This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1502

State of Minnesota,
Respondent,

vs.

Jeffrey Michael Murdent,
Appellant.

Filed October 31, 2022
Affirmed
Bryan, Judge

Anoka County District Court
File No. 02-CR-18-3956

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Bjorkman, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this appeal from the final judgments of conviction for third-degree criminal sexual conduct, appellant argues that the district court erred when it decided to exclude evidence of the victim's past sexual conduct. In addition, appellant argues that the district

court erred when it decided to admit evidence of appellant's prior acts towards another individual. We affirm the convictions because the district court did not abuse its discretion.

FACTS

Respondent State of Minnesota charged appellant Jeffrey Michael Murdent, an inmate at the Minnesota Correctional Facility at Lino Lakes (MCF-Lino Lakes), with three[1] counts of third-degree criminal sexual conduct against his cellmate, K.L.M., in violation of Minnesota Statutes section 609.344, subdivision 1(c) (2016). According to the amended complaint, in the two days after Murdent and K.L.M. became cellmates, Murdent sexually assaulted K.L.M. three times. K.L.M. promptly reported the sexual assaults and underwent a sexual assault examination, which included collection of DNA samples from semen recovered on K.L.M.'s penis, scrotum, and anus. The semen from K.L.M.'s penis was his own. The semen from K.L.M.'s scrotum was a mixture of two people's semen: Murdent and an unidentified male. The semen from K.L.M.'s rectum was a mixture from two or more persons: Murdent and at least one unidentified male.

Prior to trial, the state served notice that it intended to introduce evidence regarding Murdent's prior acts involving another inmate. Murdent objected and moved in limine to exclude this evidence. On June 1, 2021, the district court heard testimony regarding the issue. The state offered two witnesses: Murdent's former cellmate, A.R., and a clinical program therapist from MCF-Lino Lakes. A.R. testified that during the two weeks that he shared a cell with Murdent, Murdent tried to pressure him to have sex, including making

[1] The state initially charged Murdent with two offenses but amended its complaint on the first day of trial, adding a third charge.

requests that Murdent perform oral sex on A.R. and that they watch each other masturbate. A.R. further testified that Murdent offered A.R. a pair of shoes in exchange for sexual acts, and A.R. felt threatened by Murdent because Murdent blocked the entryway of the cell while making his demands. Although he stated that he never engaged in sexual acts with Murdent, A.R. believed Murdent was "going to lash out and attack [him], possibly kill [him]." The district court found that the state had "proven by clear and convincing evidence that [A.R.] felt as though he was being threatened to carry out or perform sexual actions or allow Mr. Murdent to perform sexual actions on him." The district court, however, reserved an admissibility ruling because it had not determined yet "[w]hether or not that incident or those incidents even shows a common scheme or plan."

Murdent also moved in limine to admit "testimony that the alleged victim may have had other sexual partners under Rule of Evidence 412(1)(B)." Murdent argued that the "evidence is probative to the issue of consent and the alleged victim's credibility as he denies having sexual contact with men." Murdent clarified that he was "not implying a particular person" and "not accusing [K.L.M.] of a particular act." The state argued that its forensic scientist would testify that the DNA results "indicate[] that no conclusions can be made regarding an additional contributor to the mixture" because it could have transferred from other inmates or Murdent and may not have been the result of sexual conduct. The district court denied Murdent's motion, concluding that the evidence was inadmissible under Minnesota Rules of Evidence 412 and 405:

> First, the Court notes that the State's forensic witness had stated that the presence of sperm cell fractions on K.L.M.'s scrotum from an unidentified male does not prove that K.L.M.

> was having consensual sex with other men. Rather, it is just as likely that the sperm cell fractions were found on K.L.M.'s scrotum through transfer because K.L.M. was living in very close quarters with men. As a result, the probative value of such evidence is negligible at best and is substantially outweighed by the inflammatory prejudicial nature of such evidence. The Court also notes that even if this evidence did not establish the possibility that K.L.M. lied about having sexual relationships with men, it would be inappropriate for such evidence to be used to conclude that K.L.M. must have lied about having non-consensual sex with Defendant. This type of evidence (under rule 405 of the Minn. R. of Evidence) is generally excluded character evidence of a specific incidence of conduct to attempt to demonstrate that the victim is not a believable witness.
>
> Second, for previous sexual conduct to be admissible it must tend to show a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. The mere fact that K.L.M. may have engaged in a same-sex consensual relationship is not evidence of a "common scheme or plan of similar sexual conduct," and is not probative of whether K.L.M. consented to have sex with Defendant.

The matter proceeded to a jury trial, and the Murdent did not dispute that he sexually penetrated K.L.M. The only issue for the jury was whether Murdent used force or coercion to accomplish the sexual penetration. K.L.M. testified that after only a few hours of Murdent being placed in the cell, Murdent stated that K.L.M. was attractive and tried kissing K.L.M. on the neck. K.L.M. testified that he told Murdent that he was not interested, but Murdent made another advance later that evening. When K.L.M. refused to take his clothes off, Murdent raised his voice and told him "to take [his] f-cking clothes off." In his testimony, K.L.M. explained that Murdent then forced anal and oral sex on him. K.L.M. did not resist or use the emergency alert system in his cell because he was fearful Murdent would hurt him before staff could respond. K.L.M. was also interviewed

by an investigator shortly after reporting the allegations. Portions of this interview were admitted, including K.L.M.'s statements that Murdent offered coffee in exchange for sexual favors. In addition, K.L.M. told the investigator that he is "not interested in guys, and I like females," and that he is "not like that" because "[i]t's just against [his] beliefs."

At the end of the state's case, the district court ruled on the other-act evidence:

> [A.R.] made it clear that, according to him, Mr. Murdent talked a lot about sex, was really persistent, made [A.R.] feel uncomfortable, offered him shoes, wanted to be engaged in watching each other masturbate, that he also felt he was blocked from the exit, felt that Mr. Murdent said that if Mr. Murdent went down for that instance so would the victim, [A.R.]. So it kind of shows a common scheme or plan.
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> . . . . In some ways one could argue that the fact that Mr. Murdent did not force himself on [A.R.] may actually be helpful to Mr. Murdent.
>
> But I think that the probative value of the prior here outweighs any prejudicial effect. And I will bring one other thing up for the record, and that is that [A.R.] testified that Mr. Murdent had offered him shoes to watch him masturbate, that he had – he being Mr. Murdent, offered him gifts in exchange for sexual favors.
>
> When [K.L.M.] testified, I'm not sure if it was his testimony or if it was the statement he gave to the correctional officer investigator, that Mr. Murdent would bring him coffee. And so I think that can be seen as well as part of the same motive of giving gifts for sexual favors. So that would certainly weigh towards allowing it in. . . . [S]o the Spriegl is going to be admissible. And [defense] can still, obviously, cross-examine [A.R.] as well.

Ultimately, the state never introduced A.R.'s testimony because Murdent testified about those interactions himself.

The jury found Murdent guilty of all three counts of criminal sexual conduct in the third degree. The district court sentenced Murdent to two concurrent sentences of 180 months' imprisonment for counts 1 and 2. Murdent appeals.

DECISION

Murdent asserts error in the district court's decision to exclude evidence concerning K.L.M.'s semen and the semen from unidentified persons other than Murdent. In addition, Murdent challenges the district court's decision to admit evidence of Murdent's conduct involving A.R.[2] Because the semen evidence does not meet the requirements of either of the two applicable exceptions, and because it had limited probative value, the district court did not abuse its discretion in excluding this evidence. In addition, because the evidence of Murdent's prior acts included specific behavior consistent with a common scheme or plan, the district court did not abuse its discretion in admitting that evidence.

I. Decision to Exclude Semen Evidence

The admission of evidence relating to a victim's prior sexual conduct in a criminal sexual conduct case is governed by rule and statute, commonly referred to as the rape shield rule. Under Minnesota Rule of Evidence 412 and Minnesota Statutes section 609.347, subdivision 3 (2020), evidence of prior sexual conduct of the victim "shall not be

[2] In a supplemental brief, Murdent raises claims of ineffective assistance, arguing that his counsel failed to more effectively argue for admission of the semen evidence, more effectively cross examine K.L.M., and seek admission of statements regarding K.L.M.'s credibility. These arguments are unavailing because Murdent does not include legal authority and because these concerns relate to trial strategy. *See State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002) (declining to address arguments in the absence of citations to legal authority); *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (concluding that matters of trial strategy cannot support claims of ineffective assistance).

admitted." Nor "shall any reference to such conduct be made in the presence of the jury, except by court order." Minn. R. Evid. 412(1); Minn. Stat. § 609.347, subd. 3. The rape shield rule "serves to emphasize the general irrelevance of a victim's sexual history," but it does not operate to "remove relevant evidence from the jury's consideration." *State v. Crims*, 540 N.W.2d 860, 867 (Minn. App. 1995), *rev. denied* (Minn. Jan. 23, 1996). There are two relevant exceptions to the rape shield rule permitting admission of evidence regarding the victim's prior sexual conduct when "consent of the victim is a defense in the case" and if the evidence meets the following requirements:

> (i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent; [or]
>
> (ii) evidence of the victim's previous sexual conduct with the accused.

Minn. R. Evid. 412(1)(A).[3] Even if the evidence satisfies one of the two exceptions, a district court may admit the evidence only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature. Minn. Stat. § 609.347, subd. 3; Minn. R. Evid. 412(1). We review the admission and exclusion of evidence for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

[3] To the extent that any portions of Murdent's brief could be construed as arguing that the semen evidence satisfied another exception set forth at rule 412(1)(B), we also reject this argument. The exception set forth at (1)(B) applies to evidence of specific instances of the victim's prior sexual conduct that is offered to show the source of the semen. Here, Murdent did not offer evidence of any specific act or to show a specific source of the semen. Instead, Murdent sought to cast doubt on K.L.M.'s statements to the investigator regarding his sexual orientation. Accordingly, the exception at (1)(B) does not apply in this case.

Murdent sought to introduce evidence that the semen on K.L.M.'s penis satisfied the exception set forth in rule 412(1)(A)(ii). In addition, Murdent sought to introduce evidence that semen on K.L.M.'s scrotum and anus satisfied the exception set forth in rule 412(1)(A)(i).[4] We are not persuaded that the evidence regarding K.L.M.'s own semen found on his penis satisfies the exception set forth in rule 412(1)(A)(ii). This evidence, without more, does not show that K.L.M. and Murdent engaged in sexual acts prior to the alleged offenses. In fact, the record contains no evidence that K.L.M. and Murdent had any contact prior to becoming cellmates on the date of the first offense.

We are similarly unconvinced that the evidence regarding semen found on K.L.M.'s scrotum and anus satisfies the exception set forth at rule 412(1)(A)(i) for three reasons. First, Murdent did not offer the evidence to show the identity of a third party or to show that a sexual act occurred at a specific time or place. Instead, he offered the evidence only to cast doubt on K.L.M.'s statement to the investigator that he is "not interested in guys." As the district court noted, such a purpose is not related to the type of evidence contemplated by the first exception: evidence of a common scheme or plan. Second, even assuming that Murdent had suggested that K.L.M. engaged in a specific sexual act as part of a scheme or plan, Murdent offers no evidence regarding the circumstances of any act. The rule, however, requires the district court to compare the circumstances of the prior

[4] The district court also excluded the semen evidence as improper character evidence, citing Minnesota Rule of Evidence 405. In light of our decision affirming the exclusion of the evidence under rule 412, we need not address rule 405. Similarly, we need not address whether the evidence could be characterized as impeachment evidence or whether the evidence would have been properly excluded under rules 608 or 613(b).

sexual conduct with the circumstances of the "case at issue." In the absence of any evidence regarding the circumstances of prior sexual conduct, the semen evidence cannot satisfy the requirements of this exception. Third, even assuming that the semen evidence showed that K.L.M. had previously consented to a sexual act with an unidentified male, the district court correctly concluded that Murdent is unable to show how K.L.M.'s prior consent is relevant or material to the question of whether K.L.M. consented to sexual activity with Murdent.

Finally, turning to the next step in the analysis under rule 412, we agree with the district court's assessment of the probative value of the evidence and the risk of unfair prejudice presented by the evidence. Even assuming that the evidence satisfied the requirements of the exceptions at rule 412(A)(1), it has limited probative value because the presence of a third party's semen does not indicate consent, establish K.L.M.'s sexual orientation, contradict the statements K.L.M. made to the investigator, or (given the possibility of transference noted by the district court) show that K.L.M. had sexual contact with any other persons. For these reasons, the district court did not abuse its discretion when it excluded the semen evidence offered by Murdent.

II. Decision to Admit Evidence of Murdent's Acts Involving A.R.

Murdent also challenges the district court's admission of prior acts evidence. Murdent argues that the evidence of prior acts involving A.R. was unrelated to whether Murdent forced sexual contact with K.L.M. Because the state's trial evidence included evidence that Murdent pressured K.L.M. in ways that are similar to how Murdent treated A.R., the district court did not abuse its discretion when it admitted the prior acts evidence.

Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that the person acted in conformity therewith on a particular occasion." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006) (citing Minn. R. Evid. 404(b)). "The overarching concern . . . is that [such evidence] might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *State v. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009) (quotations omitted). Prior acts evidence, may however, be admitted to show, among other things, "a common scheme or plan." *Ness*, 707 N.W.2d at 865. To show a common scheme, the evidence "need not be identical in every way to the charged crime but must instead be sufficiently or substantially similar to the charged offense—determined by time, place and modus operandi." *State v. Kennedy*, 585 N.W.2d 385, 391 (Minn. 1998).

The district court must also consider whether the probative value of the evidence outweighs its potential for unfair prejudice. *Fardan*, 773 N.W.2d at 319. Unfair prejudice is "not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means." *State v. Schultz*, 691 N.W.2d 474, 478 (Minn. 2005). And "[t]he closer the relationship in time, place, and modus operandi . . . the less likely the evidence will be used improperly by the jury." *State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004). The district court balances the relevance of the prior act, the state's need for the evidence, and the risk that the evidence may be used as propensity evidence. *Fardan*, 773 N.W.2d at 319. If admissibility is a close question, the district court should exclude the evidence. *Id.* at 316. "A district court's decision to admit

[rule 404(b)] evidence is reviewed for an abuse of discretion." *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016).

In this case, the district court determined that A.R.'s testimony was evidence of a common scheme or plan because Murdent "talked a lot about sex, was really persistent, made [A.R.] feel uncomfortable, offered [A.R.] shoes [in exchange for sex], [and] wanted to be engaged in watching each other masturbate." In addition, the district court determined that A.R. "felt he was blocked from the exit, [and] felt that [Murdent] said that if [he] went down for that instance so would [A.R.]." The district court reasoned that because Murdent offered gifts in exchange for sexual acts to both A.R. and K.L.M., that evidence also went to "that same motive of giving gifts for sexual favors." The district court concluded "that the probative value of the prior outweighs any prejudicial effect."

We agree with the district court that the evidence regarding Murdent's interactions with K.L.M. includes several similarities with the evidence of Murdent's interactions with A.R. *See State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984) (holding that similarities in "aggressive sexual behavior" between prior attempted sexual assaults and actual sexual assault rendered rule 404(b) evidence admissible). For example, both instances occurred during unguarded hours, and the solicitation began shortly after Murdent was placed in the each of the men's cells. Both A.R. and K.L.M. initially rejected Murdent's advances, and Murdent offered both men gifts in exchange for sexual contact. In addition, Murdent asked both men to engage in watching each other masturbate, and both A.R. and K.L.M. reported that Murdent positioned himself in such a way as to block their path to the cell door. Given these specific similarities, the district court did not abuse its discretion when it determined

that the prior acts evidence was evidence of a common scheme or plan. We also discern no abuse of discretion in the weight that the district court gave to this evidence or in the assessment of the unfair prejudice that the prior acts evidence presented.

Affirmed.