STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL PATRICK IVERS,

Defendant-Appellant.

UNPUBLISHED
December 2, 1997

No. 195321
Ingham Circuit Court
LC No. 94-068070-FC

Before: Michael J. Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction by jury of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Defendant was sentenced to two to fifteen years' imprisonment. We reverse and remand for a new trial.

Defendant argues that the trial court erred by prohibiting testimony concerning statements made by the complainant to one of her friends on the night of the alleged rape because the testimony did not fall within the parameters of the rape-shield statute, MCL 750.520j; MSA 28.788(10), and was otherwise relevant. This witness would have testified that the complainant told her she had discussed birth control with her mother, that she "was ready to have sex," and that she wanted the witness to help her "find a guy." The determination as to whether evidence falls within the purview of MCL 750.520j; MSA 28.788(10) is a question of law involving statutory interpretation; review is therefore de novo. *People v Bobek,* 217 Mich App 524, 528; 553 NW2d 18 (1996). However, this Court otherwise reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Lugo,* 214 Mich App 699, 709; 542 NW2d 921 (1995).

The testimony at issue was not proscribed by the rape-shield statute and was relevant to the issue of consent. MCL 750.520j; MSA 28.788(10) provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in

the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

"The rape-shield law, with certain specific exceptions, was designed to exclude evidence of the victim's sexual conduct with persons other than defendant." *People v Adair*, 452 Mich 473, 480; 550 NW2d 505 (1996) (emphasis omitted). Moreover, "[t]he rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior sexual activity, which discouraged victims from testifying 'because they kn[e]w their private lives [would] be cross-examined.'" *Id.* (quoting House Legislative Analysis, SB 1207, July 18, 1974).

The proffered testimony did not concern the complainant's past sexual conduct, opinions about her sexual conduct or her reputation regarding sexual conduct. Accordingly, it was not precluded by the rape-shield statute. It concerned statements made by the complainant to her friend showing that she had discussed birth control with her mother in anticipation of going away to college, that she believed that she was "ready" for sex, and that she asked her friend to "find her a guy." Although the statements in this case were somewhat removed from defendant's alleged act of sexual aggression, we conclude that the statements were "incident" to the alleged sexual conduct because they were made on the evening of the alleged assault and evidenced a state of mind that the complainant *may* have been contemplating having sex that evening. See *Adair, supra* at 481. We note that these statements are by no means proof that the complainant was "ready" for sex on the night in question or that "getting a guy" meant that she wanted to have sex that night. However, the testimony was relevant in that it had a tendency to make the existence of a fact which was of consequence, i.e., consent, more probable than it would have been without the evidence. MRE 401.

We conclude that the probative value of this testimony was not outweighed by its inflammatory or prejudicial nature. This case was closely drawn and turned on the credibility of the complainant and defendant. Since the complainant had allegedly suffered an alcoholic blackout, there was basically no evidence to be presented on the issue of consent besides defendant's assertion that the complainant consented. Moreover, the proffered testimony would have been subject to cross-examination and the jury would have had the opportunity to assess the statements. As was developed by the prosecutor when the testimony was elicited at an in camera hearing, the complainant denied having made the statements and the witness that would have testified to the contrary said that, although the complainant had told her that she was "ready to have sex" and that she and her mother had discussed her going on the pill, the complainant never stated that she was desiring or ready to have sex on the night of the alleged sexual assault. Furthermore, the witness' testimony that the complainant requested that she "get her a guy" could be interpreted as merely a request that the witness find her a date for the evening. This type of questioning could have significantly reduced any inflammatory or prejudicial effect of the testimony had it been allowed in.

We conclude that the refusal to admit this testimony was not harmless erro:r.

> The purpose of [the harmless error] requirement is to safeguard the defendant's right to be convicted only by a jury and only upon their finding of his guilt beyond a reasonable doubt. In applying this standard, therefore, we may not substitute our independent judgment of the defendant's guilt or innocence for the judgment of the jury. Instead, we must assess only "what effect the error had or reasonably may be taken to have had upon the jury's decision." We must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," that is, whether it might have aided in convincing an otherwise undecided juror of the defendant's guilt beyond a reasonable doubt. If it is reasonably possible that, in a trial free of the error complained of, even one such jury member might have voted to acquit the defendant, then the error was not harmless, and the defendant must be retried. If, on the other hand, "the proof was so overwhelming, aside from the taint of the error, that all reasonable jurors would find guilt beyond a reasonable doubt," then the conviction must stand. [*People v Furman*, 158 Mich App 302, 318-319; 404 NW2d 246 (1987) (quoting *People v Swan*, 56 Mich App 22; 223 NW2d 346 [1974]).]

As noted previously, the evidence in this case was even sided. In addition to her testimony, there was circumstantial evidence that the complainant did not consent to sexual intercourse, including her reactions after the alleged assault and the abrasions she received that night. However, there was also circumstantial evidence that she did consent and that her abrasions were not caused by defendant. Two witnesses testified that the complainant fell down earlier in the evening at a party. One witness testified that he entered defendant's bedroom while defendant and the complainant were there, turned on the lights, and observed the complainant cover her eyes from the light. This witness testified that during this intrusion the complainant never asked for help. Another witness testified that he entered the room on two other occasions and that each time he entered and turned on the lights the complainant covered her eyes from the light and did not ask for help. This witness also testified that the first time he entered the room, the complainant indicated that she wanted him to turn the lights off. Finally, the complainant herself testified that she suffered an alcoholic blackout and could not remember anything from the time she and defendant were walking home until the time she discovered that defendant was having sexual intercourse with her. When viewing this evidence as a whole, this case actually came down to a credibility contest about what happened in defendant's bedroom that evening. Defendant testified that the sexual intercourse was consensual and the complainant testified that it was not. Based on this conclusion, we hold that the proffered testimony that was excluded by the trial court could have corroborated defendant's testimony that the complainant had consented to sexual intercourse and, under the standard articulated in *Furman, supra* at 318-319, may have tipped the scales in favor of an acquittal in at least one jury member's mind. See *People v Lee*, 177 Mich App 382, 386; 442 NW2d 662 (1989) (holding that reversal was required where "[t]he controlling question was the parties' credibility and any corroborating evidence on either side could tip the scales").

In light of our determination that this case should be reversed and remanded for a new trial because the testimony regarding the complainant's statements was improperly excluded, we need not consider the remaining issues raised on appeal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly