

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD EUGENE WHATMAN,

Defendant-Appellant.

UNPUBLISHED
February 24, 2011

No. 293732
Lenawee Circuit Court
LC No. 08-013983-FC

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Because the trial court's declaration of a mistrial was manifestly necessary, and therefore, did not implicate double jeopardy, and because defendant has not shown evidentiary error with regard to the admission of evidence pursuant to MCL 768.27a(1), we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Defendant's biological daughter accused defendant of sexually assaulting her on two occasions. The facts of the offense are not central to defendant's issues. Rather, the procedural facts control. The trial began on March 19, 2009. During defense counsel's cross-examination of the victim, the following exchange took place, in its entirety:

Q. And at that time did you use the bathroom at all after this happened?

A. I did when I went to go get changed.

Q. Did you notice any discharge, any kind of fluid or substance?

A. Yes.

Q. What did you notice?

A. It was just white stuff.

Q. And did you notice any blood?

A. No.

Q. Was there any blood on the bedding?

A. No, not that I know of.

Q. Now, you had been a virgin, hadn't you?

A. Yes.

Prosecutor: I will object. May we approach?

The Court: Yes, you may.

[Bench discussion; the court sends the jury out.]

The Court: [Prosecution?]

Prosecutor: At this time we will move for a mistrial. It's a blatant violation of the Rape Shield Law.

Defense: Your honor, I object. This issue had come up in testimony before. It was not impugning her at all. We are not implying anything about her. It was asked and answered at the pre-trial.

The Court: I will grant the motion and declare a mistrial. You may step down. Thank you. We will set this matter for a pre-trial next Wednesday and set a new trial date at that time. Take the defendant back to lockup.

After its grant of mistrial in the first trial, the trial court began a second trial on May 19, 2009 that lasted two days. Neither party asked the victim any questions about her virginity at trial. After the close of the proofs, the jury found defendant guilty as charged. Defendant now appeals as of right.

II. Standard of Review

Defendant first argues that his retrial violated his state and federal protections against double jeopardy. Specifically, defendant claims that he did not consent to the mistrial and there was no manifest necessity for the mistrial. Defendant raises his double jeopardy challenge for the first time on appeal. A double jeopardy issue "presents a significant constitutional question that will be considered on appeal regardless whether the defendant raised it before the trial court." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). "This Court reviews unpreserved claims that a defendant's double jeopardy rights have been violated for plain error." *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005); see also *US v Robertson*, 606 F3d 943, 950 n 3 (CA 8, 2010). To avoid forfeiture the defendant must show that plain error occurred that affected substantial rights, and reversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public

reputation of judicial proceedings independent of the defendant's innocence. *Meshell*, 265 Mich App at 628, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A double jeopardy claim is a question of law that we review de novo. *People v Szalma*, 487 Mich 708, 715; 790 NW2d 662 (2010); *People v Grace*, 258 Mich App 274, 278; 671 NW2d 554 (2003). This Court reviews the trial court's decision to grant a mistrial for an abuse of discretion. *People v Blackburn*, 94 Mich App 711, 714; 290 NW2d 61 (1980).

III. Analysis

A. Rape Shield Law

“The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion.” *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). “However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence.” *Id.* We review questions of law de novo. *Id.* “Accordingly, when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law.” *Id.*

The rape shield statute reads in pertinent part:

(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. [MCL 750.520j(1).]

The purpose of the rape shield law is to exclude evidence of the victim's past sexual conduct. *People v Adair*, 452 Mich 473, 480; 550 NW2d 505 (1996). Conduct refers to “all of one's personal behavior.” *People v Parks*, 483 Mich 1040, 1044; 766 NW2d 650 (2009) (Young, J., concurring) (internal quotations omitted and emphasis in original). “The prohibitions in the law are also a reflection that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury.” *Adair*, 452 Mich at 480 quoting *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). Moreover, a victim's sexual history is generally irrelevant to an alleged sexual assault, and usually has no bearing on the victim's character for truthfulness. *Id.* at 481. Finally, “[t]he Michigan statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.” *Michigan v Lucas*, 500 US 145, 149-150; 111 S Ct 1743; 114 L Ed 2d 205 (1991).

The rape shield statute prohibits defense counsel's inquiry here. Again, the questions and answers between defense counsel and the victim went as follows:

Q. And at that time did you use the bathroom at all after this happened?

A. I did when I went to go get changed.

Q. Did you notice any discharge, any kind of fluid or substance?

A. Yes.

Q. What did you notice?

A. It was just white stuff.

Q. And did you notice any blood?

A. No.

Q. Was there any blood on the bedding?

A. No, not that I know of.

Q. Now, you had been a virgin, hadn't you?

A. Yes.

Defense counsel's inquiry into the victim's past sexual behavior and her virginity was undoubtedly intended to undermine the victim's allegation that defendant had penetrated her. Defense counsel had already determined, through his line of questioning of the victim, that there was no blood present in her underwear or on the bed sheets after the penetration. The very next question defense counsel asked the victim was, "you had been a virgin, hadn't you?" This immediate follow-up question to the victim about her virginity could only have been for the purpose of impugning her character and impeaching her credibility. Defense counsel was clearly trying to imply that the absence of blood after penetration suggested the victim was not a virgin, despite her affirmative statement that she was a virgin. Implicit in defense counsel's line of questioning was defense counsel's belief that the victim had previously engaged in sexual activity—otherwise, there would have been blood—or defendant did not penetrate her. This inquiry suggests that the victim lacked credibility and inappropriately undermined her character for truthfulness.

By her questions, defense counsel was attempting to create an illusion of evidence—that the victim had previously engaged in sexual activity or was being dishonest during her testimony because blood "should have" resulted from defendant's penetration *if* the victim had indeed been a virgin. Indeed, the record is plain that this unfounded assertion is based only on improper implications and baseless assumptions. Defendant has never identified any proper purpose for questioning the victim about her virginity, not in the first trial, the second trial, or on appeal. Defendant did not seek to offer expert medical evidence at any point during either the first or second trial regarding whether a virgin necessarily bleeds on initial sexual penetration or that the

presence of blood “should have” resulted from defendant’s penetration *if* the victim had indeed been a virgin. Thus, defendant was not asking foundational questions in preparation for the introduction of expert medical testimony on the point. If that would have been the purpose of the inquiry in the first trial and defense counsel was blind-sided by an unexpected mistrial, we would think that defendant certainly would have introduced such testimony at the second trial. If this would have been defendant’s innocent purpose in the first trial but got cut off by the grant of mistrial, defense counsel certainly would have attempted to introduce that medical evidence at the second trial. He did not and there was no mention of the victim’s virginity at the second trial. That being the case, defendant’s only goal in engaging the victim in a colloquy about the status of her virginity in the first trial could only have been to imply that she had engaged in previous sexual conduct or was lying because otherwise there would have been blood following defendant’s penetration, i.e. that the victim was either a promiscuous child or a liar. This sort of inquiry is exactly the type of inquiry that is prohibited by the rape shield statute, enacted for the purpose of avoiding inquiries into the sexual history of the victims of criminal sexual conduct and the assumptions that often accompany those inquiries.

Defendant argues that the rape shield statute was inapplicable to defense counsel’s questions and the victim’s answer because defense counsel’s question and the victim’s answer concerned the victim’s *lack* of sexual conduct. While defendant is correct that a victim testifying regarding her virginity has not been found to be a violation of the rape shield statute in *People v Mooney*, 216 Mich App 367, 373; 549 NW2d 65 (1996), that case was expressly nullified by *People v Mooney*, 454 Mich 904; 562 NW2d 789 (1997). Thus, *Mooney* is not binding on this Court. Even if it were binding, it is distinguishable. In *Mooney*, the evidence regarding the victim’s virginity was not explicitly solicited by the prosecution or defense counsel. *Mooney*, 216 Mich App at 374. Rather, the victim testified that she was a virgin to explain “the way she handled her denial of consent[.]” *Id.* To the contrary, in this case, defense counsel specifically solicited the victim’s testimony about her prior sexual experience and couched it in terms of her virginity. Defense counsel’s question implied that the victim had engaged in previous sexual conduct or was lying because otherwise there would have been blood following defendant’s penetration. The fact that the victim ultimately indicated that she was a virgin absolutely does not render defense counsel’s question proper. Defense counsel’s question amounted to a “fishing expedition” improper under the rape shield statute. *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991).

We also disagree that defense counsel’s question to the victim regarding her virginity was proper under defendant’s constitutional right to confront the witnesses against him. A defendant has a constitutional right to confront the witnesses against him, but the right is limited. US Const, Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The constitution guarantees an opportunity for the defendant to cross-examine, but not to the extent or in whatever way the defendant wishes. *Id.* This Court has held that under a defendant’s right to witness confrontation, the defendant may cross-examine a witness about past sexual conduct, usually prohibited under the rape shield statute, but only for the extremely limited purposes of showing witness bias, a false charge, or past false accusations of rape. *People v Hackett*, 421 Mich 338, 348; 319 NW2d 390 (1982). In this case, defense counsel’s question to the victim about her virginity was clearly not meant to show witness bias, a false charge or past accusations of rape. As a result, it was not a violation of defendant’s right to witness confrontation to prohibit questioning about the victim’s prior sexual experience.

B. Rules of Evidence

1. MRE 404(a)

Generally, evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with that character on a particular occasion. MRE 404(a); *People v Bone*, 230 Mich App 699, 701; 584 NW2d 760 (1998). However, in a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity is admissible to show the source of semen, pregnancy, or disease. MRE 404(a)(3); *Bone*, 230 Mich App at 702.

In *Bone*, this Court held that it was improper for the prosecution to use the victim's virginity to undermine defendant's defense that the victim consented to having sex with him. *Bone*, 230 Mich App at 701. This Court concluded that the prosecution admitted the evidence that the victim was a virgin for the purpose of demonstrating that the victim acted in conformity with her virginal status by refusing her consent. *Id.* at 702. Moreover, this Court held that the error was not harmless because the credibility of the victim was central to the prosecution's case against the defendant. *Id.* at 704. This Court did note, however, that evidence of virginity admitted for another non-character purpose might be admissible. *Id.* at 702 n 3.

Here, defense counsel's question to the victim began an inquiry into the victim's sexual history that brings with it societal assumptions about the character of the victim, which are not necessarily correct. If the victim had responded that she was not a virgin, the jury might have concluded that she was sexually promiscuous and, therefore, was not telling the truth about what occurred with defendant. On the other hand, the victim's testimony that she was a virgin may have resulted in the jury concluding that she was telling the truth about what happened with defendant. The inquiry into the victim's virginity was an inquiry into her character, which is prohibited by MRE 404(a). Moreover, the question was not asked to show the source of semen, pregnancy, or disease as permitted under MRE 404(a)(3).

2. MRE 403

In addition, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403. To determine whether to exclude evidence under MRE 403, the trial court must balance several factors, including:

the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).]

Evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010) (quotations omitted).

In this case, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The victim's status as a virgin provides no evidence whatsoever regarding whether penetration had or had not occurred and has no probative value. Even if virginity may be marginally relevant as to the issue of consent as some other states have held,¹ here, defendant was charged with first-degree CSC with someone under the age of 13. As a result, consent is absolutely irrelevant and is not at issue with such a crime. MCL 750.520b(1)(a); *Szalma*, 487 Mich at 725.

At the same time, defense counsel's question and the fact that the victim was a virgin were unfairly prejudicial to *defendant* because the jury likely would have given it undue weight. As we pointed out above, by passing the rape shield statute, the legislature recognized that inquiries into the sexual history of victims of criminal sexual conduct can be prejudicial and mislead the jury. *Adair*, 452 Mich at 480. The fact that the victim was a virgin in this case could lead the jury to believe that the charges against defendant, who is also her father, were even more serious and his crime more heinous. The information about the victim's virginity had the potential to result in a purely emotional conviction from the jury rather than a verdict that was based on a rational analysis of the facts in the case. Moreover, one can imagine a response to defense counsel's question that would be even more prejudicial. Suppose the victim had indicated that she was not a virgin, but had been sexually molested by defendant for years, since she was a young child.² Such evidence would, of course, be potentially even more unfairly prejudicial and fail MRE 403 analysis when considering the greater risk of sympathy to the victim and corresponding prejudice to defendant.

C. Double Jeopardy

An accused cannot be placed in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15; *Grace*, 258 Mich App at 278. Jeopardy attaches "once the defendant is put to trial before the trier of fact, whether the trier be a jury or a judge." *United States v Jorn*, 400 US 470, 479; 91 S Ct 547; 27 L Ed 2d 543 (1971). In a jury trial, jeopardy attaches once the jury is impaneled and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997); *People v Hicks*, 447 Mich 819, 826-827 n 13; 528 NW2d 136 (1994). Once jeopardy has attached, a defendant has a constitutional right to have his case decided by that tribunal. *People v Dry Land Marina, Inc*, 175 Mich App 322, 325; 437 NW2d 391 (1989).

If a trial concludes prematurely, double jeopardy may prohibit a retrial but does not bar all retrials. *People v Dawson*, 431 Mich 234, 251-252; 427 NW2d 886 (1988). Double jeopardy does not bar retrial when a defendant moves for or consents to a mistrial. *United States v Dinitz*, 424 US 600, 607; 96 S Ct 1075; 47 L Ed 2d 267 (1976). Double jeopardy does not bar retrial when the mistrial was occasioned by manifest necessity. *Dawson*, 431 Mich at 252, citing

¹ See, for example, *State v Pugh*, 640 NW2d 79, 83 (SD 2002) ("[N]umerous courts throughout the country have ruled . . . that evidence of a victim's virginity is relevant to, if not highly probative of, the issue of consent.")

² Such evidence would be admissible under MRE 404(b) as prior bad acts and would not be covered under the rape shield because the acts would have been with defendant.

United States v Perez, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824). “Where the motion for mistrial is made by the prosecutor, or by the judge sua sponte, retrial will be allowed if declaration of the mistrial was “manifest(ly) necess(ary)[.]” *Dawson*, 431 Mich at 252.

1. Consent

We have replicated in this opinion the entire exchange between the parties and the trial court. It is clear from the discussion that defendant did not consent to the declaration of a mistrial and objected to it on the record. Because defendant did not consent to the mistrial, double jeopardy barred a retrial unless there was “manifest necessity” for the mistrial. *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997).

2. Manifest Necessity

Manifest necessity refers to “sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible.” *People v Echavarría*, 233 Mich App 356, 363; 592 NW2d 737 (1999). Whether manifest necessity exists depends on the facts of each particular case and requires the trial court to balance the justification for the mistrial against the defendant’s interest in completing the trial in a single proceeding before a particular tribunal. *Hicks*, 447 Mich at 829. “[A] trial judge properly exercises discretion to declare a mistrial when an impartial verdict cannot be obtained, or when a guilty verdict could be returned but would be reversed on appeal because of an obvious procedural error occurring during the trial.” *Id.* at 830.

Here, this Court must consider whether the trial court abused its discretion in finding manifest necessity to declare a mistrial. *People v Lett*, 466 Mich 206, 220; 644 NW2d 743 (2002), lv den after rem 467 Mich 953 (2003), habeas corpus gtd 507 F Supp 2d 777 (ED Mich, 2007), aff’d 316 Fed Appx 421 (CA 6, 2009), rev’d ___ US ___; 130 S Ct 1855; 176 L Ed 2d 678 (2010). “[D]iffering levels of appellate scrutiny are applied to the trial court’s decision to declare a mistrial, depending on the nature of the circumstances leading to the mistrial declaration.” *Id.* at 219. A trial court’s decision to declare a mistrial on the basis of an evidentiary misstep will be “strictly scrutinized.” *Id.* “The constitutional concept of manifest necessity does not require that a mistrial be ‘necessary’ in the strictest sense of the word. Rather, what is required is a ‘high degree’ of necessity.” *Id.* A trial court properly exercises its discretion to declare a mistrial in the event that even if a guilty verdict were to be delivered, the convictions would be reversed because of a serious procedural error. *Hicks*, 447 Mich at 830.

In determining that a declaration of mistrial is merited, a trial court is not required to examine the alternatives or make factual findings of manifest necessity on the record. *Lett*, 466 Mich at 221, citing *Arizona v Washington*, 434 US 497, 515-517; 98 S Ct 824; 54 L Ed 2d 717 (1978). Defendant misconstrues the trial court’s obligations prior to declaring a mistrial set out in *Washington*, 434 US at 515-516. Defendant claims that the United States Supreme Court set out a three-factor test in *Washington* to determine whether the trial court properly exercised its discretion: “whether the trial judge (1) heard the opinions of the parties about the propriety of the mistrial; (2) considered the alternatives to a mistrial; and (3) acted deliberately, instead of abruptly” citing *Fulton v Moore*, 520 F3d 522, 529 (2008) (CA 6, 2008). In fact, the United States Supreme Court did not mandate the three requirements articulated in *Fulton* and relied on by defendant. *Washington*, 434 US at 515-516. Instead, the United States Supreme Court

concluded that a trial court should use “sound discretion” when declaring a mistrial, and the basis for the mistrial should be clear from the record. *Id.* at 514, 516. The United States Supreme Court further concluded that a trial court did not need to make an explicit finding that a mistrial was manifestly necessary. *Id.* at 516. Because this Court is not bound to follow the decision of a lower federal court, *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009), defendant wrongly urges us to apply the three-factor test articulated in *Fulton* and not in *Washington*.

In this case, the trial court did not abuse its discretion in declaring a mistrial. The basis for the mistrial was more than adequately disclosed in the record. After defense counsel’s questions about the lack of blood and the victim’s virginity, the prosecution objected on the basis of a violation of the rape shield statute. The trial court held a bench conference off of the record. The record resumes with the prosecution’s motion for a mistrial on the basis of defense counsel’s violation of the rape shield statute. Defense counsel objected, stating “[t]his issue had come up in testimony before. It was not impugning her at all. We are not implying anything about her. It was asked and answered at the pre-trial.” The trial court proceeded to grant the motion for a mistrial. It is clear from the record that the trial court granted a mistrial on the basis of a violation of the rape shield statute.

Not only did defense counsel’s question to the victim and the victim’s subsequent answer violate the rape shield statute, as discussed above, the evidence was improper, lacked foundation, and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The trial court’s determination that the improper evidence tainted the proceedings such that a mistrial was required was within the principled ranges of outcomes. A cautionary instruction could not have remedied the proceedings because, once the victim testified to her virginity, the “bell could not be unring.” Moreover, it is just as likely that, if a mistrial had not been declared, defendant would have argued that he was denied the effective assistance of counsel by defense counsel’s question, and his convictions might have been reversed on appeal. The role of a trial judge is to ensure that the jury only considers properly admitted evidence and to avoid permitting irrelevant evidence that would reversibly taint the entire trial. Drawing that line is sometimes not an easy task, but on this record the entire line of defense counsel’s questioning clearly affected the integrity of the trial. The trial court did not abuse its discretion in declaring a mistrial on the basis of the rape shield statute.

In any event, even if not every judge would have declared a mistrial in this case and might instead have issued a cautionary instruction, “the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judges’ evaluation of the likelihood that the impartiality of one of more jurors may have been affected by the improper comment.” *Washington*, 434 US at 511. A trial judge is uniquely qualified to evaluate possible juror bias because he or she was present during voir dire, knows the evidence in the case, has listened to the tone of the argument and observed the reactions of the jurors. *Id.* at 513-514. So long as the trial court considers “the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate” and exercises “sound discretion” in declaring a mistrial, the trial court’s actions should be upheld. *Id.* at 514. The fact that other judges might not have declared a mistrial under the circumstances in this case does not mean that retrial is barred. *Lett*, 466 Mich at 220. The particular trial judge in this case is long serving and experienced. The trial

court properly exercised its sound discretion when it discussed the violation of the rape shield act off the record with the parties and declared a mistrial.

IV. MCL 768.27A

Defendant also argues that the trial court erred in permitting the prosecution to present the testimony of Cassandra Boening, with whom defendant had sexual relations before she was 16 years old. Boening testified that she began dating defendant when she was 14 years old and bore his child, the victim in this case, just after Boening turned 16 years old. Defendant was criminally prosecuted for this conduct. At trial, defendant objected to the admission of this evidence. It is therefore preserved for this Court's review. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). A trial court's decision to admit other acts evidence is reviewed for an abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). The trial court has not abused its discretion if the outcome of its decision is within the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCL 768.27a(1) provides, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." See also *People v Pattison*, 276 Mich App 613, 618-620; 741 NW2d 558 (2007). Defendant seems to argue that the trial court should have ruled that the evidence was irrelevant, or else that it was more prejudicial than probative. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." MRE 403.

The trial court held a hearing on the issue but by the time the court went on the record, the parties had already discussed the matter in chambers. Defense counsel stated that the trial court had "indicated very clear that you will allow the prior CSC to be brought in," and asked that she be allowed to present testimony explaining the circumstances surrounding the charge. The trial court agreed.

The trial court's decision was not an abuse of discretion. Notably, the prosecutor did not try to emphasize the age similarities between the victim and Cassandra Boening. Instead, the evidence appears to have been used to show that defendant existed in a world with few restraints on his sexual behavior. The testimony could lead to the inference that defendant was used to selecting vulnerable female partners. This is relevant to explain why he would prey on his own daughter and why her mother would support defendant rather than her daughter. Moreover, defendant was able to cross-examine Boening, eliciting testimony that she and defendant dated for about a year before they engaged in intercourse and that her parents allowed defendant to live in the house and supported their relationship. On this record, the testimony cannot be said to be unfairly prejudicial.

V. Conclusion

The trial court's declaration of a mistrial was manifestly necessary, and therefore, did not implicate double jeopardy. Defense counsel's entire line of questioning regarding the victim's virginity was absolutely improper. Not only was it properly excluded under the rape shield statute, MCL 750.520j(1), it was also improper pursuant to MRE 404(a)(3) and MRE 403. Moreover, there was a total absence of any proper foundation for the line of questioning. The trial court was faced with a violation of rape shield on one hand and prejudice to defendant for introducing the victim's virginity on the other hand. Proceeding with the trial may have resulted in an unfair proceeding to both the prosecution and defendant. And, to continue with the trial may have placed the integrity of the verdict in jeopardy. For these reasons, the trial court did not abuse its discretion in declaring a mistrial because it was manifestly necessary and, as a result, defendant has not suffered a double jeopardy violation. And finally, pursuant to MCL 768.27a(1), the trial court did not err in permitting the prosecution to present the testimony of Boening, with whom defendant had sexual relations before she was 16 years old.

Affirmed.

/s/ Christopher M. Murray

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio