STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARSHALL RAYMOND SIMPSON,

Defendant-Appellant.

UNPUBLISHED

No. 199856
Clinton Circuit Court
LC No. 96-006069 FC

Before: MacKenzie, P.J., Bandstra and Markman, JJ.

MARKMAN, J. (concurring).

I join in the analysis of the majority opinion, as well as in its holding, but write separately to express my concern about the exclusion of one witness' testimony relating to a statement allegedly made by complainant that she had been raped by two men while in Lansing. I note, however, that appellant has not raised this issue on appeal and, therefore, I write only to express my reservations about the trial court's decision in this regard. In *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978), this Court set forth two propositions: First, "In a prosecution for a sexual offense, the defendant may cross-examine the complainant regarding prior false accusations of a similar nature and, if she denies making them, submit proof of such charges." Second, "where the verdict necessarily turns on the credibility of the complainant, it is imperative that the defendant be given an opportunity to place before the jury evidence so fundamentally affecting the complainant's credibility." *Mikula* took cognizance of the rape-shield statute. *Id*. at 113.

Here, the prosecutor's case rested largely upon the direct testimony of complainant, as well as upon the testimony of complainant's doctor, Ruth Worthington, that the complainant's physical condition suggested that she had had sexual intercourse on multiple occasions. Complementing this testimony, complainant was permitted to testify that she had had consensual sexual intercourse with only one person on a single occasion. Additionally, the trial court admitted complainant's testimony under §404(b) that she and defendant had had sexual relations, noting that such acts constituted "evidence that is central in the assessment of Dr. Worthington's conclusions concerning physical findings on examination."

Under these circumstances, I believe that the trial court should have allowed defendant to introduce the testimony of the witness, a friend of complainant. Complainant's credibility had already been placed in issue by testimony that had been offered concerning prior (apparently false) reports to Texas authorities concerning defendant's abuse, as well as by a false claim that she had had an abortion. However, the jury was not permitted to hear about her prior rape allegations. If the jury had been presented with such testimony, it is not inconceivable that they might have concluded that the prior rape had occurred-- in which case Dr. Worthington's testimony that the complainant's physical condition indicated that she had had sexual relations on more than one occasion would have been less likely to inferentially implicate defendant. "It is well settled that where the prosecution substantiates its case by demonstrating a physical condition of the complainant from which the jury might infer the occurrence of a sexual act, the defendant must be permitted to meet that evidence with proof of the complainant's prior sexual activity tending to show that another person might have been responsible for her condition." *Mikula*, *supra* at 114. Alternatively, had the jury been presented with such testimony, they might have concluded that the rape did not occur but that complainant's credibility was called further into question.

Consequently, when the court permitted the prosecutor to offer prior acts testimony-- which, in my judgment, it correctly decided-- yet precluded defendant from offering testimony concerning prior conduct by complainant, the defendant was potentially impaired in his ability to effectively confront his accuser. *People v Hackett*, 421 Mich 338, 346-51; 365 NW2d 120 (1984). While I recognize the broad range of discretion of the trial court in making determinations of this sort, *id*. at 350-51, I respectfully believe that the better course of action here would have been to permit the witness' testimony.

Nevertheless, in light of the considerable deference owed to the trial court in its decisions relating to the admission of testimony, and in light of defendant's failure to have raised this issue on appeal, *Radtke v Everett*, 442 Mich 368, 397-98; 501 NW2d 155 (1993), I join in the result reached by the majority.

/s/ Stephen J. Markman