STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0430

State of Minnesota,
Respondent,

vs.

RaSheed Dupree,
Appellant.

Filed September 30, 2008
Affirmed
Huspeni, Judge[*]

Ramsey County District Court
File No. K1-06-487

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 560, St. Paul, MN 55102 (for respondent)

Mary M. McMahon, Special Assistant Sate Public Defender, McMahon & Associates Criminal Defense, Suite 110, 670 Commerce Drive, Woodbury, MN 55125 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Huspeni, Judge.

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

U N P U B L I S H E D O P I N I O N

HUSPENI, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that trial counsel was ineffective for failing to timely file a motion under Minn. R. Evid. 412 to admit evidence of the victim's previous sexual conduct. We affirm.

FACTS

At approximately 5:00 a.m. on October 4, 2005,[1] Officer Curtis Paipoovong responded to a dispatch regarding complaining witness J.C.'s call to 911. When Officer Paipoovong arrived, he found J.C. sitting in the parking lot of her apartment building. Crying and screaming, J.C. led Officer Paipoovong back to her apartment, where she informed him that she had been raped by four men. One of these men was unknown to J.C., but the other three—Sean Doss, Tony Clausen, and appellant RaSheed Dupree—were social acquaintances of hers, and Clausen and Dupree lived in her apartment building. Although largely unable to describe the incident because she could not remember most of it, J.C. told Officer Paipoovong that she had invited the four men in for a "drinking party" when they knocked on her door at 4:00 a.m. and that, at some point, one of the men "basically pulled down her pants and raped her." Officer Paipoovong observed no signs of a struggle in her apartment.

[1] The record refers to the incident having occurred on the evening of October 4, which apparently refers to a span of time beginning late on the night of October 3 and continuing into the early morning of October 4. For the sake of clarity and consistency, we will refer to the whole period of time as "the evening of October 3."

An ambulance took J.C. to the hospital for medical attention and evidence collection. At the hospital, she was still visibly upset but had calmed down to the point that she could answer the examining nurse's questions. J.C. told the nurse that three of the four men held her wrists to the floor while the fourth inserted his penis into her vagina. When asked if her rectum had been penetrated, J.C. responded, "No." J.C. complained of vaginal pain, but the nurse did not observe any trauma to her vagina or to the exterior of her rectal area; the nurse did, however, observe some abrasions and bruising on J.C.'s wrists and forearms. J.C. also identified Dupree as the rapist to Officer Paipoovong, who had accompanied her to the hospital, recalling seeing Dupree's face when she looked up. Subsequent DNA testing confirmed the presence of Dupree's sperm in J.C.'s vagina.

Within several hours of being released, J.C. returned to the hospital after noticing rectal pain and bleeding during a bowel movement. J.C. told the doctor that she believed "something was inserted into her rectum" during the early morning's sexual assault. A focused interior examination of J.C.'s rectum revealed inflammation of the rectal lining, anal fissures, and numerous tiny lacerations, which the doctor believed were caused by a foreign object, possibly a hairbrush. After additional investigation, Dupree and Doss were each charged with two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(f)(i) (accomplice using force or coercion), 1(e)(i) (causing injury, use of force or coercion) (2004). Both men were charged as principals and as having aided and abetted the other, Minn. Stat. § 609.05 (2004), but were prosecuted separately.

Only two of the witnesses at Dupree's trial were present during the incident itself: J.C. and Dupree, who testified in his own defense. And each described the events of the evening of October 3 very differently from the other.[2]

According to J.C.'s testimony, she initially went to Clausen's apartment to socialize and drink, arriving shortly after 10:00 p.m. At some point, she and Clausen went to Dupree's apartment, where the unknown man was already present. Doss arrived shortly after. Around midnight, after a neighbor complained about noise, J.C. invited the group to continue drinking at her apartment. All four men joined J.C., but the unknown fourth person left a short time later. Clausen started showing a pornographic DVD; J.C. stopped the movie and sat down in her recliner. She noticed Dupree get up and walk around. According to J.C.: "The next thing I know, I felt the chair being flipped over . . . [and] felt my hand get pulled behind my back." Face down with her head against the back of the chair, J.C. heard Dupree say, "This is how she likes it," while tying her hands behind her back with his t-shirt. When J.C. was able to break free of the t-shirt, she felt arms holding her down and knees on the back of hers, pinning her to the floor, and felt her pants and underwear being removed followed by a person penetrating her vagina. J.C. testified both that (1) she was unable to tell who the penetrator was and could neither see nor hear anyone else and (2) that she caught a brief glimpse of Dupree's face in the mirror. Dupree and Doss then left; Clausen asked J.C. if she was all right, to which she

[2] In light of the fragmented nature of the record due to the district court's misapplication of Minn. R. Evid. 412, discussed below, we have attempted to reconstruct Dupree's version of the events based on our review of the entire record. In doing so, we have taken into account Dupree's offer of proof and trial counsel's representations to the district court in addition to Dupree's actual testimony.

replied that she just wanted to be left alone. When Clausen left, J.C. dressed, grabbed her cell phone, ran out of her apartment, called 911, and waited for the police to arrive. By J.C.'s estimation, the time at this point would have been 12:30 a.m.

By contrast, Dupree admitted to having sexual intercourse with J.C. on the evening of October 3, but claimed that it was consensual and that he and J.C. had previously engaged in consensual intercourse on three occasions during the summer and early fall of 2005. Dupree asserted that all of these previous sexual encounters were, like the intercourse here, fueled by his and J.C.'s mutual consumption of alcohol. Moreover, Dupree acknowledged holding J.C.'s hands behind her back while penetrating her but claimed that J.C. had informed him that she enjoyed such bondage and that they had engaged in consensual "rough sex" during the previous sexual encounters.

According to Dupree, he had been drinking beer in his apartment with Doss, Clausen, and a couple when J.C. arrived with more beer and a bottle of vodka sometime between 11:00 p.m. and 12:30 a.m. When the alcohol ran out an hour or so later, J.C. invited everyone to continue drinking at her apartment. Dupree, Doss, and Clausen followed, while the couple remained behind in Dupree's apartment. Once at J.C.'s apartment, Clausen, Doss, and Dupree continued drinking until everyone present was drunk. At some point, Clausen left to retrieve the pornographic movie from his apartment. While Clausen was gone, Dupree contends that he, Doss, and J.C. had a consensual three-way sexual encounter during which Dupree penetrated J.C. from behind while she performed oral sex on Doss. Dupree later returned to his own apartment but subsequently returned to J.C.'s apartment and observed Doss "doing really stupid stuff"

to J.C. without her knowledge, such as inserting his fingers into J.C.'s rectum and vagina with excessive force and pouring shampoo on her intimate areas. Dupree, however, maintained that he did not participate and in fact scolded Doss for taking advantage of J.C. after she facilitated their sexual adventure.

At a pretrial hearing in March 2006, Dupree's first public defender advised the district court that she would be filing a "rule 412 motion." *See* Minn. R. Evid. 412 (excluding evidence of rape victim's previous sexual conduct absent court order and providing procedure for obtaining one). Counsel failed to do so, however. The public defender who replaced her several months later also failed to file a rule 412 motion, apparently relying on Dupree's information that her predecessor had "made a record that [Dupree] was going to bring up a consent defense, and that he and [J.C.] had previous sexual contact." Consequently, the judge who was eventually assigned to Dupree's case was unaware that Dupree intended to introduce prior-sexual-conduct evidence until the trial was already underway. The issue was first raised during an off-the-record conference on unrelated objections made during the state's direct examination of J.C. Despite the untimely introduction of the issue of prior sexual conduct between J.C. and Dupree, the district court held a hearing outside the presence of the jury to enable Dupree to make an offer of proof on his prior sexual encounters with J.C.

The district court subsequently permitted Dupree to cross-examine J.C. about whether she had ever previously consented to sexual contact with him but prohibited any inquiry into "sexual positions, hair pulling, hands behind her back, rough sex, oral sex, [or] other sexual partners" and further prohibited Dupree from inquiring into J.C.'s

alcohol consumption during those encounters. The district court's ruling, however, was addressed not only to the three sexual encounters Dupree claimed that he had with J.C. during the months leading up to the offense, but also to any sexual conduct between J.C. and Doss that occurred on the evening of October 3. And because defense counsel had alluded to the three-way sexual encounter during Dupree's opening statement, the district court struck the opening statement in its entirety. *See* Minn. R. Evid. 412(1) (prohibiting "any reference to such conduct be[ing] made in the presence of the jury, except by court order under the procedure provided in rule 412").

During cross-examination of Dupree, the state attempted to impeach him with statements he had made during interviews with officers investigating the rape. These statements included Dupree's descriptions of the three-way encounter between him, J.C., and Doss, and also included descriptions of Dupree walking in on Doss's later sexual conduct with J.C. And because these statements fell within the scope of the district court's original ruling prohibiting such evidence, the district court concluded that the state's line of inquiry had opened the door for admission of any evidence of sexual conduct on the evening of October 3. Brief redirect examination followed.

Dupree moved for a mistrial based on his inability to present evidence of the circumstances surrounding prior consensual acts between J.C. and himself; the motion was denied. The district court also refused to reinstate the opening statement, stating that it was stricken as punishment for counsel's "misconduct" in alluding to the three-way encounter without a court order. When the jury subsequently advised that it was "deadlocked and unable to return a unanimous verdict," Dupree again moved for a

mistrial, arguing that he was substantially prejudiced when the state was allowed to cross-examine him on a portion of the court's order that was lifted. Again the motion was denied; the district court instead instructed the jury to continue to try to reach a decision. Following several more hours of deliberation, the jury returned a guilty verdict on the aided-by-an-accomplice count. This appeal followed.[3]

D E C I S I O N

Dupree claims that he was denied the effective assistance of counsel because his attorney failed to timely file a rule 412 motion. When considering a claim of ineffective assistance of counsel, we apply the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). Under the "performance" prong, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* (quoting *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064). And under the "prejudice" prong, the defendant must demonstrate the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). The defendant has the burden of proof on both prongs, *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007), and cannot succeed if the showing on either prong is insufficient. *Gates v. State*,

[3] After filing this appeal, Dupree also filed a petition for postconviction relief alleging ineffective assistance of counsel. This court stayed the appeal pending disposition of the petition. At the postconviction hearing, however, Dupree was unable to proceed because his first attorney was in the hospital. Because Dupree believed that the record contained sufficient documentation to pursue his ineffective-assistance claim on direct appeal, the district court granted him leave to withdraw his petition without prejudice, and we dissolved the stay.

398 N.W.2d 558, 561 (Minn. 1987); *see also Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. We review claims of ineffective assistance de novo. *State v. Edwards*, 736 N.W.2d 334, 338 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007).

In prosecutions for criminal sexual conduct, Minn. R. Evid. 412 generally excludes evidence of the victim's previous sexual conduct. Although such evidence may be admissible when, as here, the defendant raises consent as a defense, Minn. R. Evid. 412(1)(A), the defendant must first obtain a court order under the procedure provided in Minn. R. Evid. 412. Without a court order, the defendant is prohibited from even referring to evidence of the victim's previous sexual conduct in the jury's presence. Minn. R. Evid. 412(1). And absent "good cause shown," the procedure for obtaining the necessary court order requires the defendant to move for the evidence's admission before trial. Minn. R. Evid. 412(2)(A).

Given that consent was his sole defense at trial, Dupree claims that his attorney "did not have a valid reason" for not filing a rule 412 motion seeking admission of evidence of J.C.'s previous sexual conduct. He argues that trial counsel's failure to do so (1) prompted the district court to strike the defense's opening statement in its entirety; (2) compromised Dupree's testimony on direct examination by confusing him as to the permissible scope of his answers; and (3) hindered his ability to impeach J.C.'s version of the events by preventing inquiry into the nature of the alleged previous sexual encounters. Our analysis will be informed by identifying which incidents of alleged sexual conduct are implicated by each argument.

Dupree sought to introduce evidence that he and J.C. had engaged in consensual sexual intercourse on three occasions during the months leading up to the evening of October 3, 2005—once in June, once in July, and once in September. This evidence is relevant only to Dupree's argument regarding his ability to inquire into alleged previous sexual encounters between himself and J.C. But our thorough review of the record convinces us that Dupree is unable to satisfy the prejudice prong of the *Strickland* test based on trial counsel's failure to move before trial for admission of this evidence. The district court likely could have excluded incidents of prior sexual contact between J.C. and Dupree based solely on counsel's failure to comply with the procedural requirements of rule 412. *See State v. Larson*, 389 N.W.2d 872, 876 (Minn. 1986) (holding that district court did not abuse its discretion by prohibiting cross-examination into victim's past sexual relationship with defendant when the defendant had failed to comply with motion and offer-of-proof requirements);[4] *see also Michigan v. Lucas*, 500 U.S. 145, 152-53, 111 S. Ct. 1743, 1748 (1991) ("Failure to comply with [notice-and-hearing requirements of state rape-shield law] may in some cases justify even the severe sanction of preclusion."). The district court chose, instead, to permit Dupree to make the offer of proof contemplated by rule 412 even though trial was underway. Minn. R. Evid. 412(2)(B) (directing the district court to order a hearing outside the jury's presence where the accused is to make a "full presentation of the offer of proof"). And the district court ultimately permitted Dupree to introduce evidence of his prior sexual conduct with J.C. to

[4] Although the issue in *Larson* was the procedural requirements of Minn. Stat. § 609.347 (1984), those requirements were incorporated into rule 412. Minn. R. Evid. 412 1989 comm. cmt.

the same extent that such evidence would have been permitted under a rule 412 motion. *Cf.* Minn. R. Evid. 412(2)(C) (requiring an "order stating the extent to which such evidence is admissible"). In excluding the specific details of those encounters, such as the particular sex acts performed and whether alcohol was involved, the district court applied the same standard that it would have following a hearing on a timely filed motion. *See* Minn. R. Evid. 412(1), (2)(C) (permitting sexual-history evidence to be admitted only if district court finds that the probative value is not substantially outweighed by its inflammatory or prejudicial nature). Thus, with respect to J.C.'s sexual conduct during the alleged June, July, and September encounters, Dupree effectively received a full rule 412 hearing in the midst of trial despite counsel's failure to file a motion before trial. Dupree was not prejudiced because counsel successfully and adeptly argued for admission of the very evidence that would have been the subject of a rule 412 motion, and that evidence was as fully received as it would have been had the motion been filed.

A potentially more troubling issue could arise through Dupree's attempt to introduce evidence regarding other events he alleges also occurred on the evening of October 3, 2005. According to J.C.'s testimony, only one incident of sexual conduct occurred, in which several men forcibly held her down while Dupree penetrated her from behind. Dupree, however, alleged that two incidents of sexual conduct occurred on that evening: first, a consensual three-way encounter among himself, J.C., and Doss; second, an incident several hours later in which Dupree observed Doss digitally penetrating J.C. with excessive vigor and pouring shampoo on her intimate areas. As already noted,

Dupree was permitted to fully present evidence of his version of the first incident, and he was also permitted to fully present evidence that would have been subject to a rule 412 motion: the previous sexual relationship between himself and J.C. The jury heard the he said/she said accounts of the incident involving Dupree, J.C., and Doss. That incident was either consensual or it was not, depending upon which witness was more credible.

To the extent that Dupree complains about the exclusion of evidence of the alleged second incident between a non-responsive J.C. and Doss, that issue has not been properly preserved for our review on appeal. Dupree frames the entirety of his arguments on appeal solely on the absence of a rule 412 motion. But we are unable to fit any of the conduct occurring on the night of October 3 within the framework of rule 412.

Rule 412 is designed to limit evidence of the victim's sexual history because whether the victim consented to unrelated sexual conduct in the past is typically irrelevant to whether the victim consented to the particular sexual conduct at issue in a trial for rape. *State v. Davis*, 546 N.W.2d 30, 34 (Minn. App. 1996), *review denied* (Minn. May 21, 1996); *State v. Hagen*, 391 N.W.2d 888, 891 (Minn. App. 1986), *review denied* (Minn. Oct. 17, 1986). Even the most promiscuous victim can later say "no" or withdraw consent. *See State v. Crims*, 540 N.W.2d 860, 865 (Minn. App. 1995) (holding that initially consensual encounter with prostitute could subsequently become rape mid-coitus when defendant forcibly continued intercourse after consent was withdrawn), *review denied* (Minn. Jan. 23, 1996). Rule 412 is not, however, designed to bar evidence of the victim's sexual conduct when that conduct is "directly relevant to negate the act with which the defendant is charged." *Hagen*, 391 N.W.2d at 891.

As already recognized, this case involves the classic credibility determination that juries are so often called upon to decide. Evidence that J.C. had consented to sexual intercourse with Dupree in June, July, and September is evidence of "previous sexual conduct" that could support a reasonable inference that she also consented to sexual conduct with him on the evening of October 3. Minn. R. Evid. 412(1)(A) & 1989 comm. cmt. But we are unable to conclude that evidence of J.C.'s sexual conduct that would present the jury with an alternate version of the events occurring on October 3 is conduct coming within the scope of rule 412. Thus, Dupree's counsel had no reason to file a rule 412 motion seeking admission of any alleged October 3 conduct. We therefore conclude that Dupree cannot satisfy the performance prong of the *Strickland* test based on trial counsel's failure to file a motion with respect to evidence of alleged conduct of J.C. occurring on October 3.[5] And having so concluded, there is no need to address the prejudice prong of the *Strickland* test.

In his pro se brief, Dupree raises an additional ineffective-assistance claim criticizing the scope of trial counsel's redirect examination of him. Counsel's decisions regarding the scope of redirect examination, however, are matters of trial strategy. *See*

[5] Despite any district court error in applying rule 412 to exclude this evidence, Dupree does not challenge any erroneous rulings of the district court. Rather, as noted, the only issue on appeal is an ineffective-assistance-of-counsel claim based on trial counsel's failure to comply with the procedural requirements of rule 412. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not briefed on appeal are deemed waived), *review denied* (Minn. Aug. 5, 1997). Because all parties involved appear to assume that Minn. R. Evid. 412 applied to J.C.'s sexual conduct on the evening of October 3, no attempt was made at trial to develop a record relating to the non-applicability of the rule to that evidence or to the relevancy of such evidence, nor has any issue been raised on appeal regarding that matter.

State v. Voorhees, 596 N.W.2d 241, 255 (Minn. 1999) (scope of cross-examination). And we do not generally review challenges to counsel's trial strategy in evaluating the objective reasonableness of counsel's performance. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005). Moreover, we are unable to determine on this record whether Dupree was prejudiced by the brevity of counsel's redirect examination.

Dupree's pro se brief also raises a chain-of-custody challenge to the admission of the hairbrush allegedly inserted into J.C.'s rectum and the t-shirt used to bind her hands. An item's chain of custody, however, is purely foundational. *See generally State v. Hager*, 325 N.W.2d 43, 44 (Minn. 1982) (discussing basis and application of chain-of-custody rules). Essentially, a chain of custody authenticates the evidence by establishing that it is the thing it purports to be. *State v. Bellikka*, 490 N.W.2d 660, 663 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). But it is unnecessary to establish a chain of custody when an item's appearance is distinctive and can be recognized by a witness as the thing it purports to be. *Id.* Here, J.C. testified that she recognized the hairbrush as hers and the t-shirt as the one she found in her apartment. Thus, the district court did not abuse its discretion in concluding that the state had established an adequate foundation for those items.

Finally, Dupree argues in his pro se brief that a juror was placed in a dilemma because of a planned business meeting in Seattle. Dupree has failed, however, to demonstrate how the juror's dilemma was prejudicial.

Affirmed.