

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT CHRISTIAN,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 177286

Recorder's Court

LC Nos. 93-009079;

93-009103;

93-009104

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced to six to fifteen years' imprisonment for each of the CSC I convictions and five to fifteen years' imprisonment for each of the CSC II convictions. Defendant appeals as of right. We affirm in part and remand in part.

Defendant's first claim goes to his CSC I convictions in Nos. 93-009103 and 93-009104. Specifically, defendant contends that the trial court abused its discretion in denying him the opportunity to offer evidence of two of the victims' sexual history in order to explain medical evidence suggesting that the two girls had been sexually penetrated. The rape-shield statute, MCL 750.520j; MSA 28.788(10), generally excludes evidence of a rape victim's prior sexual conduct with others for general impeachment. See *People v Hackett*, 421 Mich 338, 347-348; 365 NW2d 120 (1984). The *Hackett* Court recognized, however, that such evidence might "in certain limited situations" be "required to preserve a defendant's constitutional right to confrontation." *People v Haley*, 153 Mich App 400, 406; 395 NW2d 60 (1986), quoting *Hackett, supra*, p 438. In *Haley, supra*, pp 404-405, this Court noted that "once the prosecution introduce[s] medical evidence to establish penetration, evidence of alternative sources of penetration [becomes] highly relevant to material issues in dispute." Thus, evidence of sexual assaults upon a complainant by third parties should be allowed for the express purpose of rebutting the prosecution's medical evidence regarding sexual penetration and the inference that the defendant was the person responsible. *Id.*, p 406.

In *Hackett, supra*, the Supreme Court set forth specific procedures to follow when a defendant seeks to admit evidence of a rape victim's sexual conduct with others. Those procedures were adopted by this Court in *Haley, supra*, p 407. They are:

The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of the issues, or misleading the jury. We again emphasize that in ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation. [421 Mich 350-351; citations omitted.]

In this case, defendant obtained an order giving him access to the victims' psychological and medical records. He also asked the trial court for permission to support his case with some of the facts contained in those records. In addressing defendant's request, the court examined the files but did not hold an *in camera* evidentiary hearing before deciding that their contents were inadmissible. Nor did the court offer a meaningful description of their contents in deciding defendant's motion for new trial. The result is that the record does not describe the information contained in those files, nor does it describe the facts from the files which defendant sought to use in support of his case. The record does indicate, however, that the trial court based its verdict at least in part on the prosecution's evidence that the hymenal ring of two of the victims was not intact. The court found that this evidence demonstrated a "strong possibility that there could have been some penetration to at least those two young ladies."

Under *Haley* and *Hackett*, defendant was denied his right of confrontation if: (1) the girls' files indicated that there was an alternative explanation for the hymenal ruptures, such as previous sexual activity, and (2) defendant made the appropriate offer of proof. Because of the manner in which the trial court addressed the question, we cannot determine whether these two factors were satisfied. We therefore remand for the trial court to supplement the record, within 28 days of the issuance of this opinion, to establish whether the two victims' records indicate an alternative explanation for the medical evidence of penetration, and whether defendant made an acceptable offer of proof demonstrating the relevancy of the information. If either factor is not satisfied, then defendant's right to confrontation was not infringed under *Haley* and *Hackett, supra*. We reiterate that our remand is confined to defendant's

CSC I convictions in Nos. 93-009103 and 93-009104, the two cases in which there was medical evidence of penetration.

Defendant's remaining claims are without merit and require little discussion. Contrary to what defendant argues, the trial court allowed substantial impeachment of the three victims, who were sisters, with psychiatric "information about the interdependency of the complainants and their emotional disturbance and indeed their proclivity toward lying which had a direct bearing on their credibility." Mental health professionals were allowed to testify, for example, that the girls were "habitual liars" who "have problems with authority figures." We therefore find no abuse of discretion on this record. We also disagree with defendant's claim that witness Dr. John Baugh improperly vouched for the credibility of one of the victims. See *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990). Moreover, because defendant chose to have all three cases tried before a judge and in a single trial, he cannot prevail on appeal by arguing that he was prejudiced when the cases were tried together before the same fact-finder. Finally, for the reasons stated by the trial court in ruling on defendant's motion for new trial, the verdicts were not against the great weight of the evidence.

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Barbara B. MacKenzie

/s/ Myron H. Wahls

/s/ Jane E. Markey