FILED
07/30/2019
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0348

DA 17-0348

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 172

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NATHANIEL J. LAKE,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC 15-605
Honorable Karen S. Townsend, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Koan Mercer (argued), Assistant Appellate Defender, Helena, Montana

For Appellee:

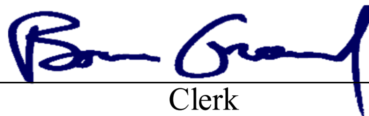
Timothy C. Fox, Montana Attorney General, Mardell Ployhar (argued), Assistant Attorney General, Helena, Montana

Kirsten Pabst, Missoula County Attorney, Suzy Boylan, Brian Lowney, Deputy County Attorneys, Missoula, Montana

Argued and Submitted: February 13, 2019

Decided: July 30, 2019

Filed:



Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Appellant Nathaniel J. Lake appeals the Judgment of the Fourth Judicial District Court, Missoula County, finding Lake guilty of attempted sexual intercourse without consent, a felony, in violation of § 45-5-503, MCA. We address the following issue on appeal:

> *Whether the District Court erred by applying Montana's Rape Shield Law to exclude evidence of the presence of unidentified sperm cells that remained on B.J.'s underwear after laundering when Lake sought to introduce such evidence to rebut the State's explanation that laundering accounted for the absence of Lake's DNA on the underwear.*

¶2 We reverse and remand for further proceedings consistent with this Opinion.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 In 2012, B.J. met Lake while she was volunteering at the Union Gospel Mission (Mission) in Missoula. Lake was a homeless individual who lived near the river in McCormick Park in Missoula. Prior to the instant charges, Lake had been homeless in Missoula for over a decade.

¶4 As a volunteer, B.J. took an interest in helping Lake obtain social services to acquire a home. From 2012 to 2014, B.J. took Lake to appointments to obtain housing and mental health services, worked with Lake to improve his hygiene, washed and brought him additional clothes and bedding, and occasionally paid for hotel rooms for Lake to stay in during winter weather. B.J. and her family also attended Lake's mother's funeral in early 2014.

¶5 B.J. testified that in the spring of 2014, Lake began exhibiting sexual behavior toward her for the first time. During the first instance, B.J. alleged that Lake pinned her

up against some bushes near his camp, proceeded to grind on her, exposed his penis, and touched her breasts. B.J. testified that she later confronted Lake about the incident, and Lake repeatedly apologized. Despite the incident, B.J. testified that she continued to help Lake because she felt like she had invested too much time to give up on him, especially considering the recent death of his mother and his general lack of a support system.

¶6 By June 2014, Lake obtained an apartment through B.J.'s assistance. B.J. helped Lake furnish it with her family, friends, and the help of the Mission. B.J. visited Lake's apartment once or twice a week to bring him food and to check up on him. B.J. testified that in November 2014, Lake initiated a second incident where he backed B.J. up against a door, grinded up against her, and exposed himself. Despite this second incident, B.J. testified she did not stop helping Lake because she believed Lake did not get out of his apartment regularly, and he lacked a support system.

¶7 B.J. testified she entered counseling for depression based on the two prior incidents with Lake. Around February 2015, B.J. told her husband about the incidents. B.J. testified that her husband immediately asked that she cease all contact with Lake. Despite her husband's request, B.J. continued helping Lake and checking up on him at his apartment.

¶8 B.J. testified that in July 2015, she visited Lake at his apartment and noticed that he had stopped bathing and washing his clothes, and that his apartment was dirty and smelled. During the visit, B.J. testified that Lake allegedly pulled on her arm and tried to put her into a closet. B.J. resisted and got away from Lake. In August 2015, after Lake allegedly left a series of threatening phone messages at her office, B.J. broke off her association with

Lake. B.J. and her husband subsequently obtained a restraining order against Lake. B.J. additionally testified that she stopped volunteering at the Mission to avoid seeing Lake.

¶9 In early October 2015, B.J. encountered Lake while she was walking along a river bank near McCormick Park during her lunch break. B.J. and Lake talked briefly before parting. The next day, B.J. returned to McCormick Park. After being approached by Lake, B.J. conversed with him again. B.J. did not report either encounter as a violation of the restraining order.

¶10 On October 12, 2015, B.J. went back to McCormick Park for a third time. B.J. testified that she went to the park to tell Lake that she would not be returning, and he would not see her again. Upon arriving, B.J. testified that she went down to Lake's camp. She testified that she then decided to sit down on Lake's blanket because of a foot injury. B.J. testified that Lake, after commenting on her appearance, attempted to pull her shirt off. B.J. alleged that Lake then backed her up against a log, pulled her pants down just below her hips, placed his penis inside her underwear, and thrusted until he ejaculated on her underwear. B.J. testified that after Lake ejaculated, she pulled up her pants and quickly left. B.J. testified that she went home, showered, and washed her clothes. B.J. testified she returned to McCormick Park for a fourth time later that day and yelled at Lake.

¶11 On October 13, 2015, B.J. went to the Missoula Crime Victim Advocacy Office and filed a police report. She then went to the First Step Resource Center in Missoula to obtain antibiotics but chose not to have a sexual assault examination done at that time. A few days later, B.J. returned to First Step and underwent a genital examination. B.J.'s examiner

testified that B.J. had tenderness in one genital area, and increased redness and tenderness in another, which the examiner determined was a "possible healing abrasion."

¶12 On October 14, 2015, Missoula Police Department Detective Robert Franke interviewed Lake. Franke testified that Lake acknowledged seeing B.J. during the last few days when she came down to the river but denied he had sexually assaulted her. Franke testified Lake suggested B.J. had made up the allegations because of past incidents of him rejecting her advances.

¶13 Missoula police collected B.J.'s underwear and submitted it for testing at the Montana State Crime Lab (Crime Lab). The Crime Lab discovered sperm cell evidence and skin cells on the underwear and determined the sperm cell evidence was a mixture of a major profile from an unknown male and a minor profile from which no conclusions could be made. The Crime Lab concluded the major profile did not match Lake's DNA. The Crime Lab additionally determined the skin cells were a mixture of a major profile that matched B.J.'s DNA and a minor profile that could not be sourced. B.J.'s husband refused to submit to DNA testing to determine the contributor of the sperm cell evidence major profile, and Lake did not seek to compel a sample to be produced.

¶14 On November 13, 2015, the State charged Lake with attempted sexual intercourse without consent, a felony, in violation of § 45-5-503, MCA.[1] On March 21, 2016, the State filed a motion *in limine* to exclude the sperm cell evidence as evidence of B.J.'s prior sexual

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[1] The State also charged Lake with violating an order of protection, a misdemeanor in violation of § 45-5-626(3), MCA, but later dropped the charge.

conduct pursuant to Montana's Rape Shield Law, § 45-5-511(2), MCA. The District Court granted the State's motion and held that testimony about another person's DNA on the underwear was barred by the Rape Shield Law.

¶15 On August 4, 2016, Lake moved to admit the sperm cell evidence. Lake argued that presenting the presence of sperm cell evidence on B.J.'s underwear to the jury was essential to his defense because the jury could wrongly assume the absence of his DNA was due to it being washed away and not because a sexual assault did not occur. Lake additionally argued that the evidence was not speculative because it was developed from the Crime Lab's findings. The State argued that the Rape Shield Law barred the evidence because it implicated B.J.'s prior sexual conduct and that Lake's presumption was unsupported by expert opinion or any other non-speculative evidence.

¶16 On August 25, 2016, the District Could held a hearing to address Lake's motion. During the hearing, Lake submitted that Crime Lab Forensic Scientist Joseph Pasternak would testify at trial that DNA, specifically sperm cells, can survive repeated washings. Lake argued that he intended to introduce Pasternak's testimony that all of the DNA on B.J.'s underwear likely went through the same wash cycle, could have been through several previous wash cycles, and that the DNA evidence was crucial for Lake because it supported his account that he did not sexually assault B.J. The State argued that it was possible that Lake's DNA was washed away while another's DNA was not, so the presence of another individual's DNA did not support Lake's defense. The State additionally argued that expert testimony would not assist the jury because the expert would not be able to conclusively say whether Lake's DNA was washed away or not.

¶17 The District Court did not immediately decide the matter after the hearing and asked Lake to submit an offer of proof precisely demonstrating what testimony Pasternak would provide. Lake filed an additional pleading post-hearing. In the pleading, Lake submitted Pasternak was expected to testify at trial that: (1) sperm cells were present in B.J.'s underwear; (2) DNA was extracted from those sperm cells, a major profile of an unknown male was obtained, and Lake was excluded as the major contributor; (3) sperm cells are "hardy"; (4) sperm cells can survive washing; (5) DNA is more likely to be recovered from cotton material than polyester; and (6) B.J.'s underwear was cotton.

¶18 On August 30, 2016, the District Court issued an order prohibiting Lake from introducing the sperm cell evidence on B.J.'s underwear. The District Court held that admitting the sperm cell evidence was speculative and would improperly invite the jury to consider B.J.'s sexual conduct contrary to the Rape Shield Law. The District Court also concluded that such evidence would violate M. R. Evid. 403 because it would be more prejudicial than probative. The District Court noted that Lake had "proffered no expert testimony that would enable a jury to understand the significance of unidentified DNA evidence which persisted after laundering or how to relate the presence of unidentified DNA to evidence that [Lake] was not a contributor." The District Court delineated that Lake, subject to laying the proper foundation, would be able to offer testimony through Pasternak that: (1) Lake's DNA was not found in the Crime Lab's examination of B.J.'s underwear; (2) that sperm cells from which DNA can be extracted are "hardy" in comparison to other cells; (3) Pasternak's review of scientific literature supports a conclusion that sperm cells can survive washing; (4) there is support in the scientific

community for finding that DNA is more likely recovered after washing cotton than polyester; and (5) that B.J's underwear was cotton.

¶19 Lake's jury trial was conducted from September 1-9, 2016. At trial, Lake presented testimony from Pasternak that he tested B.J.'s underwear for the presence of Lake's DNA, but that it was not found. Pasternak testified that he was also unable to find B.J.'s DNA on the swim trunks Lake wore at the time of the alleged assault. Pasternak additionally testified that the Crime Lab found B.J.'s skin cells on her underwear.

¶20 The State explained the absence of Lake's DNA on B.J.'s underwear by presenting evidence that the underwear had been washed prior to the Crime Lab's testing. Lake rebutted that the presence of B.J.'s skin cells meant Lake's DNA should have also survived any washing. The State argued B.J.'s skins cells may have been deposited on the underwear from her handling them after the washing. The District Court continued to forbid Lake from introducing evidence of any surviving sperm cells on B.J.'s underwear to rebut the State's theory.

¶21 On September 9, 2016, the jury found Lake guilty of attempted sexual intercourse without consent. The District Court sentenced Lake to forty years in the Montana State Prison, with twenty years suspended. Lake appeals.

STANDARD OF REVIEW

¶22 District courts have broad discretion to determine whether evidence is relevant and admissible. *State v. Walker*, 2018 MT 312, ¶ 11, 394 Mont. 1, 433 P.3d 202 (citing *State v. Daffin*, 2017 MT 76, ¶ 12, 387 Mont. 154, 392 P.3d 150). Generally, we review a district court's evidentiary rulings for an abuse of discretion. *Walker*, ¶ 11

(citing *State v. Madplume*, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 150). However, a district court is bound by the Rules of Evidence and applicable statutes in exercising its discretion. *Walker*, ¶ 11 (citing *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811). Accordingly, where the district court's ruling is based on its interpretation of a statute, our review of the district court's ruling is de novo for correctness. *Walker*, ¶ 11 (citing *Derbyshire*, ¶ 19); *Daffin*, ¶¶ 12-13 (citing *State v. Aguado*, 2017 MT 54, ¶ 9, 387 Mont. 1, 390 P.3d 628; *State v. Colburn*, 2016 MT 41, ¶ 6, 382 Mont. 223, 366 P.3d 258).

DISCUSSION

¶23 *Whether the District Court erred by applying Montana's Rape Shield Law to exclude evidence of the presence of unidentified sperm cells that remained on B.J.'s underwear after laundering when Lake sought to introduce such evidence to rebut the State's explanation that laundering accounted for the absence of Lake's DNA on the underwear.*

¶24 Montana's Rape Shield Law protects against the presentation of any "[e]vidence concerning the sexual conduct of the victim . . . ." Section 45-5-511(2), MCA. The Rape Shield Law is intended to avoid putting victims and their past sexual history on trial, and to protect victims from "harassing or irrelevant questions concerning their past sexual behavior." *Colburn*, ¶ 22; *Walker*, ¶ 52. Section 45-5-511(2), MCA, provides two exceptions to this exclusionary rule—parties may present evidence of: (1) the "victim's past sexual conduct with the offender," and (2) "specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or diseases that is at issue in the prosecution." The district court possesses the responsibility to manage the presentation of evidence under the Rape Shield Law to prevent "'sordid probes into a victim's past sexual

conduct.'" *Colburn*, ¶ 28 (quoting *State v. Anderson*, 211 Mont. 272, 284, 686 P.2d 193, 200 (1984)).

¶25 Under the Sixth Amendment to the United States Constitution, and Article II, Section 24 of the Montana Constitution, criminal defendants have a constitutional right to confront their accuser and to present evidence in their own defense. *Colburn*, ¶ 24 (citing U.S. Const. amend. VI; Mont. Const. art. II, § 24; *State v. MacKinnon*, 1998 MT 78, ¶ 33, 288 Mont. 329, 957 P.2d 23; *State v. Johnson*, 1998 MT 107, ¶ 22, 288 Mont. 513, 958 P.2d 1182). The Rape Shield Law's protections for victims "exists in tension" to, and generally competes with, these constitutional rights. *Walker*, ¶ 53 (citing *Colburn*, ¶ 24); *State v. Awbery*, 2016 MT 48, ¶ 19, 382 Mont. 334, 367 P.3d 346. However, neither the Rape Shield Law's protections for victims, nor the defendant's constitutional protections, are absolute. *Walker*, ¶ 53 (citing *Aguado*, ¶ 33; *Colburn*, ¶ 25; *MacKinnon*, ¶ 33; *Johnson*, ¶¶ 21-23).

¶26 Pursuant to the Rape Shield Law, the district court is required to strike a balance between the victim's rights under the Rape Shield Law and the defendant's conflicting constitutional rights to determine whether the admission of evidence implicating the victim's prior sexual conduct is proper. *Walker*, ¶ 54 (citations omitted). In balancing the victim's and defendant's respective interests, the district court must require that the defendant's proffered evidence is not "speculative or unsupported." *Walker*, ¶ 54 (quoting *Aguado*, ¶ 33; *Colburn*, ¶ 25). The district court must also apply M. R. Evid. 401, 402, and 403 and consider "whether the evidence is relevant and probative, whether the evidence is merely cumulative of other admissible evidence, and whether the probative

value of the evidence is outweighed by its prejudicial effect." *Walker*, ¶ 54 (citing *Colburn*, ¶ 25); *Aguado*, ¶ 33.

¶27 In conducting this balancing, a district court may not "arbitrarily or mechanically" employ the Rape Shield Law to exclude evidence. *Walker*, ¶ 54 (citing *Colburn*, ¶ 25). Likewise, the Rape Shield Law "has long been construed to not automatically exclude evidence that 'can be narrowed to the issue of the complaining witness' veracity.'" *Colburn*, ¶ 28 (quoting *Anderson*, 211 Mont. at 284, 686 P.2d at 200). The district court's balancing is to ensure the defendant is provided a fair trial, while also keeping the proceedings from becoming a trial about the victim. *Aguado*, ¶ 33 (quoting *Colburn*, ¶ 25).

¶28 A district court may not apply the Rape Shield Law to bar *all* evidence concerning a victim's past sexual conduct. *Walker*, ¶ 55 (citing *Colburn*, ¶ 25). In *Colburn*, a minor victim made detailed statements during a forensic interview which indicated that the defendant sexually abused her. *Colburn*, ¶¶ 10-11. During trial, the defendant sought to introduce evidence that the victim's father was convicted of sexually abusing her. *Colburn*, ¶ 20. The defendant's theory was that the victim's knowledge of sexual abuse was caused by her father, and that the victim fabricated her allegations against him. *Colburn*, ¶ 20. The district court excluded the evidence. *Colburn*, ¶ 21.

¶29 We reversed and held that the district court mechanically applied the Rape Shield Law when it failed to balance the defendant's constitutional right to present evidence of the victim's father's conviction with the victim's rights under the Rape Shield Law. *Colburn*, ¶¶ 29-30. In reaching our decision, we specifically noted the evidence of prior abuse by the father was "neither speculative nor unsupported" given that the father had

already been convicted of sexual abuse. *Colburn*, ¶ 25; *see also Awbery*, ¶ 39 (Cotter, Baker and McKinnon, JJ., concurring) (observing in *Colburn* that "there was an immediate relevant straight-line connection" between the victim's sexual knowledge and the fact that the victim was previously assaulted by her father). We additionally observed in *Colburn* that the defendant's defense to the charges significantly relied upon undermining the credibility of the victim's account, and that presenting the conviction evidence was an essential part of the defendant's "important right to confront the witnesses against him and to mount a meaningful defense . . . ." *Colburn*, ¶ 27.

¶30 In contrast, we barred the introduction of evidence regarding a victim's past sexual conduct under the Rape Shield Law where the defendant failed to establish a sufficient foundation for its admission. *Awbery*, ¶¶ 21-22. In *Awbery*, the defendant sought to proffer evidence that three of his alleged victims suffered prior sexual abuse that left them suffering from PTSD, which caused them to make erroneous reports against him. *Awbery*, ¶¶ 21-22. We affirmed the district court's exclusion of the evidence because the defendant's theory "never progressed past conjecture and speculation." *Awbery*, ¶ 21. We noted that there was: (1) no clear evidence regarding any prior abuse with similarity to the acts allegedly perpetrated by the defendant; (2) no evidence any of the victims suffered from PTSD prior to the defendant's assaults; and (3) no evidence that any condition the victims suffered from resulted in their making false accusations. *Awbery*, ¶¶ 21-22.

¶31 We affirmed a district court's exclusion of evidence of DNA on the victim's shirt that was from an individual other than the defendant where the State did not put the origin of the DNA at issue and the defense was permitted to argue that the defendant's DNA was

not found on the victim's clothing or person. *State v. Patterson*, 2012 MT 282, ¶¶ 17-20, 367 Mont. 186, 291 P.3d 556 (concluding that the exceptions under § 45-5-511(2), MCA, did not apply), *overruled in part on other grounds by City of Helena v. Frankfurter*, 2018 MT 193, ¶¶ 13 n. 1, 14, 392 Mont. 277, 423 P.3d 581. We determined the evidence that the DNA stain was of unknown origin was not in and of itself probative because it did not reveal how or when the stain got there or help to demonstrate the defendant's innocence. *Patterson*, ¶ 18.

¶32 The State argues the District Court did not abuse its discretion when it excluded the sperm cell evidence because it properly balanced the Rape Shield Law with Lake's constitutional rights. The State additionally argues the District Court properly excluded the evidence because Lake failed to present expert testimony to support his theory that his DNA would not have selectively been washed away on B.J.'s underwear if another person's DNA remained. Finally, the State argues that, under M. R. Evid. 403, the probative value of the sperm cell evidence was significantly outweighed by a danger of prejudice to B.J. by inviting the jury to improperly consider her prior sexual conduct, and that even if the District Court erred, the error was harmless.

¶33 Lake argues that the District Court incorrectly applied the Rape Shield Law. Lake contends that: (1) his inability to present evidence of the unidentified sperm cells on B.J.'s underwear to rebut the State's theory that washing explained the absence of Lake's sperm cells improperly excluded a non-speculative exculpatory defense; (2) the District Court incorrectly balanced the evidence under the Rape Shield Law because any prejudice inferred that B.J. had sex with someone—presumably her husband—was heavily

outweighed by Lake's need for the sperm cell evidence for his defense; and (3) the excluded evidence was essential to his constitutional right to confront his accuser and to present evidence in his own defense and the denial of the use of this evidence was not harmless. We agree.

¶34 The District Court ruled pre-trial that Lake was prohibited from introducing this evidence, based on its application of the Rape Shield Law. At trial, when Lake noted to the jury that his DNA was not present on B.J.'s underwear, despite her testimony that he ejaculated onto her underwear, the State was allowed to introduce evidence that B.J. washed her underwear as an explanation of why Lake's DNA was not present. The State thus invited the jurors to make a common-sense inference that the washing machine removed Lake's DNA from the underwear. When Lake sought, unsuccessfully, to introduce evidence that another man's sperm cells on B.J.'s underwear survived the washing, he did not seek to do so for the purpose of harassing B.J. or impugning her character generally. *See Colburn*, ¶ 22; *Walker*, ¶ 52; § 45-5-511(2), MCA. Rather, Lake sought to introduce evidence of the presence of unknown sperm cells on B.J.'s underwear solely for the purpose of rebutting the State's theory that Lake's DNA was not found because it had been washed away. Admission of such evidence would not, as the Dissent claims, Dissent, ¶ 49, have put B.J.'s sexual history on trial, nor would it have resulted in an assassination of her character. *See* § 45-5-511(2), MCA. Admission of such evidence was purely for the purpose of providing the jury with the full picture from which it could draw its own inferences about the effect of laundering on physical evidence that either linked Lake to the crime or lent credence to his version of events. The District Court's

ruling erroneously barred Lake from countering the State's contention with existing evidence that another individual's DNA remained on the underwear despite the underwear being washed.

¶35 The Dissent creates a scenario in which evidence that an unidentified man's sperm cells survived washing necessarily results in a probe into the source of the sperm cells and details regarding the sexual encounter that led to the sperm cells getting on B.J.'s underwear, in violation of the Rape Shield Law. Dissent, ¶¶ 48-50. This scenario is implausible and unfounded. Neither Lake nor the State had any intention of suggesting who the unidentified sperm cells might belong to or when or how the sperm cells were deposited on B.J.'s underwear. Lake himself acknowledges such an inquiry would be improper and irrelevant. In fact, the only one who is asking who the unknown sperm cells belong to is the Dissent. Dissent, ¶ 49. The only purpose for introducing the evidence of another man's sperm cells was to counter the State's narrative that, but for the washing, Lake's DNA would have been found. The introduction of the evidence for that limited purpose does not violate either the spirit or the letter of the Rape Shield Law. *See* § 45-5-511(2), MCA; *Colburn*, ¶ 22; *Walker*, ¶ 52.

¶36 Unlike *Patterson*, the State in this case made evidence of washing the underwear relevant and put at issue how and whether laundering affects DNA presence on clothing. *See Patterson*, ¶ 18. But Lake was not allowed to counter the State's narrative of the effect of laundering on DNA. Also, unlike *Patterson*, the evidence of the presence of another man's sperm cells following laundering of the underwear *was* probative because it could help to demonstrate Lake's innocence. *See Patterson*, ¶ 18. To illustrate the inequity of

the District Court's ruling, one need only consider a scenario in which Lake sought to preclude the State from informing the jury that B.J. had washed her underwear. Neither party disputes that Lake was within his rights to submit into evidence the fact that his DNA was not found on B.J.'s underwear, so as to call into question her contention that Lake ejaculated onto her underwear. If that was the extent of the evidence submitted on this point, then the presence of the unknown sperm cells would be wholly irrelevant and barred by the Rape Shield Law. But the evidence did not end there. The State elected to introduce evidence that the underwear had been washed to explain the absence of Lake's sperm cells. If Lake had moved *in limine* to prohibit the State from presenting evidence that the underwear had been washed, his motion would have been denied without question.

¶37 The Dissent argues that, absent expert testimony regarding when the sperm cells stained the underwear, and information regarding the origin of the sperm cells, such evidence "has little probative value to understanding whether Lake's semen would have washed out." Dissent, ¶¶ 47-48. Incongruously, though, the Dissent also contends that the effect of laundering on clothing stains is a matter of "common sense." Dissent, ¶ 47. Yet the Dissent then contends that only an expert witness can explain why the unknown sperm cells were not washed away by the same laundering. The upshot of this argument is that laundering underwear to explain the absence of one individual's sperm cells is a matter of common sense, but the failure of the same laundering to remove another individual's sperm cells is something only an expert can explain.

¶38 Lake's defense to the charges depended upon his ability to undermine the credibility of B.J.'s account of the alleged assault. *See Colburn*, ¶¶ 27-28; *Anderson*,

211 Mont. at 284, 686 P.2d at 200. The sperm cells of unknown origin that survived the washing were evidence from which exculpatory inferences[2] could be drawn. *See Colburn*, ¶¶ 39, 50 (McKinnon, J., concurring). The State's washing theory to explain the absence of Lake's sperm cells, coupled with the District Court's denial of Lake's rebuttal, provided the jury with an incomplete story. It also deprived the fact of the absence of Lake's DNA on the underwear of any exculpatory value. Lake's need to present that another individual's DNA remained on the underwear after washing, to rebut the State's assertion that Lake's DNA was washed away, was an essential part of his constitutional right to confront his accuser and to mount a meaningful defense. *See Walker*, ¶ 53; *Colburn*, ¶¶ 24, 27; *MacKinnon*, ¶ 33; *Johnson*, ¶¶ 22-23.

¶39 The probative value of the sperm cell evidence would not have been outweighed by its prejudicial effect. *See* M. R. Evid. 403; *Walker*, ¶ 54; *Colburn*, ¶ 25; *Aguado*, ¶ 33. The evidence Lake sought to admit was, at best, minimally prejudicial to B.J. since the most likely inference to be drawn from the unidentified sperm cells was sexual conduct within her marriage. Given the State's theory that Lake's sperm cells were not found on B.J.'s underwear because the underwear was washed, Lake's constitutional right to present a defense and evidence in support of his defense greatly outweighed any prejudice toward

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[2] Although the Dissent describes Lake's theory for admission of the evidence as an "unsupported inference," Dissent, ¶¶ 48, 50, such evidence is necessary to counter the State's equally "unsupported inference" that laundering explains the absence of Lake's DNA on B.J.'s underwear. Obviously, the State considered the distinct possibility that Lake's DNA could have survived the laundering; otherwise, there would have been no point to having B.J.'s underwear tested.

B.J. *See* M. R. Evid. 403; *Walker*, ¶¶ 53-54; *Colburn*, ¶ 25; *Aguado*, ¶ 33. Lake's purpose for presenting the sperm cell evidence was a relevant, probative, and permissible means of attempting to impeach B.J.'s veracity and not a prejudicial and "sordid probe" into her prior sexual conduct. *See* M. R. Evid. 401, 402, 403; *Colburn*, ¶ 28; *Anderson*, 211 Mont. at 284, 686 P.2d at 200.

¶40 Finally, the District Court's error was not harmless. In conducting a harmless error analysis, the first inquiry is to determine whether the error was a structural error or a trial error. *State v. Van Kirk*, 2001 MT 184, ¶¶ 37, 41, 306 Mont. 215, 32 P.3d 735. Structural error is error that "affects the framework within which the trial proceeds, rather than simply an error in the trial process itself," and is automatically reversable. *Van Kirk*, ¶¶ 38-39 (internal citations omitted). Trial error, on the other hand, is the type of error "that typically occurs during the presentation of a case to the jury." *Van Kirk*, ¶ 40 (citing § 46-20-701(1), MCA). If the error is a trial error, the inquiry proceeds to the second step, and it becomes incumbent on the State to demonstrate the error at issue was not prejudicial to the defendant. *Van Kirk*, ¶ 42. In other words, to prove that a trial error was harmless, "the State must demonstrate that there is no reasonable possibility that the inadmissible evidence might have contributed to the [defendant's] conviction." *Van Kirk*, ¶ 47.

¶41 This is a case of trial error, *see Van Kirk*, ¶ 40, and the State bears the burden to demonstrate that exclusion of the sperm cell evidence that remained after laundering was not prejudicial, *see Van Kirk*, ¶¶ 42, 47. The State's case against Lake depended entirely upon the credibility of B.J.'s accusation and her prior accounts of Lake sexually assaulting her. There were no other witnesses to Lake's alleged assault, and the medical evidence

presented by the State was not conclusive as to B.J.'s account. B.J.'s central claim that Lake ejaculated on her underwear went to the core of whether Lake actually assaulted her. Consequently, the State fails to establish that the exclusion of sperm cell evidence that would potentially undermine B.J.'s accounting of events, and might have contributed to Lake's conviction, was harmless error. *See Van Kirk*, ¶ 47.

¶42 Our review of the record demonstrates that the District Court incorrectly applied the Rape Shield Law when it failed to appropriately balance B.J.'s rights with Lake's constitutional rights. *See Walker*, ¶¶ 53-54; *Colburn*, ¶ 25. Accordingly, the District Court erred when it applied the Rape Shield Law to exclude Lake's presentation of the sperm cell evidence to the jury during his trial. *See Walker*, ¶ 11; *Derbyshire*, ¶ 19.

CONCLUSION

¶43 The District Court incorrectly balanced Lake's and B.J.'s competing interests when it applied Montana's Rape Shield Law to deny Lake the opportunity to present evidence that another individual's sperm cells were found on B.J.'s underwear after laundering. We reverse and remand for further proceedings consistent with this Opinion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JIM RICE

Justice Beth Baker, dissenting.

¶44 Resolution of Lake's appeal turns on proper application of the standard of review and respect for the District Court's conscientious consideration of the relevant competing interests. The District Court did not commit an error of law. It discussed and understood this Court's admonition that a trial court may not mechanistically apply the protections of the Rape Shield Statute, § 45-5-511(2), MCA, to automatically exclude evidence of a victim's prior sexual conduct. *See Colburn*, ¶ 25. Rather, just as we have instructed, it weighed the constitutional interests of the defendant with the statutory rights of the victim as protected by § 45-5-511(2), MCA. After weighing both interests, the Court made a discretionary decision to permit certain evidence and to exclude other evidence. Because the District Court applied the correct balancing test, our review should be limited to whether the District Court abused its discretion. I would conclude that it did not.

¶45 The Rape Shield Statute "exists in tension with a defendant's constitutional rights to confront his accuser and to present evidence in his own defense." *Walker*, ¶ 53. Because neither right is absolute, a district court must strike a balance between the victim's rights under § 45-5-511(2), MCA, and the defendant's constitutional rights. *Walker*, ¶¶ 53-54. "The purpose of these considerations is to ensure a fair trial for the defendant while upholding the compelling interest of the Rape Shield Law in preserving the integrity of the trial and keeping it from becoming a trial of the victim." *Colburn*, ¶ 25. The District Court's decision did just that. Unlike the Court's decision today, the District Court gave appropriate weight to B.J.'s interests and did not minimize the protections the Rape Shield Statute provides.

¶46 A court must balance the defendant's rights against the victim's right to be protected from having her sex life that is not at issue in the case put on trial. The District Court did not act arbitrarily or exceed the bounds of reason when it found the evidence of unidentified semen minimally probative against its highly intrusive and prejudicial impact to B.J.

¶47 Lake argued before the District Court that "there is no danger of this evidence becoming a second unrelated trial. There would be no questioning as to whose sperm it is, or when or how it got there." The Court buys into this theory. But without information regarding how long the semen found in the underwear had been there before the washing, the evidence is not as probative as Lake claims. Lake insists that no expert testimony is needed because whether clothes come clean or not in the washing machine is a matter of common sense and experience. True. But it also is a matter of common sense and experience that the longer stains sit on clothing the less likely they are to wash out. Without information regarding when the semen from the unidentified male stained the underwear, the presence of that semen after washing has little probative value to understanding whether Lake's semen would have washed out.

¶48 B.J. testified that she washed her clothing almost immediately after Lake's assault—any stain from such incident would have been fresh. For the semen found in the underwear to be highly probative—as Lake argues—that DNA does not selectively wash out, the surviving semen would need to have been on the underwear under similar conditions, including within a similar short time frame before washing. *Cf.* Opinion, ¶ 31; *Patterson*, ¶¶ 17-19. Lake's theory that the fact that someone else's sperm cells were found in the underwear makes it less likely that his semen completely would have washed away

is an unsupported inference that would require further probing into B.J.'s sexual history. As in *Awbery*, ¶ 21, that defense theory "never progressed past conjecture and speculation." No one could testify that the presence of other semen in the underwear after washing made it more or less likely that Lake's semen would have washed out. Thus, without expert testimony, determining whether the presence of other semen in the underwear exonerates Lake requires digging even deeper into B.J.'s prior sexual conduct—the very core interest the Rape Shield Law is meant to protect. The Court responds that the State's theory that laundering washed Lake's semen away is an "equally 'unsupported inference.'" Opinion, ¶ 38, n.2. This misses the obvious: it is common knowledge that laundering will clean clothes; but without more evidence—expert or otherwise—there is no non-speculative evidence in the record to explain how laundering may affect two different semen stains on a single garment in the same or in a different manner.

¶49 Contrary to the Court's assertions, *see* Opinion, ¶ 34, allowing evidence of other semen in the underwear to go to the jury would put B.J.'s sexual history with other people directly on trial. The Court blithely states that this evidence is minimally prejudicial because the semen "presumably" belongs to her husband. *See* Opinion, ¶ 33. But the Court fails to recognize that the Rape Shield Statute protects a victim from having her prior sexual conduct put on trial—even prior consensual conduct with her husband. And what if it didn't belong to him? The Rape Shield Statute protects a victim from that inquiry. Whether a victim is married doesn't inform the Rape Shield Statute inquiry; she should not have to be subjected to speculation about with whom she has had sexual relations or when. The Court does not mention the trial testimony that B.J.'s husband was out of town during

the assault. Even if the Court's assumption regarding the origin of the semen in the underwear is correct, that the underwear B.J. was wearing while her husband was out of town contained unidentified semen invites the jury to speculate about her sexual conduct.

¶50 In balancing the interests, the District Court did not abuse its discretion because it allowed Lake to put in evidence highly probative of his theory: his DNA was not located on the victim's underwear, sperm cells are resilient to washing, sperm cells can survive washing, and sperm cells are more likely to remain in cotton underwear like the underwear B.J. was wearing. The District Court found that the inference Lake wished to draw from the presence of semen from an unidentified third party was not sufficiently supported by necessary expert testimony. Because there was not expert explanation, the inference Lake desired needed to be supported by information regarding the timeframe in which the sperm cells found in the underwear were left—information within the Rape Shield Statute's protection. Without such additional information, the presence of the cells in the underwear lacks strong probative value. And such additional information regarding the deposit of other sperm cells found in the underwear requires further probing into B.J.'s prior sexual conduct. The District Court considered the prejudice to B.J. of delving into her prior sexual conduct and the resulting confusion to the jury in digging into this history, and it concluded that these considerations substantially outweighed any probative value the unidentified semen had as evidence. The District Court permitted Lake to present the most relevant and probative pieces of the evidence he proffered, subject to laying the proper foundation. The Court today undermines the protections the Rape Shield Statute provides.

¶51 I would affirm Lake's conviction because the District Court conducted the proper balancing between Lake's and B.J.'s interests and did not abuse its discretion in precluding evidence of the semen from an unidentified male.

/S/ BETH BAKER