IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9505-CR-00141**
	)	
Appellee,	)	
	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	**HON. DOUGLAS A. MEYER**
STEPHEN TRACY SHELINE,	)	**JUDGE**
	)	
Appellant.	)	(Rape)

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF HAMILTON COUNTY

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OPINION FILED _____

REVERSED AND REMANDED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Stephen Sheline, brings this appeal as of right from a jury verdict convicting him of rape. He was sentenced to eight years of split confinement, with eleven months and twenty-nine days to be served in the county workhouse and seven years on supervised probation. He appeals this conviction. We reverse the judgment of the trial court.

The Defendant argues the following issues for our review: (1) That the trial court erred in disallowing the testimony of three witnesses under Tennessee Rule of Evidence 412, the rape shield law; (2) that the trial court erred in prohibiting the Defendant from introducing physician testimony on the blood alcohol level of the victim at the time of the incident, when the testimony should have been allowed to impeach the victim's credibility under Tennessee Rule of Evidence 617; (3) that the trial court erred in allowing a witness for the prosecution to testify as to a conversation she and the victim had about the rape immediately after the incident under either a fresh complaint or excited utterance theory; (4) that the trial court erred in prohibiting the Defendant from adequately presenting his case as provided by the Due Process Clauses and the Fifth Amendment of the Tennessee and United States Constitutions, specifically by charging the jury with all of the lesser included offenses of rape and by refusing to allow the defense counsel to play a tape of the preliminary hearing for the purpose of impeaching the testimony of the victim; and (5) that the evidence was not sufficient to support a conviction of rape beyond a reasonable doubt.

I. Facts

Late on the night of August 26, 1993, the victim was introduced to the Defendant in a Chattanooga bar called "Yesterday's." Both the Defendant and the victim were twenty-three-year-old students at the University of Tennessee in Chattanooga at the time of the incident. Earlier that evening, the victim and several girlfriends had been to another local bar where the victim drank a couple of beers. They then drove to Yesterday's. The victim testified that the victim often went to Yesterday's to socialize. The victim arrived there at approximately 11:30 p.m., and she testified that she drank two or three more beers while she was there.

The victim testified that she knew the Defendant by sight because she had previously seen him at school and at other social functions. She testified that she told her friend Ray that she thought the Defendant was "cute." The Defendant testified that Ray introduced him to the victim and told the Defendant that the victim "thought he was cute and that she wanted to kiss" him. The Defendant testified that for the rest of the night, the victim would hug and talk to him whenever he was in her vicinity. The victim, however, testified that after talking to Ray, she did not talk to the Defendant again until thirty minutes later when he approached her and asked her for a ride home. The victim said that she agreed, thinking that she would drop him off at the fraternity house where he lived.

During the drive home, the Defendant explained that he was no longer staying at the fraternity house. The victim offered to let the Defendant spend the

night at her apartment which she shared with three other roommates. From this point, the testimony of the Defendant and the victim differs significantly.

The Defendant testified that the victim approached him outside of Yesterday's after the bar closed and asked him if he wanted a ride, to which he agreed. He said that after they arrived at the victim's apartment, they went into the bedroom. The Defendant sat down on the bed while the victim went into the bathroom. She returned a few minutes later, and the two began kissing and touching each other. The Defendant said that she took off his shirt, and he removed hers. He then performed oral sex on her for several minutes. The Defendant pulled down the victim's underwear and penetrated her with his penis for about fifteen seconds. He said that the victim then said, "I don't think we can do this anymore." The Defendant said that he then stopped having intercourse with the victim, but that they kissed for another ten to fifteen minutes. He said that they cuddled for a short time before he fell asleep.

The victim testified that she told the Defendant he could spend the night at her apartment. She said that when they arrived there, she checked the messages on her answering service. When she hung up the telephone, the Defendant came over to her, pushed her up against a wall, and attempted to pull up her skirt. The victim told the Defendant that he could sleep on the couch, and that blankets and pillows were already there for him to use. She then went into her bedroom and shut the door.

The victim testified that she went into the bathroom to change her tampon, because she was menstruating. When she emerged from the bathroom, the

Defendant was standing in her bedroom. He had taken off his shirt and was only wearing his pants. The victim testified that the Defendant put her down on the bed and pulled up her skirt. She fought him and tried to "wiggle out from underneath him." The Defendant tried to pull her underwear over to one side, and she told him to leave her alone because she was having her period. She said that the Defendant stopped, but as she was getting up, he rolled back on top of her and pulled her panties over to the side. He then placed his penis inside her vagina. The victim said that the penetration hurt her because the tampon was still in her vagina. She said that she told the Defedndant to stop, but he held her hands down at her sides and was trying to keep her legs pinned down with his legs. The penetration did not last long, and the Defendant did not ejaculate.

The victim testified that she got up, ran from her apartment, and knocked on neighboring apartment doors to seek help. She went upstairs to a friend's apartment where she called her friend, Stacy Price. Stacy's boyfriend, Tray, answered the phone, and she told him that she needed help. Stacy testified that the victim was crying hysterically and kept saying, "Come get him out of my apartment, he's trying to kiss me." Stacy and Tray tried to calm the victim, and they told her that they would contact a friend named Boyd, who lived next door to the victim, to have him help. The victim then left that friend's apartment when she saw another friend, Mike Robb, returning to his apartment nearby.

At this point, Boyd arrived and told her to go into his apartment and stay with his fiancee, Nancy Fogle. Boyd Patterson testified that the victim appeared to be confused and upset and said, "Get him out of my apartment." Patterson and Robb then went to the victim's apartment to search for what they believed

may have been an intruder. They saw the Defendant sleeping in the victim's bed wearing only his boxer shorts. Both men knew the Defendant, so they left him sleeping and returned to ask the victim who she wanted out of the apartment. She told them that it was the Defendant that she wanted out of her apartment. Patterson and Robb returned to the victim's apartment, woke the Defendant, and handed him his clothes. They testified that the Defendant appeared to have been drinking. They then drove him back to the fraternity house. During the drive, the Defendant said, "She came on to me." After dropping off the Defendant, they returned to Patterson's apartment to wait for the police.

After talking to the police, the victim went to Erlanger Medical Center where a rape kit and examination was performed by Dr. Stacy Boyd. Dr. Boyd testified that the victim had not suffered external trauma, nor was there any indication that force had been used. The internal examination revealed a wadded up tampon that had been pushed into the victim's vagina. The tampon was removed and placed in a specimen bag in the rape kit. The rape kit was not submitted to laboratory analysis, however, because the Defendant fully admitted to having sexual intercourse with the victim.

II. Sufficiency of the Evidence

The Defendant first contends that the evidence is not sufficient to support a verdict of guilt beyond a reasonable doubt because the elements of force and lack of consent were not proven by the State.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623

(Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

At the time of the incident described herein, rape was defined as unlawful sexual penetration accomplished by force or coercion. Tenn. Code Ann. § 39-15-503[1]. The jury was presented with two conflicting stories as to what happened on the night of the incident. The victim testified that the Defendant penetrated her vagina and that force was used to accomplish the act. The physician who examined the victim testified that the tampon the victim was wearing had been compressed, indicating that something entered the vagina. The physician, however, also testified that he found no physical trauma to the patient indicating force. Thus, the only evidence of forced penetration was the crushed tampon and the victim's testimony.

The jury obviously accredited the testimony of the victim and the State's witnesses. In viewing this testimony and the evidence in the light most favorable to the State, the record supports a finding of the elements of rape. Thus, we conclude that the evidence in the record sustains a verdict of guilt beyond a reasonable doubt.

III. Exclusion of Testimony on the Victim's Blood Alcohol Level

[1]Effective July 1, 1995, the legislature added the element that the penetration was accomplished without consent: "(2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent . . . ." Tenn. Code Ann. § 39-13-503 (Supp. 1995).

We will next address the issue of whether the trial court erred by barring the Defendant from introducing testimony on the blood alcohol level of the victim at the time of the incident.

Tennessee Rule of Evidence 617 provides that "[a] party may offer evidence that a witness suffered from impaired capacity at the time of an occurrence or testimony." Generally, questions regarding the witness's alcohol use are allowed if the proof relates to the witness's capacity to observe, record, recall, or describe accurately the events about which the witness testified.

The Defendant contends that the State opened the door to the level of the victim's intoxication by asking her whether she considered herself to be drunk when she left the bar, thus he had the right to question the physician who saw the victim on the details of the victim's blood alcohol level at the time the offense occurred. The trial court would not let the physician testify as to what level is considered "legally drunk," nor was he allowed to testify as to the approximate blood alcohol level the victim had at the time of the offense.

The Defendant argues that if the evidence had been admitted, the jury could have concluded that the victim inadvertently forgot to remove the tampon prior to intercourse because she was so intoxicated. Subsequently, when she realized that she could not remove the tampon without medical assistance, she fabricated the rape story to hide how she had acted while intoxicated.

At trial, the defense sought to introduce evidence of the victim's intoxication on the night of the incident through Dr. David Wharton, an emergency room

physician who examined the victim shortly after the incident occurred. Dr. Wharton was certified as a medical expert and testified about the results of the physical examination. He testified that at 5:35 a.m., several hours after the incident, the victim had a blood alcohol level of .066. The trial court allowed this testimony, but instructed the jury to disregard the doctor's statement that .10 would be considered "legally drunk."

The trial court is given wide discretion in ruling on the propriety, scope, manner, and control of the examination of witnesses. Coffee v. State, 188 Tenn. 1, 216 S.W.2d 702, 703 (1948). The trial court's rulings will not be disturbed on appeal, absent a finding that the trial court abused that discretion. Id. The court ruled that Dr. Wharton was not qualified to testify as to what blood alcohol level would be considered "legally drunk," nor was he correct in making that statement. Tennessee's statutory laws do not designate what blood alcohol level is "legally drunk." The code does, however, permit inferences to be drawn when a person's blood alcohol level reaches certain percentages. See Tenn. Code Ann. § 55-10-408. Thus, we cannot conclude that the trial court abused his discretion in prohibiting the physician from testifying at what point a person is "legally drunk."

The Defendant also contends that the trial court erroneously prohibited the witness from testifying as to what the victim's blood alcohol level was at the time of the incident. Dr. Wharton testified that alcohol is metabolized by the body at the rate of ten to twenty units per hour, although this rate is relative to several factors, such as how much the person drinks or whether the person was taking other medications. The State objected to Dr. Wharton's testimony on what the victim's blood alcohol level would have been at the time of the incident because

he did not have knowledge of all the relevant factors that could have affected how fast the alcohol was metabolized.

The trial court held two sidebar conferences on this issue. However, these conferences were out of the hearing of the court reporter and not included in the record. After the second bench conference, the trial court apparently prohibited the defense from questioning Dr. Wharton concerning the rate at which the alcohol in the victim's blood dissipated. The witness was, however, allowed to testify that the victim's blood alcohol level would have been higher at an earlier point in the evening.

Again, the trial court has wide discretion in permitting the scope of examination of a witness. Based on the record before us, we cannot conclude that the trial court erred in disallowing the defense witness to extrapolate on the victim's blood alcohol level earlier in the evening when the witness admittedly did not have all of the information relevant to making such a determination. The witness was allowed to testify that the victim's blood alcohol level was probably higher earlier in the evening; thus, evidence of the victim's possible impairment was admitted into the record for the jury to consider. We conclude that the trial court did not abuse his discretion in limiting the physician's testimony on this issue.

The Defendant also argues that the trial court improperly excluded the testimony of two witnesses, Gordon Colbaugh, a security guard at the victim's apartment complex, and, Kay Lloyd Price, the victim's mother. During an offer of proof, Colbaugh testified that he had once quieted a loud party at the victim's

apartment and that he had seen other parties there that lasted until two in the morning. The trial court ruled that this testimony was not material. The trial court also sustained the State's objections when the defense questioned the victim's mother as to whether the victim was the "wild one" of her children and as to what the mother's reaction was when she discovered the victim had a tattoo.

The Defendant has not cited any reasons or authority as to why this evidence should have been admitted. Therefore, we conclude that the testimony of both witnesses was not relevant and was properly excluded under Tennessee Rule of Evidence 403.

IV. Other Assignments of Error by the Trial Court

The Defendant argues that "the trial court erred in a number of rulings which prohibited the Defendant from presenting his case which had the cumulative effect of denying Defendant a fair trial in violation of the due process and right of confrontation clauses of the Tennessee Constitution and the United States Constitution." The Defendant makes a general complaint that the trial court erred in charging the jury with all of the lesser included offenses over the objections of defense counsel and that the court erred in refusing to allow the defense to play the tape of the preliminary hearing to impeach the testimony of the victim. Although the Defendant complains of these matters, he does not explain how he was prejudiced by the court's actions, and he neither articulates any reasons to support his theory nor cites any applicable rules or case law.

Generally, an issue is waived when the defendant fails to cite reasons to support a conclusory statement. Tenn. Ct. of Crim. App. R. 10(b); T.R.A.P. 27(a)(7). Notwithstanding the technical waiver, we will address these issues on their merits.

A. Preliminary Hearing Tape

The Defendant alleges error because the trial court did not allow him to play a tape of the victim's prior testimony. The victim apparently responded differently at trial than she had at the preliminary hearing to a question posed by defense counsel. The portion of the transcript complained about reads as follows:

> Q: (by defense counsel): A minute ago, Miss Stern asked you about this comment you made in the bar to Mr. Haynes, who's a friend of yours and of Steve's that you thought he was cute, and Miss Stern asked you if you said that you wanted to kiss him and you said no?
>
> A: (by the victim): Right.
>
> Q: Is that right?
>
> A: (Moves head in affirmative response.)
>
> Q: Do you remember your hearing in the preliminary hearing, and at that point I asked you specifically, "But you did tell this friend of his that you thought he was cute and that you wanted to kiss him," and you said, "Yes"; is that not true?
>
> A: I was answering to the "you thought he was cute."
>
> Q: But my question was very specific, was it not? I asked you, did I not, "Okay. But you did tell this friend of his that you thought he was cute and that you wanted to kiss him," and you said, "Yes"?
>
> A: (Nods head in affirmative response.)
>
> Q: Now, what is true?
>
> A: I said that I thought he was cute.
>
> Q: And you wanted to kiss him?
>
> A: I didn't say that.
>
> Q: You didn't say that?
>
> A: No.

> Q: Well, why would you admit that you said it in the preliminary hearing?
> A: When we sat in here in the preliminary hearing, you were, you were being--
> Q: I just want the truth and the truth is that you--
> MS. STERN: Your Honor, he asked her why she said it. She gets to answer.
> A: When you were, when you were--when we had the preliminary hearing, you were asking questions and pausing and then asking more, and you were asking me, you were making it--I wanted to leave. I answered yes, that I thought he was cute.
> Q: But you also said you wanted to kiss him?
> A: Well, I didn't answer yes to that part.
>
> MR. GROVES: Well, Your Honor, could I ask that--
> MS. STERN: Your Honor, she's answered and explained.
> THE COURT: Yes.
> MR. GROVES: I would like to play that tape to the jury of that hearing.
> THE COURT: Well, I think you've made the statement that that's what she said to you, so I think the jury understands that.

Defense counsel was obviously pointing out the discrepancy in the victim's testimony at the preliminary hearing and at trial. He sought to play the tape of the preliminary hearing to emphatically illuminate that discrepancy. Apparently, however, the trial court found the playing of the tape would be cumulative evidence on a point that had already been made. As the State suggests, Rule 403 of the Tennessee Rules of Evidence permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of "undue delay, waste of time, or needless presentation of cumulative evidence." We cannot conclude that the trial judge abused his discretion by precluding the defense from playing the tape of the preliminary hearing when the discrepancy in the victim's testimony had already come before the jury.

B. Jury Instructions Charging Lesser Included Offenses

The Defendant next argues that the trial court erred in charging all of the lesser included offenses of rape, including attempted rape, sexual battery, attempted sexual battery and assault.

Trial courts are not required to charge the jury on a lesser included offense when the record is devoid of any evidence to support an inference of guilt of the lesser offense. State v. Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994). However, a trial judge has a mandatory duty to charge a lesser included offense, whether requested or not, if the facts so justify. Tenn. Code Ann. § 40-18-110(a); State v. Jones, 889 S.W.2d 225, 230 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1996). Thus, when there is some evidence upon which reasonable minds could convict the Defendant of a particular lesser offense, the court is required to instruct the jury on that offense. Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975); see Taylor v. State, 212 Tenn. 187, 369 S.W.2d 386 (1963) (trial judge is required to make affirmative instructions on every issue raised by the proof).

The State requested that the trial court instruct on the lesser included offenses, and the trial judge granted that motion over the Defendant's objection. On the Defendant's motion for a judgment of acquittal, the trial judge denied the motion saying that a factual basis existed on which a jury could convict of the offense of rape or any of the lesser included offenses.

In reviewing the record, we cannot say that no evidence existed to support a finding of the lesser included offenses charged by the trial court. Therefore, we

cannot conclude that the trial court erred in so instructing the jury. This issue is without merit.

V. Trial Court's Admission of Witness Testimony Under Fresh Complaint or Excited Utterance Theories

The Defendant next argues that the trial court improperly allowed into evidence testimony of the victim's conversation with Nancy Fogle shortly after the incident. The Defendant contends that the testimony was not admissible under either the fresh complaint theory or the excited utterance exception to the hearsay rule, and the trial court erroneously allowed the testimony into evidence under these theories.

The testimony at issue was that of witness Nancy Fogle, the acquaintance of the victim who was with her after the incident until the police arrived. The witness testified regarding the victim's upset and shaken state when she arrived at the witness's apartment. The witness then testified as to what the victim told her:

> [MS. FOGLE]: It was kind of awkward because we really didn't know each other. I sat her down on the couch and, you know, I was sitting next to her. I was just trying to calm her down to see what was wrong with her, and she was just like -- she had her hands on her knees and she was just like, just, "He put his knees in between mine and I couldn't get them closed."
>
> MS. STERN: Okay. What else did she say?
>
> A: And I started to cry because I sensed then what had happened. And she said that he put his knees between hers and she couldn't get her legs closed, and he pulled her panties aside. She had on a long wrap skirt, her blouse was tucked in and

everything and she -- I was just like freaking out that she was telling me this.

Q: Was she saying who had done that to her?

A: I don't recall hearing a name at that point. That really wasn't -- and I was just like so -- you know, what had happened, I was just trying to see if I was reading her correctly, and she was just like, "I can't believe he put it inside me," and she was afraid. She wanted to go take a shower and she wanted to go to the bathroom. She said she was on her period and that . . .

The State argued that this testimony was admissible under both the fresh complaint and excited utterance theories. The trial court allowed the testimony, without stating for the record the basis for admitting the evidence. At the hearing on the Defendant's motion for new trial, the court cited the excited utterance exception as the basis for admitting the evidence.

The State argues that the evidence was properly admitted under either theory. The testimony qualified as fresh complaint because the victim talked to the witness minutes after the event occurred and did not give a detailed statement of the events. The State contends that the testimony was also admissible as an excited utterance, because the victim was still under the stress of excitement caused by the incident when she talked to the witness. Fogle testified that the victim was visibly upset, crying, and shaking at the time she made the statement.

Under the fresh complaint doctrine, the law allows a complaint made by a rape victim to a third person soon after the incident to be admitted as evidence-in-chief for the purpose of corroborating the victim's trial testimony. In State v. Kendricks, 891 S.W.2d 597 (Tenn. 1994), the Tennessee Supreme Court traced

the evolution of the doctrine in this state and clearly redefined its parameters. Contrary to the Defendant's assertions in this case, the Kendricks court held that the fresh complaint doctrine had survived the passage of the Tennessee Rules of Evidence and remained a viable theory under which evidence could be admitted. Id. at 600, 603-04.

In Kendricks, the supreme court set forth three criteria for allowing evidence under the doctrine of fresh complaint: (1) the fact of the complaint, which may include the nature of the complaint and the identity of the wrongdoer, remains admissible in the State's case-in-chief, but the details of the incident may not be presented before the victim's credibility is attacked; (2) the complaint must be timely, but it need not be contemporaneous with the underlying event; and (3) a statement can be a fresh complaint even if made in response to questions by law enforcement officers, provided the questioning was general and neither coercive nor suggestive. Id. at 603-04, 606.

Under this criteria, we conclude that the victim's statements to the witness were admissible under the doctrine of fresh complaint. The statements, made shortly after the alleged incident, were indeed timely. The witness's testimony at trial during the State's case-in-chief included the fact of the complaint, which mainly described the nature of what happened to the victim, rather than being a detailed account of the events. Additionally, in this instance, even the details of the complaint would be admissible because the victim's credibility had already been attacked on cross-examination before Fogle testified.

The victim's statements were also admissible under the excited utterance theory. Tennessee Rule of Evidence 803(2) governs the admission of excited utterances. To qualify as an excited utterance, a statement must be "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Tenn. R. Evid. 803(2). The declarant must have made the statement in an excited state because of a startling event, and "normal reflective thought processes must be rendered inoperative." State v. Payton, 782 S.W.2d 490, 494 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1989). Also, the statement must have been a spontaneous reaction to the occurrence, not the "result of reflective thought." Id.

The witness described the victim as crying, shaking, and being upset at the time she made the statements to the witness. These statements were made shortly after the event, and the victim was obviously still under the "stress of excitement" caused by the incident. Thus, these statements were clearly admissible under the excited utterance exception. Based on our analysis of these issues, we conclude that the statements were properly admitted under either theory set forth by the State.

VI. Exclusion of Testimony Under the Rape Shield Rule

We will finally address the issue of whether the trial court improperly excluded the testimony of three witnesses under Tennessee's rape shield provision found at Tennessee Rule of Evidence 412.

Under traditional common law rules, a rape victim could be questioned concerning prior sexual history or reputation. Such questioning was often irrelevant to the case at hand and served merely to degrade or unnecessarily harass the victim by exposing any evidence of unchastity. Other goals of defense counsel in revealing this information were to cast doubt on the prosecutrix's credibility by rendering her unworthy of belief or to make the jury believe that a woman's unchaste character would make consent more likely.

Because of the inevitable invasion into their sexual privacy, victims were less likely to report sexual offenses or testify about them at trial. The conduct of harassing the victim during rape trials came under widespread criticism in the 1970's. Consequently, states progressively began enacting "rape shield laws," which deny a defendant in a sexual assault case the opportunity to examine a complainant concerning her prior sexual conduct except under a limited number of circumstances.

Tennessee followed this emerging trend and enacted a rape shield statute in 1975.[2] Tennessee's rape shield statute was established to "eliminate the unjustified besmirching of a woman's reputation by examining her prior sexual activities when such testimony is of highly dubious relevance to the issue of her

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[2]The rape shield statute was first enacted at Tennessee Code Annotated section 40-2445. The law was later found at Tennessee Code Annotated section 40-17-119 and read as follows:

> 40-17-119 Admissibility of prior consensual sexual activity. --Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in prosecutions under §§ 39-2-601--39-2-607 and 39-2-612, provided, however, that when consent by the victim is at issue, such evidence may be admitted if it is first established to the court outside the presence of the jury and spectators by the method of clearing the courtroom that such activity shows such a relation to the conduct involved in the case on the part of the victim that is relevant to the issue of consent.

Tenn. Code Ann. § 40-17-119 (1982).

later consent and credibility." Shockley v. State, 585 S.W.2d 645, 648 (Tenn. Crim. App. 1978). The statute required the defense to make an offer of proof in a jury-out hearing in which the trial court could rule on the admissibility of the evidence.

Tennessee's rape shield statute withstood several attacks and generally passed constitutional muster, even when the challengers contended that the statute was unconstitutional because it denied a defendant his Sixth Amendment right to confront witnesses.[3] In Bell v. Harrison, 670 F.2d 656 (6th Cir. 1982), the defendant brought a federal habeas corpus action challenging the trial court's refusal to allow him to question the victim on cross-examination about prior relationships with other men. The defendant asserted that in so limiting his cross-examination of the victim, the trial court improperly infringed on his Sixth Amendment right to confront and cross-examine the adverse witness. Id. at 658. The appellate court held that, in determining whether to admit the victim's prior sexual conduct, the trial court should balance "the probative value of the evidence in light of the defendant's right of confrontation against the potential embarrassment to the victim in light of the danger of prejudice and of the policies under the statute." Id.

Two other cases sought review as to whether the Tennessee statute was unconstitutional. In Shockley v. State, the victim claimed that she had become pregnant as a result of being raped by the accused. 585 S.W.2d 645. The trial court allowed evidence of the victim's pregnancy, but barred the Defendant from

[3]The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees a defendant a fair trial by providing him with the right to cross-examine all witnesses against him. See Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

introducing evidence that he was not the person who impregnated her. The Court of Criminal Appeals reversed the trial court, holding that in situations in which the rape shield act violated the defendant's Sixth Amendment right of confrontation and to present witnesses in his favor, the statute would be inapplicable. Id. at 651.

This court again found the statute to be constitutional in State v. Marquadis, 649 S.W.2d 15 (Tenn. Crim. App. 1982), perm. to appeal denied, id. (Tenn. 1983). Recognizing that the need to exclude immaterial and irrelevant evidence should not result in an abridgement of an accused's right of confrontation, the court again said that no constitutional violation exists in precluding a defendant from introducing evidence of the victim's prior sexual conduct if the evidence is only intended to attack the victim's credibility. Id. at 17.

Tennessee's rape shield law was significantly different from the one utilized in federal courts. There, Federal Rule of Evidence 412, rather than a statute, governed the admissibility of evidence to show the character of a rape victim. Although Tennessee's rape shield statute limited the admissibility of past sexual conduct between the victim and others, the law provided no exclusion of evidence of past sexual conduct between the victim and the accused. Tenn. Code Ann. § 40-17-119 (repealed 1991). The federal rule, on the other hand, stringently excluded the prior sexual conduct of the victim, allowing evidence of the conduct of a victim with a person other than the defendant only on the issue of whether the defendant was source of semen or injury, and allowing evidence of the

victim's conduct with the defendant only on the issue of consent. Fed. R. Evid. 412.

In 1991, Tennessee repealed the rape shield statute, and subsequently replaced it by adding the more comprehensive Rule 412 to the Tennessee Rules of Evidence, a rule somewhat more similar to its federal counterpart.[4] Rule 412 is to be applied in lieu of Tennessee Rule of Evidence 404(a)(2) (character of crime victim) for the crimes of aggravated rape, rape, aggravated sexual battery, sexual battery, spousal sexual offenses, or the attempt to commit any such offense. Tenn. R. Evid. 412 and Advisory Commission Comment. The rule provides in part:

> **(c) Specific Instances of Conduct.** Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:
>
> (1) Required by the Tennessee or United States Constitution, or
>
> (2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or
>
> (3) If the sexual behavior was with the accused, on the issue of consent, or

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[4]Federal Rule 412 disallows evidence "offered to prove that any alleged victim engaged in other sexual behavior," of evidence "offered to prove any alleged victim's sexual predisposition." Fed. R. Evid. 412(a). The rule allows some evidence to be admitted if it is:

> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

Fed. R. Evid. 412(b).

(4) If the sexual behavior was with persons other than the accused,

(I) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove *consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented*.

Tenn. R. Evid. 412(c) (emphasis added).

Rule 412 strikes a resounding balance between the interests of the accused in getting a fair trial and fully presenting his defense and the interests of ensuring that the victim does not suffer an unnecessary, degrading, and embarrassing invasion of sexual privacy. Id. at Advisory Commission Comments. Thus, the rule continues to exclude dissimilar and remote conduct and does not allow into evidence totally irrelevant prior sexual activities.

Although the need to keep the victim in a rape case from being put on trial is of paramount concern, the competing interest of allowing the defendant the Sixth Amendment right to confrontation is also of great importance. Rape shield statutes should not be used to exclude highly relevant evidence or to violate the defendant's right of confrontation or any other constitutional right. Bell v. Harrison, 670 F.2d at 658.

The Defendant argues that the trial court improperly excluded the testimony of Rich Burns and Eric Gray, and certain portions of testimony from

Gary Jindrak under Rule 412. He argues that the testimony of Burns and Gray should have been admissible pursuant to Tenn. R. Evid. 412 (c)(4)(iii) because the testimony was highly relevant to the issue of consent and involved sexual acts with the victim that demonstrated a pattern of sexual behavior closely resembling the Defendant's version of events.

Rich Burns testified during an offer of proof that he was a former boyfriend of the victim. He started dating the victim and engaged in sexual relations with her soon afterward. He testified that they grew apart when commuting to see each other and that they broke up when the victim told him that she kissed someone at a party the night before. The Defendant contends that this testimony should have been allowed to bolster his testimony and that of witness Eric Gray.

Likewise, the Defendant proposes that the testimony of Eric Gray was admissible evidence. Gray had two sexual encounters with the victim during the time that she was dating Burns. Gray's proffered testimony was that he knew the victim from college. One night, he and the victim were at a local bar, and both had been drinking heavily. They went back to Gray's apartment and had sexual relations. On the second occasion, he and the victim went to a basketball game and a fraternity party before returning to the victim's apartment where they had sexual relations. Both had been drinking, but not heavily.

Specifically, the Defendant argues that the testimony of these two witnesses should have been allowed under the rape shield rule to prove consent because each is evidence of a distinctive pattern, so resembling the Defendant's

version of the story that it tends to prove that the victim consented to sexual relations with the Defendant.

With respect to the testimony of Rich Burns, we disagree. His testimony is the very type that is intended to be excluded by the rape shield rule. He maintained a relationship with the victim for some period of time. Their sexual conduct is irrelevant to the issue of consent, because it was part of a long-term relationship very different to the situation in the case sub judice in which the victim allegedly had sexual relations with someone she had just met. Any testimony regarding the victim's relationship, sexual or otherwise, with a former boyfriend is an unnecessary invasion into the victim's privacy. This evidence was properly excluded.

Whether the testimony of Eric Gray should have been excluded poses a more difficult question. The first incident of behavior closely resembles the Defendant's version of events in that the victim knew Gray somewhat remotely, met him at a bar, was drinking heavily, and had sexual relations with him later that night. By the time of their second sexual encounter, however, Gray testified that they had become good friends.

We conclude that the first encounter should have been admitted into evidence. Rule 412 allows acts with third parties to prove consent if the conduct fits a distinctive pattern, and the acts are so similar to the defendant's version of the offense that they tend to corroborate his story. The evidence of the first sexual encounter with Gray is relative to the issue of consent because the factual scenario so closely resembles the Defendant's version of the facts that it

constitutes one episode of a distinctive pattern in which the victim met an acquaintance at a bar, was drinking, and eventually had sexual relations with that person. This encounter is also similar to the events described by witness Gary Jindrak, and these two encounters taken in conjunction with the Defendant's version of the facts, constitute a distinctive pattern.

Under this same rationale, we conclude that the testimony of Gary Jindrak should also have been admitted. Jindrak testified during an offer of proof that the victim approached him at the bar on the evening in question, shortly before she left with the Defendant. They talked, she put her arm around him and kissed him, and later asked him if he wanted to go home with her, which the witness declined to do. The trial court precluded the testimony under the rape shield rule without stating his reasoning on the record.

We conclude that the trial court erred in excluding the testimony of Jindrak because this highly relevant testimony is the very kind of evidence allowed under section (c)(4)(iii) of the rule. Surely the jury should have been given the opportunity to hear Jindrak's claim that the victim propositioned him immediately before offering to give the Defendant a ride home. When consent is the determinative issue in a rape trial and the jury's decision turns on the weight they are placing on the testimony of a victim and the accused, the jury should hear the relevant evidence that has a direct bearing on the issue of consent. While the jurors may not choose to accept these facts as true, they are entitled to hear proof of the defense theory so they can make an informed judgment on the weight to place on both the victim's and the defendant's testimony. Allowing Jindrak's testimony into evidence does not mean that the victim participated in

consensual sex with the Defendant; however, the jury should be allowed to consider this evidence in determining the weight to give the witnesses' testimony.

Although the rape shield rule was created to protect the unnecessary invasion into a victim's privacy, the rule was not designed to do so at the expense of a defendant's constitutional rights. Under Tennessee's Rule 412, even though evidence of the victim's prior sexual behavior can be admitted, an indiscriminate admission of totally irrelevant prior sexual conduct is not allowed. Thus, as we previously noted, remote and dissimilar conduct is not allowed, and the victim is afforded protection from an unnecessary and irrelevant intrusion into her private life. However, we must also be cognizant that the rule does not allow an indiscriminate *exclusion* of evidence of the victim's prior sexual behavior; rather, the rule provides protection for the defendant as well by allowing such evidence of the victim's prior sexual behavior if specific circumstances are met.

The Advisory Commission Comment following Rule 412 distinctly notes that specific acts of the victim are admissible when required by the United States or Tennessee Constitutions. A trial court should carefully determine whether the proffered evidence of the victim's prior sexual behavior falls within the parameters of the rape shield rule before allowing it into evidence.

We conclude that the testimony of Gary Jindrak and part of the testimony of Eric Burns was erroneously excluded under the rape shield law thereby denying the Defendant his Sixth Amendment right to confront and cross-examine witnesses and to present witnesses in his defense.

The Defendant cites a Wisconsin case, State v. Vonesh, 401 N.W.2d 170 (Wis. App. 1986), in alternatively arguing that Jinkdrak's testimony did not constitute evidence of "sexual behavior" as defined by Rule 412(a). The Defendant contends that the victim's conduct with Jindrak does not fall within the purview of the rape shield law because the language of Rule 412 only applies to "physical, sexual acts," not kissing or conversation, and therefore, should have been admitted.

In Vonesh, the Wisconsin court held that sexual conduct does not include the act of writing about sexual desires or activities and, therefore, was not the type of conduct protected by the rape shield law. The Wisconsin rape shield law defined "sexual conduct" as "any conduct or behavior relating to sexual activities of the complaining witness, including, but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangements and lifestyle." Id. at 173. Although the Wisconsin court specifically defined what conduct would fall within the realm of "sexual conduct," we do not believe those same guidelines apply to the Tennessee rape shield rule.

Rule 412 disallows any evidence of "sexual behavior," which is defined as "sexual activity of the alleged victim other than the sexual act at issue in the case." Tenn. R. Evid. 412(a). Jindrak testified during the offer of proof that the victim kissed him, put her arm around him, and invited him home with her. We can only conclude that this type of conduct in this situation is the "sexual behavior" that Rule 412 intends to exclude. The Defendant's argument on this issue is, therefore, without merit.

We conclude that the exclusion of the two witnesses' testimony under the rape shield law was error resulting in a deprivation of the Defendant's constitutional rights. An error of constitutional dimensions will not necessarily require a reversal if the reviewing court determines that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); State v. Cook, 816 S.W.2d 322 (Tenn. 1991). In this case, we cannot conclude that the errors were harmless because they went to the core of the defense's theory of consent.

Therefore, we must reverse the judgment of the trial court and remand this case for a new trial.

_____
DAVID H. WELLES, JUDGE

CONCUR:

_____
JOE B. JONES, PRESIDING JUDGE

_____
JOHN H. PEAY, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1995 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9505-CR-00141**
Appellee,	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	**HON. DOUGLAS A. MEYER , JUDGE**
STEPHEN TRACY SHELINE,	)	
	)	
Appellant.	)	(Rape)

DISSENT

I respectfully dissent from the majority's holding that Gray's testimony about his first sexual encounter with the victim, and Jindrak's testimony about his contact with the victim earlier on the evening in question, are admissible under the Rape Shield Rule, Tenn. R. Evid. 412. I agree with the trial court that this testimony should not have been admitted.

The Rape Shield Rule permits the defendant to introduce evidence about the victim's sexual history with other persons in order to prove consent under very limited circumstances. First, the evidence must be of "specific instances of [the] victim's sexual behavior . . . with persons other than the defendant." Tenn. R. Evid. 412(c)(4) (emphasis added). The Rule's use of the plural in both the words "instances" and "persons" is significant because the second requirement of the Rule is that the evidence be of a "pattern" of "distinctive" sexual behavior. The word "pattern" denotes multiple incidents. Thus, to meet the stringent tests of Rule 412, the defendant must proffer admissible testimony from more than one witness, about more than one incident.

Next, the testimony proffered by the defendant must be evidence of a "pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented." Tenn. R. Evid. 412 (c)(4)(iii). While "so distinctive and so closely resembling" is not defined in the Rule, the Advisory Commission Comments describe this provision as pertaining to "signature cases."

Gray's testimony about his first sexual encounter with the victim is deficient with respect to Rule 412's requirements in several respects. First, there is nothing "distinctive" about the victim's behavior with Gray. If the victim's behavior with Gray is "distinctive," then every woman who has "first date" sex with a man she meets in a bar is engaging in "distinctive" sexual behavior. Approve of it or not, this conduct cannot be considered "distinctive."

Of course, this is not to say that such behavior cannot become distinctive under certain circumstances. For instance, over the course of a month, a woman frequents the same bar one or more evenings a week. Each time she is there, she singles out a potential partner, drinks with him, and spends a significant amount of time engaging in both verbal and physical flirting with him. Eventually, she asks to be driven home, invites the gentleman into her abode, and then engages in consensual sex. She declines any further encounters with this man. Arguably, this behavior contains a number of distinctive elements: the "pick-up" always occurs in the same place and in the same manner; the sex always occurs in the same place; and the relationships are limited to "one-night stands." Repeated often enough, this behavior would satisfy the requirement of a "pattern of sexual behavior" which is "distinctive." Where a defendant engaged in sex under circumstances fitting the woman's usual scenario, testimony from other men

with whom she engaged in sex under the same circumstances would be admissible under Rule 412 on the issue of consent.

Another problem with Gray's testimony is that, alone, it does not establish any "pattern." Yet the defendant proffers no testimony from other men with whom the victim actually had sex under circumstances similar to his own. Again, the Rule contemplates the admission of multiple incidents: not single, isolated ones. To establish the required pattern, a defendant must offer testimony from more than one partner with whom the victim had consensual sex in situations which very closely resemble his own.

Finally, Gray's first encounter with the victim does not "closely" resemble the defendant's encounter with him. Importantly, Gray's first sex with the victim occurred at his home. The defendant's encounter with the victim, on the other hand, occurred at her place of residence. That a woman consents to have sex at her date's residence does not tend to prove that she would consent to have sex with a different person at her own residence.

I would hold that none of Gray's testimony was admissible under Rule 412.

Jindrak's proffered testimony was that the victim approached him at the same bar on the same evening in question, talked with him, put her arm around him, kissed him and eventually asked him if he would like to go home with her. Jindrak declined the victim's alleged offer. The majority rules this testimony admissible, finding it to be "highly relevant testimony [of] the very kind of evidence allowed under section (c)(4)(iii) of the rule." The defendant also argues in the alternative that Jindrak's testimony does not trigger Rule 412, and is therefore admissible under Rule 401, because it doees not constitute evidence of a specific instance of the victim's "sexual behavior." The majority rejects this argument, but in doing so it inconsistently refers to

this testimony as involving "the 'sexual behavior' that Rule 412 intends to exclude." I agree that it is the type of conduct which Rule 412 intends to exclude, but my analysis differs significantly from that of the majority.

The only way that Jindrak's testimony is even arguably relevant is to assume that the victim would have consented to sexual intercourse with him had he accepted her invitation to go home with her. The majority is apparently willing to make this assumption. I am not. We must acknowledge the possibility that, even if the victim intended to have sex with Jindrak at the time she offered him a ride, she may have changed her mind by the time they arrived at their destination. We must also acknowledge the possibility that the victim may have consensually engaged in some sexual activities with Jindrak, but not others. The defendant's story is that the victim engaged in consensual intercourse with him. If she had engaged only in some sexual activities with Jindrak, and refused to engage in intercourse, surely the majority would not find the victim's encounter with Jindrak to "so closely resembl[e] the defendant's" that it would be admissible. In fact, in this scenario, it is likely that the defendant would be trying to keep Jindrak's testimony out.

The defendant wants to offer Gray's and Jindrak's accounts of their encounters with the victim for one purpose and one purpose only: to prove that, since she said yes to them, then she must have said yes to him, as well. Yet this is the very argument which Rule 412 is designed to prevent. Only where the victim has engaged in a series of "signature" encounters is this outdated and soundly discredited notion deemed appropriate. We have no such signature encounters here.

Rape shield laws are designed to permit women to assist in the prosecution of their rapists without fear that their past acts of consensual sex will be used as a weapon against them. By its very structure, Rule 412 sets forth the particular type of past

conduct by a victim with other persons that is deemed relevant to determining whether she also consented to have sex with the defendant. If the evidence is not of this particular type of conduct, but is still being proffered by the defendant in an attempt to prove "she said yes to him, therefore she said yes to me, too," then it is simply not admissible.

We would arrive at the same conclusion if we accepted the defendant's argument that Jindrak's testimony does not trigger Rule 412 because it does not involve a specific instance of the victim's sexual behavior as defined in Rule 412. Under the combined rubric of the Tennessee Rules of Evidence 401, 402 and 403, the argument in favor of admissibility is that Jindrak's testimony is relevent to prove that the victim was actively seeking a sexual encounter. The argument against admissibility is that the victim's alleged willingness to engage in sex with Jindrak is hardly evidence of her willingness to engage in sex with the defendant, and that any probative value at all that attaches to Jindrak's testimony is substantially outweighed by the danger of unfair prejudice. On balance, even assuming that Jindrak's testimony tends to prove that the victim consented to have sex with him, this evidence is not relevant to prove that the victim thereby consented to have sex with the defendant. Rule 412 supports the concept that, ordinarily, sexual partners are simply not that fungible.

Finally, giving the majority the benefit of the doubt that the Gray and Jindrak testimony is arguably admissible, the trial court properly considered the proffered evidence and ruled it inadmissible. With respect to Gray's testimony, the defendant's lawyer argued, "I think it shows promiscuity on her part and we feel like that we're entitled to go into this in our proof." The trial court correctly responded, "No, I don't think it's -- it's not promiscuity that's the issue. Really the issue is whether or not that evidence is a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that [it] tends to prove the victim

consented to the act. I don't think it does." With respect to Jindrak's testimony, the trial court simply said, "That testimony is precluded by the rape shield [rule]."

As this Court has previously held, "The question of whether evidence is admissible rests within the sound discretion of the trial court; and this Court will not interfere with the exercise of this discretion unless clear abuse appears on the face of the record." State v. Hill, 885 S.W.2d 357, 361 (Tenn. Crim. App. 1994). No such clear abuse appears on the face of the record in this case. The trial court heard the offers of proof and made a proper analysis under our rules of evidence. I would affirm the trial court's rulings.

I would hold that the trial court properly excluded all testimony from Gray and Jindrak, and that the defendant's conviction should be affirmed.

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JOHN H. PEAY, Judge