

DA 17-0347

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 186N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MATTHEW PAUL MITCHELL,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDC-15-284c
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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For Appellee:

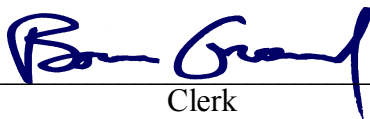
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Decided: August 6, 2019

Filed:



Clerk

Justice Laurie McKinnon 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 A jury in the Eighth Judicial District Court, Cascade County, found Robert Mitchell (Mitchell) guilty of sexual intercourse without consent (SIWC). The District Court sentenced Mitchell to 60 years' incarceration with 20 years suspended. Mitchell appeals, raising two issues and further arguing cumulative error. We affirm.

¶3 When K.S. was fourteen years old, her father became angry with her after he saw a Facebook message from another girl to K.S. In that message, the girl said she loved K.S. K.S. told her father she loved the other girl too and told him she was bisexual. K.S.'s father became upset about K.S.'s sexual orientation, and the two got into an intense argument. During the argument, K.S.'s father asked K.S. why she was acting out: Had someone sexually abused her? K.S. responded yes, her older cousin Mitchell had been sexually abusing her for years.

¶4 Thereafter, K.S. reported the abuse to police officers, and, in June 2015, the State charged Mitchell with three counts of SIWC. The State alleged Mitchell started abusing K.S. in 2008 when Mitchell babysat her and subsequently sexually assaulted her countless times. At Mitchell's trial, the District Court permitted Mitchell to explain that K.S. and her father were intensely fighting when K.S. first reported the sexual abuse, but

prohibited Mitchell from disclosing that the fight was about K.S.’s sexual orientation. K.S. testified at trial and, over Mitchell’s objection, the District Court permitted K.S. to read a Facebook post to the jury that she wrote after she disclosed the sexual abuse. The jury found Mitchell guilty of one count of SIWC and acquitted him of the other two counts. Mitchell appeals his conviction, raising two issues and further arguing cumulative error.

¶5 Mitchell first argues the District Court improperly excluded evidence that K.S. and her father were arguing about K.S.’s sexual orientation when K.S. first reported Mitchell abused her. Mitchell’s defense theory was that K.S. fabricated the accusations against him to take the attention away from herself during the argument about her sexual orientation with her Father. To prove his defense to the jury, Mitchell asserts he needed to show the argument was over K.S.’s sexual orientation—a topic of “such magnitude and negative emotional impact for K.S. that it plausibly could have motivated K.S. to fabricate serious abuse allegations to deflect her father’s attention away from the argument and quell his outrage.” Mitchell reasons the jury could only understand the significance of the argument and K.S.’s motivation to lie if it knew the argument was about K.S.’s sexual orientation. Accordingly, Mitchell asserts the District Court compromised his constitutional right to present evidence in his own defense by not allowing Mitchell to present evidence that K.S. and her father were arguing about K.S.’s sexual orientation.

¶6 Montana’s rape shield law, § 45-5-511(2), MCA, provides that evidence of a victim’s sexual conduct is generally inadmissible in a criminal prosecution. The law is

designed to prevent the defendant's trial "from becoming a trial of the victim's prior sexual conduct" and to protect victims from "harassing or irrelevant questions concerning their past sexual behavior." *State v. Colburn*, 2016 MT 41, ¶ 22, 382 Mont. 223, 366 P.3d 258 (citations omitted). "The statute reflects a compelling state interest in keeping a rape trial from becoming a trial of the victim." *Colburn*, ¶ 22. The rape shield law exists in tension with a defendant's constitutional right to confront his accuser and to present evidence in his own defense. *State v. Walker*, 2018 MT 312, ¶ 53, 394 Mont. 1, 433 P.3d 202 (citing U.S. Const. amend. VI; Mont. Const. art. II, § 24). A court may not arbitrarily or mechanically apply the law to exclude evidence; instead, it must strike a balance between the victim's rights under the rape shield law and the defendant's constitutional rights. *Walker*, ¶ 54. Thus, in determining whether to admit evidence of a victim's sexual orientation, a trial court must strike a balance between the victim's rights under the rape shield law—ensuring the trial does not become a trial of the victim and protecting the victim from harassing and irrelevant questions—with a defendant's constitutional right to confront his accuser and present evidence in his own defense.

¶7 In *State v. Lindberg*, 2008 MT 389, ¶¶ 51-56, 347 Mont. 76, 196 P.3d 1252, we considered whether evidence of a female victim's sexual relationship with another female was admissible under the rape shield law. In that case, the defendant Lindberg reported that he strenuously objected to female victim H.B.'s sexual relationship with her female friend. *Lindberg*, ¶ 52. Lindberg's defense theory was that H.B. fabricated abuse allegations against Lindberg because of his disapproval of her sexual relationship with a female. *Lindberg*, ¶ 52. The district court permitted Lindberg to present evidence that

H.B. had a close female friend and that Lindberg disapproved of that friendship, but excluded any evidence or testimony regarding the sexual relationship, H.B.’s sexual orientation, or H.B.’s sexual history. *Lindberg*, ¶¶ 10-11, 52, 54. On appeal, Lindberg argued the district court abused its discretion by excluding the testimony, “claiming that an understanding of the nature of H.B.’s relationship with [another female] was crucial to his defense so that the jury could fully understand the tension between him and H.B. and why H.B. would have been so outraged by Lindberg forbidding th[e] relationship.” *Lindberg*, ¶ 54.

¶8 We affirmed the district court’s exclusion of evidence of H.B.’s sexual orientation under the rape shield law. *Lindberg*, ¶ 56. We noted the district court struck an appropriate balance between H.B.’s rights under the rape shield law and Lindberg’s constitutional rights—it provided Lindberg with the “opportunity to expose H.B.’s alleged motivation to fabricate the charges based on his disapproval of H.B.’s relationship with [her female friend], but also correctly reasoned that evidence of the sexual nature of that relationship was irrelevant, especially in light of the rape shield law.” *Lindberg*, ¶ 56.

¶9 We conclude the District Court similarly struck an appropriate balance between K.S.’s rights under the rape shield law and Mitchell’s constitutional rights in this case.¹ By prohibiting Mitchell from inquiring about K.S.’s sexual orientation, the court

¹ Before the District Court, the State did not attempt to exclude the evidence pursuant to the rape shield law and the District Court did not specifically cite the statute when it excluded the evidence. The court did, however, balance the relevant competing interests, and both parties present their legal arguments on appeal in terms of the rape shield law. We, accordingly, apply the rape shield law and balance K.S.’s and Mitchell’s countervailing interests.

protected K.S.’s rights under the rape shield law by ensuring the trial would not become a trial about K.S. and protecting K.S. from harassing and irrelevant questions. The District Court also protected Mitchell’s constitutional rights by providing him with the opportunity to expose K.S.’s alleged motivation to fabricate the allegations by explaining that K.S. and her father were arguing about a Facebook message from another child. The court permitted Mitchell to emphasize the intense nature of the argument—Mitchell could describe K.S.’s father as “livid” and could “cross-examine [K.S.] until [his] heart’s content about how angry [K.S.’s father] was.” Thus, Mitchell had the opportunity to confront his accuser and present evidence in his own defense. We accordingly affirm the District Court’s decision to exclude evidence that K.S. and her father were arguing about K.S.’s sexual orientation when K.S. first reported Mitchell abused her.

¶10 Second, Mitchell argues the District Court improperly admitted K.S.’s Facebook post. After K.S. disclosed the sexual abuse, K.S.’s extended family divided, posting comments on Facebook and confronting other family members. In response, K.S. wrote a lengthy Facebook post about her emotions, her disclosure, and the consequences of the disclosure. When the State sought to have K.S. read the Facebook post at trial, Mitchell objected on numerous grounds, including best evidence, relevance, foundation, confrontation, and late disclosure. The District Court admitted the Facebook post, stating it was not hearsay because it was a prior consistent statement under M. R. Evid. 801(d)(1)(B).

¶11 Preliminary, the parties dispute whether this issue is properly before this Court, because neither the State nor Mitchell referenced the hearsay issue before the

District Court ruled the Facebook post was admissible as a non-hearsay prior consistent statement. The District Court developed its own theory and sua sponte decided the Facebook post was non-hearsay under M. R. Evid. 801(d)(1)(B). However, the State and Mitchell had the opportunity to address the issue and the District Court had the opportunity to rule on it. Therefore, we conclude Mitchell's hearsay issue regarding whether the court properly admitted the prior consistent statement is not barred on appeal. *See State v. Baze*, 2011 MT 52, ¶¶ 9-11, 359 Mont. 411, 251 P.3d 122.

¶12 Hearsay—"a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"—is generally inadmissible at trial. M. R. Evid. 801(c), 802. A *prior* statement is not hearsay, however, if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive." M. R. Evid. 801(d)(1)(B); *accord State v. Teters*, 2004 MT 137, ¶ 25, 321 Mont. 379, 91 P.3d 559. The prior consistent statement is only admissible non-hearsay, however, if the statement was made before the alleged motive to fabricate arose. *State v. McOmber*, 2007 MT 340, ¶ 13, 340 Mont. 262, 173 P.3d 690.

¶13 In this case, K.S. testified at trial, was subject to cross-examination concerning her Facebook post, and the Facebook post was consistent with her trial testimony that Mitchell sexually assaulted her. Mitchell's defense theory was that K.S. fabricated the abuse she alleged against him during the intense argument with her father, and the

Facebook post could have rebutted those charges of fabrication. However, K.S. authored the Facebook post after the alleged motive to fabricate arose—that is, after she reported the abuse. Therefore, the District Court erred in its application of M. R. Evid. 801(d)(1)(B) and improperly admitted K.S.’s Facebook post on those grounds; the Facebook post was hearsay.

¶14 However, this court will not reverse a district court for committing an error that did not prejudice the defendant. Section 46-20-701(1), MCA. “[A] defendant is not prejudiced by the introduction of inadmissible hearsay testimony when the hearsay statements are separately admitted through the testimony of the declarant or through other direct evidence.” *State v. Mensing*, 1999 MT 303, ¶ 18, 297 Mont. 172, 991 P.2d 950. “[W]here the declarant testifies at trial and the defendant is given the opportunity to cross-examine regarding the statements at issue, the improper admission of the declarant’s out-of-court statements is considered harmless.” *Mensing*, ¶ 18 (citing *State v. Veis*, 1998 MT 162, ¶ 26, 289 Mont. 450, 962 P.2d 1153). In this case, K.S.—the declarant of the hearsay statements at issue—testified at trial and Mitchell had an opportunity to cross-examine her about those statements. Therefore, pursuant to *Mensing*, ¶ 18, and *Veis*, ¶ 26, the admission of the Facebook post was harmless error.

¶15 Because the District Court did not err by excluding evidence that K.S. and her father were arguing about K.S.’s sexual orientation when K.S. first reported Mitchell abused her and because the District Court’s error in admitting K.S.’s prior consistent statement was harmless, there are no errors to cumulate and we need not address Mitchell’s cumulative error argument.

¶16 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.

¶17 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH

/S/ JIM RICE

/S/ INGRID GUSTAFSON

Justice Dirk M. Sandefur, dissenting.

¶18 I agree that the District Court erroneously allowed the victim to read a self-serving Facebook post, made after her allegations against the defendant, as corroboration of her earlier allegations. The substance of the post was rank hearsay, inadmissible under any recognized hearsay definition, exclusion, or exception. I disagree, however, with the Court's conclusion that the error was harmless, particularly in conjunction with the erroneous rape shield exclusion of otherwise compelling evidence of a victim motive to make false allegations. I would reverse and remand for a new trial.

¶19 Montana's rape shield statute is an important policy determination by the Legislature to prevent persons charged with sex offenses from diverting attention away from their own conduct by converting a criminal prosecution into a farcical and horribly

unfair attack on the victim's character based on his or her sexual history. *See State v. Colburn*, 2016 MT 41, ¶ 22, 382 Mont. 223, 366 P.3d 258. Regardless of this compelling public policy justification, we cannot and should not allow, as here, the State and district courts to “arbitrarily or mechanistically” apply the rape shield statute without careful balance of the constitutional and statutory rights of a defendant to a fundamentally fair trial. *See Colburn*, ¶ 25. As important as it is, the rape shield protection is not absolute. *State v. Johnson*, 1998 MT 107, ¶¶ 22-23, 288 Mont. 513, 958 P.2d 1182. Where the rape shield statute conflicts with a defendant's right to a fair trial, the court must carefully consider and balance both the victim's protected interest *and* the defendant's right to, and society's equally compelling interest in, a fair trial. *See Colburn*, ¶ 25. Courts must protect and preserve both to the maximum extent reasonably possible under the circumstances of each case. *See Colburn*, ¶ 25. The District Court clearly failed to do that here and the Court now perpetuates the error with prejudice to the defendant and the integrity of the most sacred of our fundamental constitutional rights—the right to a fair trial.

¶20 Here, compelling circumstantial evidence exists that the alleged victim had a motive to falsely accuse the defendant of sexually assaulting her, i.e., that she did not make any allegation against the defendant until after her father angrily confronted her about her Facebook revelations regarding her sexual preference and a romantic attraction to another female and then questioned her as to whether her preference and attraction were the result of her being sexually abused. Whether the alleged victim's allegations were credible or simply a means to avoid or deflect her father's judgmental wrath, this

crucially pivotal matter of evidentiary credibility was not for the District Court or this Court to determine—it was and should have been exclusively a matter for jury consideration and determination under the totality of the circumstances. See similarly, *Colburn*, ¶¶ 27-30 (victim’s failure to disclose sex abuse allegations against her father until after she made similar allegations against defendant highly relevant and admissible to credibility of victim’s allegations against defendant—defendant denied fair trial by exclusion). After at least tacitly acknowledging the critical relevance of this evidence, the Court dismisses it on the fiction that the defendant at least had the opportunity to inform the jury that the allegations against the defendant came in the wake of an unexplained abstract argument between the alleged victim and her father “about a Facebook message from another child.” The jury could not possibly have felt the fervor and understood the intensity of the situation and the resulting magnitude of the victim’s motive to deflect or minimize her father’s judgmental wrath without knowing why he was so angry.

¶21 The balance between a fair trial and protecting against unfair probing of an alleged victim’s sexual history tips in favor of admission when the subject evidence is non-speculative, highly relevant, not “merely cumulative of other admissible evidence,” and the probative value is not substantially “outweighed by its prejudicial effect.” *Colburn*, ¶ 25. In this classic he-said/she-said case, devoid of significantly corroborating evidence, nothing was more critically relevant and probative than the credibility of the victim’s allegations against the defendant. Regardless of what weight, if any, the jury may have ultimately given the existence of a motive to falsely accuse the defendant, the

evidence of its existence was certainly not cumulative, speculative, or unsupported—it was undisputed.

¶22 Nor would disclosure of the alleged victim’s Facebook revelations have unfairly subjected her to humiliation or harassment under the facts and circumstances of this case. Without elaboration or reference to any actual sexual conduct, the revelations were no more than the victim’s *own publicized affirmative assertion* of a loving same-sex *attraction or relationship*—hardly a sensationally provocative, improper, controversial, humiliating, harassing, or unfair matter in this day and age, particularly under the circumstances of this case. The only potential prejudicial effect of the alleged victim’s Facebook revelations was that they might undermine the State’s case—a matter to which the rape shield statute is not concerned. Under the circumstances of this case, the right to a fundamentally fair trial required that the balance tip in favor of admission of the alleged victim’s Facebook revelations as explanation of the reason for her father’s angry confrontational response and the resulting existence of a motive to make a diversionary false allegation.

¶23 The cumulative effect of these trial errors denied the defendant a fundamentally fair trial. I would reverse and remand for a new trial.

¶24 I dissent.

/S/ DIRK M. SANDEFUR