STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 1999
v	No. 206847 Recorder's Court
RONALD WAYNE DILLINGHAM, Defendant-Appellant.	LC No. 96-503287

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

WHITBECK, J. (*concurring*).

I concur completely with my colleagues' holdings with respect to the sufficiency of the evidence and the adding of two charges at the end of the preliminary examination. I write separately to express a different view with respect to the character evidence under MRE 404(a).

I. The Relevant Provisions

A. MRE 404(a)

MRE 404(a) provides:

> *Character Evidence Generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> * * *
>
> (3) *Character of victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

B. The Rape-Shield Statute: MCL 750.520j(1); MSA 28.788(10)(1)

MCL 750.520j(1); MSA 28.788(10)(1) provides:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

C. "Parallel" Provisions

The Michigan Supreme Court in *People v Hackett*, 421 Mich 338, 346; 365 NW2d 120 (1984) characterized these two provisions as being "parallel." Strictly speaking, this is not completely accurate. As noted by Justice Kavanagh in his separate opinion, the rape-shield statute "absolutely prohibits the admission of evidence of sexual conduct between the victim and any person other than the defendant except to show the source or origin of semen, pregnancy, or disease." *Id*. at 362. Justice Kavanagh amplified on this point later:

> MRE 404(a)(3) is a more sophisticated approach to the question of the admissibility of prior sexual conduct evidence. Unlike the statute, MRE 404(a)(3) focuses on the purpose for which such evidence is offered. The statute simply excludes all evidence of prior sexual conduct with third persons unless offered to show the source or origin of semen, pregnancy, or disease. Moreover, MRE 404(a)(3) has the incidental benefit of correcting the discredited use to which evidence of prior sexual conduct has been most frequently put, which is what aroused the Legislature originally to enact MCL 750.520j(1); MSA 28.788(10)(1). [*Id.* at 364.]

Presumably, when mentioning the "focus" by MRE 404(a)(3) on the purpose for which the evidence was offered, Justice Kavanagh was referring to the first sentence in MRE 404(a) that provides that evidence of a person's character or trait of character is *not* admissible "for the purpose of proving action in conformity therewith." Thus, while the rape-shield statute contains a process that allows evidence of prior sexual conduct with a defendant but sweeps out all evidence of prior sexual conduct with third persons unless offered to show the source or origin of semen, pregnancy or disease, MRE 404(a)(3) contains an admissibility threshold in its first sentence that precludes the introduction of a person's character or trait of character for the purpose of proving action in conformity therewith and then, in parallel with the rape-shield statute, makes exceptions for prior sexual conduct with a defendant and prior sexual conduct with third persons showing the source or origin of semen, pregnancy, or disease.

Here, as my colleagues note, the prosecutor introduced evidence that the victim did not have a reputation for being promiscuous, did not dress promiscuously, and had not evidenced prior sexually aggressive behavior when dealing with strangers. Clearly, then, neither of the two exceptions contained within the rape-shield statute or MRE 404(a)(3) (i.e. evidence of the victim's past sexual conduct with the defendant or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease) are at issue in this case. Thus, while it is somewhat inaccurate to say that the rape-shield statute and MRE 404(a)(3) are "parallel" or "corresponding" provisions, the differences in the two provisions have no direct bearing here. Simply put, we are dealing only with the prohibition in the first sentence of MRE 404(a) against the introduction of a person's character or trait of character for the purpose of proving action in conformity therewith; the provisions of the rape-shield statute are irrelevant to this matter.

II. Admissibility Of Evidence Versus Use Of Evidence

My colleagues, as noted above, describe the evidence that the prosecutor introduced that tended to show the victim's lack of promiscuity and then recite the prosecutor's argument with respect to this evidence, in particular the statement by the prosecutor to the effect that the victim "wasn't the type of person to do that, and I submit to you, she wasn't the type of person to do [that] on August 28th [the date of the alleged rape] neither." My colleagues go on to say:

> This argument is clearly impermissible where the prosecutor suggested that because the victim was not sexually aggressive or promiscuous in the past, she would not have, in conformity with her character, been sexually aggressive or promiscuous on the date in question. As in [*People v*] *Bone* [230 Mich App 699; 584 NW2d 760 (1998)], the use of such evidence constitutes error requiring reversal because the strength and weight of the remaining evidence depended upon the complainant's credibility versus that of defendant. Accordingly, we find that defendant is entitled to a new trial on the criminal sexual conduct charges.

Here, I believe, my colleagues are conflating two questions: the proper application of MRE 404(a)(3) (i.e. whether the evidence of the victim's lack of promiscuity was *admissible* under the rule) and the possibility of prosecutorial misconduct (i.e. whether the prosecutor *misused* the evidence once it was admitted). This is troublesome in light of the fact that, although defendant in his appeal to this Court alleged instances of prosecutorial misconduct,[1] the defendant did *not* allege, in the portion of his brief dealing with this alleged prosecutorial misconduct, that the prosecutor committed misconduct with respect to the evidence of the victim's lack of promiscuity.

In any event and simply put, I do not believe that the focus of our decision as to this evidence should be the *use* to which the prosecutor put it. Rather, I believe the proper focus to be on the question of whether this evidence was properly *admissible* under MRE 404(a). This requires, as my colleagues correctly note, a consideration of *Bone, supra*.

III. *Bone*

Bone contains two statements that bear directly on this case:

> We interpret MRE 404(a)(3) to preclude the use of evidence of a victim's virginity as circumstantial proof of the victim's current unwillingness to consent to a particular sexual act.
>
> * * *
>
> The prosecutor contended that the victim would not consent to sexual activity because she had never done so previously, essentially arguing that the victim was acting in conformity with her prior lack of sexual activity. Evidence of the victim's virginity is barred for this purpose under MRE 404(a)(3). [*Bone, supra* at 702-703.]

It is troubling that the *Bone* panel gave no hint of its reasons for concluding that evidence of a victim's previous lack of sexual activity was barred under MRE 404(a)(3). As do my colleagues in this case, however, the *Bone* panel fairly clearly conflated the question of the *admissibility* of the evidence with the question of the *use* to which the prosecutor put the evidence:

> Here, the prosecutor sought to admit evidence of the victim's virginity for the limited purpose of explaining inconsistencies in the victim's testimony regarding what she told police following the incident. *However, the context of the prosecutor's opening statement, direct examination of the victim, and closing argument shows that the prosecutor used evidence of the victim's virginity to demonstrate to the jury that because the victim had no prior sexual experience, she was less likely to have consented to sexual relations with defendant on the night of the incident.* [*Bone, supra* at 702; emphasis supplied.]

Thus, apparently, the central issue to the *Bone* panel was the prosecutor's *use* of the evidence of the victim's virginity. Indeed, the panel's use of the word "however" implies that the evidence was properly admitted for the limited purpose of explaining inconsistencies in the victim's testimony.

This implication is, I believe, correct. In this regard, the Michigan Supreme Court has recognized that while in the vast majority of rape cases evidence of a rape victim's prior sexual conduct with others and sexual reputation when offered to prove the conduct was consensual or for general impeachment is inadmissible, there are limited exceptions to that rule:

> We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant

> should be permitted to show that the complainant has made false accusations of rape in the past. [*Hackett, supra* at 348; citations omitted.][2]

The question here (and, I contend, the actual question in *Bone*) then becomes whether there are any limited exclusions to the general prohibition in MRE 404(a) against the introduction of a person's character or trait of character for the purpose of proving action in conformity therewith that would permit the admission of evidence of the victim's lack of promiscuity. The question is somewhat difficult analytically in that it was not *defendant* who sought to introduce evidence of the victim's prior sexual conduct but rather the *prosecutor* who sought to introduce—and was successful in introducing—such evidence.

My reading of the cases, however, leads me to conclude that it makes no difference whether it is a defendant who seeks to introduce evidence of an alleged rape victim's prior sexual encounters or a prosecutor who seeks to introduce evidence of an alleged rape victim's *lack* of such encounters. If, generally, there is no logical nexus between a complainant's reputation for unchastity and the character trait for truthfulness or untruthfulness, see *Hackett, supra* at 352; see also *People v Williams*, 416 Mich 25, 45; 330 NW2d 823 (1982) (Williams, J.), and *People v Wilhelm* (*On Reh*), 190 Mich App 574, 580; 476 NW2d 753 (1991), then there is no logical nexus between this alleged victim's lack of promiscuity and the character trait for truthfulness or untruthfulness.[3] In like fashion, if evidence of a complainant's prior sexual unchastity, in the form of reputation evidence or a specific instance of conduct, has little or no relevancy to the issue of consent—see *Hackett, supra* at 354—the evidence of this victim's lack of promiscuity has little or no legal relevancy to the issue of her consent or lack thereof.

In my view, therefore, MRE 404(a) is a two-way street; it applies as equally to evidence of virginity or lack of promiscuity as it does to evidence of unchastity. Both are precluded, with limited exceptions, as they go to a person's character or trait of character for the purpose of proving action in conformity therewith.

Moreover, in my view there are no exceptions that would allow the introduction of such evidence here. The prosecutor argues that the evidence was "rendered relevant by the defendants' (sic) theory of the case that the victim was the instigator." I first note that relevance is a concept governed by MRE 402 and 401.[4] In another context, the Michigan Supreme Court has explained that evidence must be "logically relevant" and "legally relevant." *People v VanderVliet*, 444 Mich 52, 61-62; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). Indeed, the Court went on to say:

> On its face, Rule 404 limits only one category of logically relevant evidence. As we explained in [*People v*] *Engelman*, [434 Mich 204, 212-213; 453 NW2d 656 (1990)]:
>
> > "[o]nly one series of evidential hypotheses is forbidden in criminal cases by Rule 404: a man who commits a crime probably has a defect of character; a man with such a defect of character is more likely . . . to

> have committed the act in question." [Citing 2 Weinstein, Evidence, ¶ 404(8), p 404-52.]
>
> If the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible. [*VanderVliet, supra* at 62-63.]

Here, the prosecutor's only theory of relevance is that the victim's lack of promiscuity showed her disinclination to promiscuous sexual conduct in general to prove that she did not consent to the conduct in question. Under such a theory, the evidence of the victim's lack of promiscuity was not admissible. Further, the prosecutor has not argued that any of the courts' articulated exceptions with respect to prior sexual conduct testimony, even when reconfigured to deal with the reverse situation of *lack* of prior sexual conduct,[5] apply in this case.

IV. *People v Sandoval*

I note that my conclusion that MRE 404(a)(3) generally prohibits the prosecution, as well as the defense, from offering evidence of the character or of a trait of character of an alleged sexual assault victim is consistent with the pertinent observations of the Illinois Supreme Court in *People v Sandoval*, 135 Ill 2d 139; 142 Ill Dec 135; 552 NE2d 726, 731 (1990). As with MRE 404(a)(3), the rape-shield statute considered in *Sandoval*, Ill Rev Stat 1987, ch. 38, par. 115-7 as then in effect, phrased its prohibition on the admission of certain types of evidence without regard to the party that offered the evidence:

> "a. In prosecutions for [rape or deviate] sexual assault * * *, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused. [*Sandoval, supra* at 730.]

The Illinois Supreme Court stated:

> We note that the statute does not limit its proscription to a defendant's attempts to introduce evidence of the victim's prior sexual encounters; the statute says quite simply that "the prior sexual activity * * * is inadmissible." …. The words of limitation which follow do not indicate that only the defendant is prohibited from introducing such evidence; the *exception* addresses only the "past sexual conduct of the alleged victim with the accused."
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> * * *
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> The language of the statute is clear and unambiguous; it leaves no room for introduction of reputation or specific-act evidence from any party in the action. [*Id.* at 731; emphasis in the original.]

Like the statute at issue in *Sandoval*, MRE 404(a)(3) by its plain language generally prohibits the introduction of character evidence regarding a complainant in a criminal sexual conduct case *regardless of the party offering the evidence* and regardless of whether the character evidence tends to portray the complainant in a positive or negative light. Accordingly, a Michigan court should apply the plain language of MRE 404(a)(3) and thus should preclude the prosecution, as well as the defense, in a criminal sexual conduct case from offering evidence of the character or a trait of character of an alleged sexual assault victim unless such evidence falls under the narrow exceptions allowed by MRE 404(a)(3). *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997) ("If the language of the court rule is clear, this Court should apply it as written.").

V. Conclusion

I conclude that the evidence of the victim's lack of promiscuity was inadmissible under MRE 404(a)(3). Unlike my colleagues, I do not reach this conclusion based upon the *use* to which the prosecutor put this evidence; I believe that such use is properly a question for consideration under the category of prosecutorial misconduct. Rather, I conclude that, as a matter of law, it makes no difference whether it is a defendant who seeks to introduce evidence of an alleged rape victim's prior sexual encounters or a prosecutor who seeks to introduce evidence of an alleged rape victim's *lack* of such encounters. Generally, any such evidence is irrelevant to the question of the victim's truthfulness or untruthfulness or consent or lack of consent. I can see no exception—and the prosecutor has, in fact, not argued the applicability of any exception—to the general rule that applies in this case. I also agree with my colleagues that the error in this case may not properly be deemed harmless. I therefore concur in the remand to the trial court for a new trial.

/s/ William C. Whitbeck

[1] I.e. that the prosecutor elicited opinion evidence about whether the victim was truthful and then argued to the jury that she was a truthful church going woman, that the prosecutor mislead the jury about other sexual misconduct allegedly committed by defendant, and that the prosecutor introduced evidence that a prosecutor had approved a warrant for the charges against defendant.

[2] I recognize that, above, I maintain that the rape-shield statute, the subject of the Court's ruling in *Hackett*, and MRE 404(a), the rule in question here, do not, strictly speaking, contain exactly parallel or corresponding provisions. Nevertheless, it appears to me that, within context, the Court's comments on the rape-shield statute are reasonably applicable to MRE 404(a).

[3] Similarly, in *Bone* there was no logical nexus between the victim's virginity and the character trait of truthfulness or untruthfulness.

[4] MRE 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

MRE 401, in turn, describes relevant evidence:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[5] Constructing such reverse formulations is difficult and logically somewhat attenuated but it can be done (e.g. *lack* of prior sexual conduct might be relevant for showing witness bias, for showing the victim's ulterior motive for making a true charge, for showing that the victim has made true accusations of rape in the past, or for explaining inconsistencies in the victim's testimony).