DA 19-0236

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 35N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT DONALD BOONE,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADC 16-335
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Carl B. Jensen, Attorney at Law, Great Falls, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Jennifer Quick, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: December 18, 2019

Decided: February 11, 2020

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Robert Donald Boone appeals from his conviction by a jury of sexual intercourse without consent. Boone challenges the District Court's failure to grant a mid-trial continuance to examine rebuttal evidence the State proposed to introduce, and two evidentiary rulings the District Court made during the trial.

¶3 On a first date after meeting two days before, Boone and the victim, K.H., drove around in his car, stopped at a pull-out near Sun River, and walked down to the water. They kissed, but when Boone began to pull down K.H.'s shorts, she resisted, and the two returned to the vehicle. Inside, Boone attacked K.H., physically hurting her and engaging in forced intercourse despite her refusal and resistance. Boone returned K.H. to her apartment and, later that evening, K.H. sought medical treatment at an emergency room, accompanied by a friend. Emergency room personnel contacted law enforcement, and the State charged Boone with one count of Sexual Intercourse Without Consent, in violation of § 45-5-503, MCA.

¶4 This Court reviews a district court's ruling on a motion for continuance for an abuse of discretion. *State v. Toulouse*, 2005 MT 166, ¶ 14, 327 Mont. 467, 115 P.3d 197.

Likewise, "[w]hether evidence is relevant and admissible is left to the sound discretion of the district court and will not be overturned on appeal absent an abuse of discretion." *State v. Whipple*, 2001 MT 16, ¶ 17, 304 Mont. 118, 19 P.3d 228 (citations omitted).

¶5 Boone's mother was the account holder for Boone's cell phone, and provided his cell phone records to defense counsel. During cross examination of K.H. at trial, defense counsel questioned her about the order and timing of calls and texts she had exchanged with Boone. The next day of trial, the State advised the District Court and defense that it was in the process of procuring K.H.'s phone records. Defense counsel replied that "some sort of recess" would be necessary to review the records. The District Court indicated it did not have a problem providing some review time, but described the records, in light of defense counsel's questioning of K.H., as "classic rebuttal evidence." Ultimately, although it obtained and provided the records, the State did not use or introduce them. On appeal, Boone argues the District Court erred by failing to grant a mid-trial continuance for defense counsel to review the records, and not just "a brief recess." However, the defense did not request a continuance, and, in any event, the State did not use the evidence. Thus, the failure to grant the unrequested continuance was not error and did not cause any prejudice to Boone.

¶6 Before trial, the State filed a motion in limine to preclude reference to Boone's statements made during his interview with police because the State did not intend to use the statements in its case, the statements were hearsay, and there was no applicable hearsay exception. The defense objected to preclusion of the evidence for impeachment purposes.

The District Court granted the motion preliminarily, but stated, "[i]f it comes time for impeachment, and you need to use it for impeachment evidence, then we can take that up at that time. But until then, it wouldn't be proper to reference something that has not been admitted to evidence, either in the opening statement or with another witness." The State did not offer evidence of Boone's prior statement. On appeal, Boone notes he testified at trial, and argues the District Court erred by excluding reference to his prior statements to police, specifically, his denial that he had raped K.H. Although the parties dispute whether the statement, offered to prove the truth of Boone's asserted innocence and prior denial of the crime, is hearsay, in any event, we conclude the District Court did not abuse its discretion in its handling of the issue, and excluding the statement except for possible impeachment. While Boone also argues his "*behavior* before and after the police arrested him" (emphasis added) was admissible under the transaction rule, § 26-1-103, MCA, the Court's order in limine did not preclude evidence of his behavior.

¶7 Lastly, Boone argues the District Court erred by admitting the statement K.H. made to the examining nurse when she sought treatment at the emergency room after Boone's assault. The statement was a verbatim narrative of K.H.'s account written down by the nurse, who testified the statement was used to determine the scope of the physical examination and proper treatment. After Boone's objection to the evidence, the District Court redacted portions of the narrative and admitted the remainder, reasoning that the remaining statements were "all physical symptoms of physical injuries that the victim is alleging and communicating to the medical personnel," who were in the process of

determining treatment for K.H. "Courts are guided by two factors in determining admissibility under M. R. Evid. 803(4): (1) 'the statements must be made with an intention that is consistent with seeking medical treatment'; and (2) the statements 'must be statements that would be relied upon by a doctor when making decisions regarding diagnosis or treatment.'" *State v. Porter*, 2018 MT 16, ¶ 31, 390 Mont. 174, 410 P.3d 955 (internal citation omitted). K.H. did not immediately proceed to the emergency room after the assault, but did so later that evening after she experienced significant pain. She did not initiate contact with law enforcement, and the content of her statement primarily concerned the symptoms of her injuries. The District Court excluded K.H.'s description of the perpetrator and his statements after intercourse, including calling her a "dirty whore" and stating, "[y]ou know you liked it." We conclude the District Court did not abuse its discretion by admitting portions of K.H.'s narrative statement recorded by the emergency room nurse.

¶8 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. In the opinion of the Court, the case presents a question controlled by settled law and by the clear application of applicable standards of review. The District Court did not abuse its discretion by entering the rulings challenged on appeal.

¶9 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON