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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0634
A12-0807

State of Minnesota,
Appellant,

vs.

David Loren Haukos,
Respondent.

Filed October 29, 2012
Reversed and remanded; motion granted
Kirk, Judge

Dakota County District Court
File No. 19HA-CR-11-3128

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Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KIRK, Judge

In these consolidated appeals from two pretrial orders, the state argues that (1) the orders will have a critical impact on this fourth-degree criminal sexual conduct prosecution; (2) the district court abused its discretion by permitting testimony on S.D.'s previous sexual conduct; (3) the court abused its discretion by permitting respondent's expert witness to testify; (4) the court abused its discretion by releasing all of S.D.'s privileged treatment records; and (5) the court abused its discretion by awarding respondent expert witness fees. Because we conclude that the district court abused its discretion by permitting evidence of S.D.'s prior sexual conduct and Dr. Hackett's testimony and awarding respondent expert witness fees, we reverse and remand.

FACTS

In August 2011, appellant State of Minnesota filed a complaint charging respondent David Loren Haukos with fourth-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.345, subd. 1(d), .101 (2010). The complaint alleges that respondent sexually assaulted S.D., who is a vulnerable adult, in respondent's home.

In January 2012, on the day the trial was scheduled to begin, the state advised the district court that S.D. was being treated by Sandy Jung, Psy. D., in part because of his status as a sex offender. The district court ordered the state to submit a written proffer of Dr. Jung's testimony. Later that day, the state submitted a written proffer to the district court that explained that, when S.D. was a juvenile, he was adjudicated delinquent for committing criminal-sexual-conduct offenses against his two younger sisters. The

proffer also explained that S.D. is no longer under court supervision and is voluntarily receiving treatment. In response, respondent requested a continuance to obtain S.D.'s confidential treatment records and to seek his own expert to review those records. The district court granted the continuance and ordered Dr. Jung to submit the records to the court for an in camera review.

After completing its review of the records, the district court released all of the records to the parties. Shortly afterward, respondent submitted a written proffer from his expert witness, Maureen Hackett, M.D., to the district court. In response, the state moved the district court in limine "to suppress any testimony or documents related to the alleged victim's prior criminal history, his sexual history, and psychiatric counseling records."

At a hearing on April 2, the district court stated that "there will not be any mention made of the victim's juvenile conviction for criminal sexual conduct." The district court further stated:

> I indicated to defense counsel that if they wanted to talk in any way about the victim's past sexual history, that based upon the [c]ourt's own review of case law, that they would need to demonstrate clearly—and I don't use that word very often—but clearly specific similar behavior that the victim demonstrated in the past and somehow how that's similar to this behavior being present at the time of the alleged sexual assault. And having reviewed in camera at least the—Dr. [Jung's] records at some considerable length, I don't know how they could do that, because I don't think that that jumps out of the records.
>
> So as far as the actual sexual history of the victim goes, I'm not sure, in connection with trying to prove any facts, based upon that, that we're going to get there. It's not to say that we couldn't get there; it's just to say that that's the standard you're going to have to meet.

Finally, the district court determined that

> the victim's mental health issues are fair game. And I know there's going to be expert testimony about that, and we're going to follow the procedure in Rule 412 of the Rules of Evidence concerning a proffer outside the presence of the jury of Dr. Hackett's testimony . . . .
>
> Dr. Hackett cannot testify about the State's charging decision in this case, nor can Dr. Hackett testify about the . . . specifics of the sexual behavior, except to the extent that it's necessary and they become a basis of foundation for her opinion. . . .
>
> I'm allowing her to testify because I think that given the nature of the treatment that the victim has received—and I've reviewed the notes of that treatment in my in-camera review—is that there may be issues concerning his ability to . . . testify. And as to the specific charges involved in this case, I think there are important issues concerning the victim's credibility that are a consequence of the conditions, his mental health conditions, for which he's being treated.

After the district court made its rulings, the prosecutor summarized the state's objection to the district court's ruling, stating in part:

> In addition, defense counsel has already indicated that they would intend to inquire about the basis for the opinion, and some of the things that they would intend to inquire about of either Dr. Hackett or from the victim — they were unclear in their email of March 26th — that they would inquire into statements regarding pornography, statements regarding sexual fantasies, statements regarding sexual inappropriateness and deviance, statements regarding sexual convictions.
>
> Now the [c]ourt has ruled that [defense counsel] can't inquire into sexual convictions, but the [c]ourt was willing to let [defense counsel] inquire into any of those behaviors if they formed the basis for the doctor's opinion, which also, when we're talking about the prior sexual conduct, would not—there's nothing in there that would overwhelm the bar of Rule 412. I understand the [c]ourt's position that apparently

> 412 is not written for situations where the victim is a sex offender as well, but there are no allowances for that . . . under the rule.

The district court did not comment on the prosecutor's summary.

The state appealed the district court's April 2 pretrial rulings under Minn. R. Crim. P. 28.04. On May 2, the district court ordered the state to pay $1,400 in expert witness fees to Dr. Hackett after her testimony was cancelled due to the state's filing of the pretrial appeal. The state appealed the order, and this court consolidated the appeals.

D E C I S I O N

The state may appeal "any pretrial order" if it can establish that "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subds. 1(1), 2(1). The state must show "clearly and unequivocally" that the district court's decision "will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Rambahal*, 751 N.W.2d 84, 89 (Minn. 2008) (quotation omitted). "Critical impact is a threshold issue and in the absence of critical impact [this court] will not review a pretrial order." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quotation omitted). "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

As an initial matter, we note that this case is ripe for review. For appellate review, a case must "present a fully developed substantive issue ripe for decision." *State v.*

Jennings, 487 N.W.2d 536, 538 (Minn. App. 1992), *review denied* (Minn. Sept. 29, 1992). The state may not "premise critical impact on a series of evidentiary rulings that may or may not follow that ruling." *State v. Jones*, 518 N.W.2d 67, 70 (Minn. App. 1994), *review denied* (Minn. July 27, 1994). While the district court deferred its decision about the specific aspects of Dr. Hackett's testimony that it would allow, it determined that it would permit Dr. Hackett to testify about S.D.'s sexual and mental health history as foundation for her expert testimony. In addition, the state has no practical remedy other than to appeal the district court's pretrial rulings at this stage in the case because it must file an appeal from an evidentiary ruling before the jury is sworn or it will be barred from appealing the issues by double jeopardy. *See State v. Rhines*, 435 N.W.2d 542, 544 (Minn. App. 1989), *review denied* (Minn. Mar. 17, 1989).

I. The district court's pretrial orders have a critical impact on this case's outcome.

The state argues that two of the district court's pretrial rulings will have a critical impact on its ability to prosecute respondent: (1) the district court's decision to allow respondent to elicit testimony about S.D.'s prior sexual conduct, and (2) the district court's order allowing Dr. Hackett to testify about S.D.'s prior sexual conduct and mental illnesses. The critical-impact requirement is "a demanding standard" that "requires the [s]tate to show that the ruling significantly reduces the likelihood of a successful prosecution." *Rambahal*, 751 N.W.2d at 89 (quotation omitted). "Whether suppression of a particular piece of evidence will significantly reduce the likelihood of a successful prosecution depends in large part on the nature of the state's evidence against the

accused." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). The critical-impact standard applies to both pretrial suppression orders and pretrial admission orders. *State v. Skapyak*, 702 N.W.2d 331, 335 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005) (citing *State v. Barsness*, 446 N.W.2d 666 (Minn. App. 1989), *rev'd mem.*, 473 N.W.2d 828 (Minn. 1990)).

A. S.D.'s prior sexual conduct.

The state argues that testimony about S.D.'s prior sexual conduct will have a critical impact on its ability to prosecute respondent because S.D. was the only witness and his credibility will be a central issue at trial. While the district court ruled that S.D.'s prior conviction for criminal sexual conduct was inadmissible, the district court determined that S.D.'s prior sexual history could be admissible if respondent demonstrated "clearly specific similar behavior," and that Dr. Hackett could testify about it as foundation for her expert testimony.

The state's argument has merit. S.D. and respondent were the only people present when the incident occurred and the state's case depends primarily on S.D.'s testimony. The admission of evidence of a witness's prior sexual conduct is highly prejudicial. *See State v. Crims*, 540 N.W.2d 860, 869 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). The admission of evidence of S.D.'s prior sexual history, which includes his own sexual abuse of his younger siblings, would negatively affect his credibility. *See State v. Zais*, 805 N.W.2d 32, 36 (Minn. 2011) (concluding that excluding the testimony of the defendant's wife would have a critical impact on the state's prosecution because the defendant's "wife was the only eyewitness to [the defendant's] conduct, and her

testimony bears directly on whether the [s]tate can establish the elements of disorderly conduct"). If allowed, evidence of S.D.'s prior sexual conduct would have a critical impact on the state's ability to prosecute respondent.

B. Dr. Hackett's testimony.

The state also contends that the district court's decision to allow Dr. Hackett to testify about S.D.'s past sexual conduct and mental illness will have a critical impact on the prosecution's case. This argument also has merit. An expert's testimony can be very influential to a jury. *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) ("In most cases, even though an expert's testimony may arguably provide the jury with potentially useful information, the possibility that the jury may be unduly influenced by an expert's opinion mitigates against admission."). Here, although the district court deferred a decision about the specific content of Dr. Hackett's testimony until after a proffer had been held out of the presence of the jury, the district court specifically stated that S.D.'s mental health could be addressed and that Dr. Hackett could discuss specifics of S.D.'s prior sexual history as foundation for her testimony. Because Dr. Hackett's testimony is founded on the relationship between S.D.'s prior sexual history and his mental illness, her testimony would affect S.D.'s credibility and, thus, have a critical impact on the case.

Accordingly, we conclude that the state has met the "threshold" critical-impact standard.

II. The district court abused its discretion by permitting evidence of S.D.'s prior sexual history.

The state argues that the district court abused its discretion by allowing testimony about S.D.'s prior sexual conduct. In Minnesota, evidence of a victim's prior sexual conduct generally "shall not be admitted nor shall any reference to such conduct be made in the presence of the jury." Minn. R. Evid. 412(1); Minn. Stat. § 609.347, subd. 3 (2010) (the rape-shield statute). The rape-shield statute and rule 412 provide that this evidence is only admissible "if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature" and (1) if the defendant is asserting a consent defense, or (2) if the state's case "includes evidence of semen, pregnancy, or disease at the time of the incident." *Id.*; *see* Minn. R. Evid. 403. However, Minnesota appellate courts have recognized that this evidence is also admissible "in all cases in which admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986). This includes "[a]ny evidence tending to establish a predisposition to fabricate a charge of rape . . . unless its potential for unfair prejudice outweighs its probative value." *State v. Kroshus*, 447 N.W.2d 203, 204 (Minn. App. 1989) (citing *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982)), *review denied* (Minn. Dec. 20, 1989). Absent special circumstances, evidence of a victim's prior sexual history will not survive the rule 403 balancing test. *Crims*, 540 N.W.2d at 868. Special circumstances "include situations in which the evidence explains a physical fact in issue

at trial, suggests bias or ulterior motive, or establishes a pattern of behavior *clearly* similar to the conduct at issue." *Id.*

Here, the district court excluded any mention of S.D.'s conviction for criminal sexual conduct but stated that if the defense "wanted to talk in any way about the victim's past sexual history . . . they would need to demonstrate . . . clearly specific similar behavior that the victim demonstrated in the past." In addition, the district court determined that Dr. Hackett could testify about S.D.'s sexual history as foundation for her expert opinion.

We first note that there is no exception to rule 412 and the rape-shield statute for victims who are sex offenders; thus, they apply to S.D. in this matter. Applying rule 412 and the rape-shield statute here, all evidence of S.D.'s prior sexual conduct must be excluded, without regard for his status as a sex offender, unless an exception applies and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Respondent is not asserting a consent defense, and the state's case does not include evidence of semen, pregnancy, or disease. While the theory of respondent's defense is that S.D. fabricated the incident and evidence of prior sexual conduct may be admissible if it "tend[s] to establish a predisposition to fabricate a charge of rape," there is nothing in the record to indicate that S.D. has ever previously fabricated a claim of sexual assault or that his past sexual conduct is at all similar to the conduct at issue here.

See Kroshus, 447 N.W.2d at 204. We conclude that the district court abused its discretion by finding that evidence of S.D.'s prior sexual conduct was admissible.[1]

III. The district court abused its discretion by permitting testimony by respondent's expert witness about S.D.'s mental-health history.

The state argues that the district court abused its discretion by allowing testimony from Dr. Hackett. Traditionally, admission of expert witness testimony in criminal cases is limited because "[a]n expert with special knowledge has the potential to influence a jury unduly." *State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997). Expert testimony is generally admissible if it assists the factfinder, has a reasonable basis, is relevant, and its probative value outweighs its prejudicial effect. *State v. Jensen*, 482 N.W.2d 238, 239 (Minn. App. 1992), *review denied* (Minn. May 15, 1992); *see* Minn. R. Evid. 702. But because determining the credibility of witnesses is a function for the jury, "[a]n expert witness may not testify as to the credibility of a specific witness, though the expert may be able to testify generally as to certain psychological or physiological conditions that may affect credibility, if such testimony is beyond the knowledge and experience of an average jury." *State v. Reese*, 692 N.W.2d 736, 741 (Minn. 2005).

The state first argues that Dr. Hackett's testimony about mental illness will not be helpful to the jury because mental illness is not an element of the crime. An expert may testify if their testimony will be helpful to the trier of fact. *Id.* at 740. "[I]f the subject of

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[1] We also note that respondent did not follow the procedure set forth in the rape-shield statute and rule 412 to submit prior-sexual-conduct evidence. Minn. Stat. § 609.347, subd. 3 (2010) (requiring the defendant to first file a motion "setting out with particularity the offer of proof of the evidence" he intends to offer); Minn. R. Evid. 412(2) (same).

the testimony is within the knowledge or experience of a lay jury and the expert would not be able to deepen the jury's understanding, then the testimony does not meet the helpfulness requirement and is not admissible." *Id.*

In explaining why it would permit Dr. Hackett's limited testimony, the district court stated that "[m]ental illness is an element that the State's going to have to prove." Respondent was charged with fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(d) (2010). Under that statute, "[a] person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree" when "the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." Minn. Stat. § 609.345, subd. 1(d) (2010). A person is mentally impaired if he or she, "as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact." Minn. Stat. § 609.341, subd. 6 (2010). The district court accurately stated that the state must prove that respondent knew or had reason to know that S.D. is mentally impaired. While Dr. Hackett's testimony might be relevant to the issue of whether S.D. is mentally impaired, respondent concedes that S.D.'s mental impairment is not in dispute. It does appear from the proffer that Dr. Hackett's testimony might be relevant regarding the issue of whether S.D. is competent to testify. However, the foundation for such an opinion is problematic in this case because Dr. Hackett has not examined S.D. and is relying solely on S.D.'s psychologist's treatment notes.

We further conclude that the district court abused its discretion when it determined that Dr. Hackett's testimony about S.D.'s mental-health issues could be helpful to the jury to understand how he perceives things due to those issues. But there is nothing in Dr. Hackett's proffer that discusses S.D.'s alleged difficulties in perception. In the proffer, Dr. Hackett asserts that S.D.'s diagnosis of personality disorder, not otherwise specified, indicated "a combination of Antisocial Personality Disorder, Borderline Personality Disorder and Narcissistic Personality Disorder." As part of that diagnosis, Dr. Hackett asserts that S.D. engages in "deceitfulness, conning, lying, manipulations and taking advantage of others for his own gain" and "extreme attention-seeking behaviors." But after a careful review of S.D.'s treatment records, we do not find support in the records for Dr. Hackett's conclusions. Instead, the records indicate that, while S.D.'s psychologist observed some sexual-boundary issues, she primarily focused on S.D.'s ability to perform his day-to-day activities, including personal hygiene, adjustment to a group home, and attendance at work.

In addition, the probative value of Dr. Hackett's proffered testimony would be substantially outweighed by the danger of unfair prejudice. While the district court specifically stated that Dr. Hackett could not testify about "the ultimate issue whether or not somebody is truthful or not truthful," the proffer she submitted to the parties specifically states that S.D. fits certain diagnoses. This testimony is inadmissible because it is not general testimony about psychological conditions that may affect credibility. *See Reese*, 692 N.W.2d at 741.

Accordingly, we conclude that the district court abused its discretion by determining that Dr. Hackett's testimony was admissible.

IV. The district court abused its discretion by releasing S.D.'s treatment records.

In general, a witness's psychological records are protected from disclosure. Minn. Stat. § 595.02, subd. 1(g) (2010). However, a criminal defendant's constitutional right to a fair trial includes the right to present a defense. *State v. Wildenberg*, 573 N.W.2d 692, 697 (Minn. 1998) (citation omitted). To balance these two interests, Minnesota courts conduct an in camera review of a witness's confidential records before determining whether to disclose the records to the parties. *State v. Paradee*, 403 N.W.2d 640, 641 (Minn. 1987). A defendant requesting in camera review "must make at least some plausible showing that the information sought would be material and favorable to his defense." *State v. Burrell*, 697 N.W.2d 579, 605 (Minn. 2005) (quotation omitted). To demonstrate that a witness's confidential records are material and favorable to the defense, the defendant must go beyond mere "argument and conjecture." *State v. Evans*, 756 N.W.2d 854, 873 (Minn. 2008). And the request "must be reasonably specific." *State v. Lynch*, 443 N.W.2d 848, 852 (Minn. App. 1989), *review denied* (Minn. Sept. 15, 1989).

When conducting an in camera review, the district court must determine "what if any of the information in the records might help in the defense." *Paradee*, 403 N.W.2d at 642. In other words, the district court should disclose records that it determines are relevant to the case. *See Reese*, 692 N.W.2d at 742-43 (concluding that the district court did not err by refusing to release confidential records to the defendant's expert after in

camera review "because the expert could not properly base an opinion on them; i.e. the expert was limited to testifying about the effects of long-term drug use generally, not as it relates to [the victim] specifically"); *State v. Enger*, 539 N.W.2d 259, 262-63 (Minn. App. 1995) (concluding that the district court did not abuse its discretion by not releasing the victim's entire diary to the parties, stating that the district court "properly determined that the contested material failed to disclose information relevant to the fairness of the trial" and that there was no evidence that the victim "had ever previously fabricated sexual assault charges"), *review denied* (Minn. Dec. 20, 1995). The district court's decision whether or not to release confidential records after in camera review is reviewed for an abuse of discretion. *Reese*, 692 N.W.2d at 742-43.

Here, the district court released S.D.'s confidential treatment records to the parties in their entirety after an in camera review.[2] But our review of S.D.'s treatment records establishes that very little information in the records was relevant to this matter. While there is some discussion in the records about S.D.'s sexual-boundary issues, there is nothing to indicate that S.D. had previously fabricated similar allegations or engaged in similar behavior. Although the district court's release of the records cannot be undone, we conclude that the district court abused its discretion by releasing the records in their entirety to the parties.

[2] We note that the *Paradee* process was not properly followed in this matter. Respondent never made an initial showing—and the district court never found—that respondent had established that the records were material and favorable to his defense.

V. The district court abused its discretion when it awarded expert witness fees to respondent.

The state argues that the district court abused its discretion by awarding respondent expert witness fees. In civil cases, a district court may allow "such fees or compensation as may be just and reasonable" to "any witness [who] is summoned or sworn and examined as an expert in any profession or calling." Minn. Stat. § 357.25 (2010). This includes providing compensation for a witness's pretrial preparation time. *See Buscher v. Montag Dev., Inc.*, 770 N.W.2d 199, 209 (Minn. App. 2009) (upholding a district court's award of costs although no experts testified because no trial was held). However, in criminal cases, a district court may only order "travel and attendance" fees for the state's witnesses and "witnesses attending on behalf of any defendant represented by a public defender or an attorney performing public defense work." Minn. Stat. § 357.24 (2010). Here, the district court ordered the state to pay $1,400 in expert witness fees to Dr. Hackett for the day she was scheduled to testify at trial. But respondent was represented during the proceedings by private counsel. The district court abused its discretion by awarding expert witness fees to respondent.

VI. The state's motion to strike is granted.

The state requests an order striking several pages of respondent's appendix, arguing that the documents are not part of the record on appeal. Minn. R. Crim. P. 28.02, subd. 8, provides that "[t]he record on appeal consists of the papers filed in the district court, the offered exhibits, and the transcript of the proceedings, if any." This court may

strike portions of a party's appendix that are not part of the record on appeal. *State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003).

The state challenges certain documents that are included in respondent's appendix, including correspondence between the court and parties regarding the status of the district court's in camera review of the medical records and Dr. Hackett's curriculum vitae. Some of the challenged pages are present in the district court file, but pages 70, 71, 72, part of 74, 75, 76, and 78 are not present in the file.

The state also argues that part VI of respondent's brief should be stricken. In part VI of his brief, respondent requests "a ruling that [the state], no matter the outcome of the instant appellate litigation, not be permitted to bring a competing expert to trial." This argument is outside the scope of our review because respondent is not asking this court to review a district court decision. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."). Respondent did not file a cross-appeal. *See* Minn. R. Crim. P. 28.04, subd. 3.

Accordingly, the state's motion to strike part VI of respondent's brief, and the seven pages of respondent's appendix that are not part of the record, is granted.

Reversed and remanded; motion granted.