our review of criminal appeals is ordinarily on assigned error. State v. Oshinbanjo, 361 N.W.2d 318, 320 (Iowa App. 1984). However, we make an independent evaluation of the totality of the circumstances on issues involving the violation of basic constitutional guarantees. Id.

The only real issue raised by the appellant is whether the trial court should have allowed him to present evidence showing that the victim, (who was deaf), had previously referred to consensual sex as "rape." At issue is Iowa Rule of Evidence 412 and the interpretation given that rule by the Iowa courts, and also whether the constitution

requires that the appellant be allowed to present the evidence. Iowa Rule of Evidence 412 provides as follows:

(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.

The next two subsections, (c)(1) and (c)(2), only provide procedural requirements and are not relevant to our discussion.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(D) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which sexual abuse is alleged.

The two narrow exceptions of subsection (b)(2) are not pertinent to the facts of this case. Our decision here must therefore turn on our application of subsection (b)(1), which requires that prior sexual conduct be admitted if the requirements of subsection (c) are satisfied and the constitution so requires.

The constitutional provisions most often implicated in cases of this type are the sixth amendment right to confrontation and the fourteenth amendment due process right to a fair trial. State v. Clarke, 343 N.W.2d 158, 161 (Iowa 1984). The constitution, however, ordinarily requires only the introduction of otherwise relevant and admissible evidence. Id. Further, the trial court has a duty to protect a witness from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate. Id. Even relevant evidence is not constitutionally required to be admitted if the prejudicial effect outweighs the probative value. Id. We must decide whether the evidence offered by the appellant is relevant and, if so, whether the probative value of the evidence outweighs its prejudicial effect.

There are two main cases which directly address this issue. The first is the Clarke case cited above. In

Clarke, the defendant wished to present evidence of the victim's prior experience with oral sex to contest the assumption that her knowledge of the act could only have arisen from the alleged sexual abuse. The court held that the evidence was not sufficiently relevant to overcome the policies favoring its exclusion. In that case the evidence related directly to a sexual act and the victim's knowledge of a sexual act. In the appellant's situation, the evidence is not being offered to show that the victim is promiscuous or that she knows how to perform intercourse. The evidence is being offered to contest the evidence offered by the State that when the victim wrote "he rape" on a piece of paper, she understood what it meant. The evidence offered by the appellant would show that a disinterested witness and several others saw the victim come out of a room after having intercourse and state that her partner had raped her, when it was clear that they had consensual sex. This evidence is clearly relevant. It is also important that the witness noticed the victim appeared upset at the time of the consensual sex. These facts could very well convince a jury that the victim is easily confused concerning sexual matters and that she really does not understand the difference between consensual sex and rape. Perhaps under different circumstances this evidence would not be quite so probative, however, the record shows that the victim was not very clear on the details of what

happened that evening and this evidence could have shed some light on why that was.

In State v. Bettier, 438 N.W.2d 1, 4 (Iowa 1989), the court upheld the ruling by the trial court that the evidence was inadmissible. The court reasoned that it could find no abuse of discretion on the part of the trial judge. Bettier dealt with a statement concerning two sex acts; one with the defendant and one with a third person. The trial court had to balance the admissible evidence relating to sex with the defendant against the clearly inadmissible evidence of sex with a third person. The court in Bettier could find no abuse of discretion. In the present case the evidence is not being offered to prove that the victim had sex with another man, but only to show her confusion over what rape means. This is not a "time consuming and distracting inquiry into collateral matters." Id. at 3. The appellant is not concerned with the victim's sexual habits; only her understanding of them. Based on the unusual facts of this case: that the victim was deaf, that she possibly did not understand what rape means, and that her knowledge of the details of the alleged crime was extremely vague; the probative value of the evidence clearly outweighs any prejudicial effect. We reverse the trial court and remand for a new trial.

REVERSED.