No. 18-118,837-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

Vs

HANBIT CHANG
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Douglas County, Kansas
Honorable Sally Pokorny, Judge
District Court Case No. 17 CR 261

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NATURE OF THE CASE

Hanbit "Joseph" Chang and some friends from high school gathered at a party. His friend A.S., who attended school in another state, decided to sleep over in his dorm room. She drifted in and out of sleep, but at one point, she woke up to find Chang feeling her breasts. After he placed a hand down her pants, she fled the room. As she had never consented to this touching, a jury convicted him of sexual battery. He appeals.

STATEMENT OF ISSUES

I. The district court appropriately granted the motion in limine concerning Chang's earlier conversations with A.S.

II. The district court properly limited Chang from cross-examining A.S. about their earlier conversations.

III. The prosecutor did not commit reversible error during closing arguments.

IV. The cumulative error doctrine does not require reversal of Chang's conviction.

STATEMENT OF FACTS

A.S., a college freshman, decided to spend Labor Day weekend visiting her high school friends at the University of Kansas. (R. VI, 133-36.) On Friday night, she and a couple friends headed to a party. (R. VI, 136-37.) There, they met up with high-school friend Chang and a handful of other students. (R. VI, 137-38.) They talked, drank, and just generally hung out together for around three-and-a-half hours. (R. VI, 137-43.) Apart from when he mixed her a drink, Chang paid no special attention to A.S.; as far as she remembered, he behaved "[j]ust normal," like friends. (R. VI, 140-41.)

By the end of the night, A.S. felt fairly intoxicated. (R. VI, 140.) As the party wound up, a debate broke out about where everyone should sleep. (R. VI, 142.) The host wanted A.S. to stay in his dorm room, where he would "sleep outside of his door so no one could come in," but A.S.

wanted everyone to sleep in a bed. (R. VI, 142.) Because Chang's roommate had left town, she volunteered to stay with him. (R. VI, 142-43.)

At Chang's room, A.S. asked for clothes to sleep in. (R. VI, 146-47.) While Chang provided her a t-shirt and sweatpants, he refused to turn around while she changed. (R. VI, 146-47.) She ended up facing the corner, lights off, to change. (R. VI, 147-49.)And because his roommate's bed had no sheets, Chang suggested they swap and A.S. sleep in his bed. (R. VI, 145-50.) They stayed up a little longer, lying in the bed together and looking at a painting A.S. had given Chang. (R. VI, 150-51.) Next, Chang suggested they watch a movie, and A.S. acquiesced in hopes "it would shut him up." (R. VI, 151-52.)

A.S. drifted off as the movie played, aware only that Chang moved from the end of the bed to lie next to her with the laptop on the pillow. (R. VI, 152-54.) Even when he put the laptop away, Chang remained in bed with A.S. (R. VI, 154.) She "didn't think anything of it" until she woke up to Chang with his hand up her shirt, fondling her breasts. (R. VI, 154-56.) Pretending to be asleep, A.S. tried to turn away; Chang stopped momentarily only to shove his hand down her sweatpants, instead. (R. VI, 157.) A.S. "felt his knuckles on [her] bikini line" inside her underwear, reaching for her vagina, but she clenched her legs to stop him. (R. VI, 157-58.) Eventually, Chang gave up, and A.S. fled to a friends' room. (R. VI, 158-59.)

After A.S. reported the assault to the authorities, the State charged Chang with sexual battery. (R. I, 8-9.) Immediately before trial, the State filed a motion in limine concerning in part two earlier, presumably text-message conversations between Chang and A.S. (R. I, 19-20.) In one, A.S. responded to Chang's comments about a potential sexual encounter by saying she would participate if she were drunk; in the other, Chang asked A.S. to "tak[e] his virginity," and she declined. (R. V, 4-5.) The State argued that the messages did not concern A.S.'s consent but

instead "paint[ed] a picture of, well, maybe she shouldn't have been around him, she knew he was interested in her." (R. V, 5.)

Chang objected, insisting that these conversations showed that A.S. implicitly consented because she knew that Chang had a romantic interest in her. (R. V, 7.) The district court, however, granted the motion, explaining,

> "This just smacks to me of, you know, a woman saying no is not really a no, and in order for . . . no to mean no, that means she . . . can never have contact with you again, because, obviously, if she wants to still hang around with you, it must mean that in her heart, she really wants to have sex with you." (R. V, 10.)

At trial, A.S. recounted the night in question, including disclosing the sexual assault to friends and, the next morning, the university. (R. VI, 160-65.) She unequivocally testified that she had never consented to Chang touching her in that way. (R. VI, 159.) She admitted that she never confronted Chang, protested, or pushed him away, but she also said that since Chang "never made advances in the past at all," she had not expected his behavior. (R. VI, 159, 193-94.)

While recounting her friendship with Chang on cross-examination, A.S. testified that she did not think he had romantic feelings for her. (R. VI, 172-73, 177-78.) At that time, Chang asked to bring up the text messages, arguing that A.S. had opened the door to impeachment when she claimed he had "never previously made a pass." (R. VI, 174-76.) The district court ruled that Chang needed to start by clarifying what A.S. meant. (R. VI, 176.) A.S. responded, "He never tried to kiss me or anything. The most that we ever did was hug." (R. VI, 176.) The district court determined that this testimony did not open the door because she only meant physical advances. (R. VI, 177.)

The friend A.S. sought out after the assault, Jane Azhar, also testified about that night. To her, A.S. seemed intoxicated at the party, and she noticed Chang flirting and "cuddling up to her" there. (R. VI, 209-10.) Still, A.S. was "crying hysterically" when she showed up at Azhar's

door in the dead of night, and she quickly told Azhar and her roommate about Chang touching her. (R. VI, 213-15.) Angry, Azhar headed over to Chang's room to collect the rest of A.S.'s things; when she confronted him, he denied assaulting their friend. (R. VI, 215-16.) The next day, however, he changed tact, and Azhar testified about an apologetic text message where Chang took responsibility for hurting A.S. (R. VI, 221-22.) The university's sexual-harassment investigator also testified about A.S.'s disclosure, which substantially matched the testimony at trial. (R. VI, 237-41.) To the investigator, Chang admitted that he had touched A.S. while she slept. (R. VI, 244-46.)

Chang's roommate testified for the defense, saying that he did not strip his bed before leaving town. (R. VII, 291.) The detective who took A.S.'s report testified about the details of his investigation. (R. VII, 295-310.) Chang also testified, explaining that he thought he had "made it obvious . . . through [his] actions . . . that [he] was romantically interested in [A.S.]." (R. VII, 320-22.) He flirted with A.S. "a little" at the party before they headed back to his room. (R. VII, 325.) Regardless, he claimed that he never told A.S. that he would sleep in his roommate's bed, and he insisted that he turned around while she changed. (R. VII, 327-28.)

As for the assault, Chang said that he cuddled up with A.S. after he switched off the movie, touching her stomach before moving to her breasts. (R. VII, 330-31.) He did not believe she had fallen asleep, and when she did not protest, he "assumed . . . that she was receptive." (R. VII, 332.) He only stopped touching her when he pushed his hand down her pants and received no response. (R. VII, 333.) Still, he admitted that he and A.S. had not talked about having a sexual encounter at any point that night; instead, as far as Chang knew, A.S. just wanted to sleep. (R. VII, 339-42.) In fact, on cross-examination, he said, "She never said no either, but yes, she was not receptive." (R. VII, 344.)

Ultimately, the jury convicted Chang of sexual battery. (R. VII, 408.) The district court sentenced him to 12 months in jail but granted him parole after he served 48 hours. (R. I, 52.) Chang timely appealed. (R. I, 47.)

ARGUMENTS AND AUTHORITIES

I. The district court appropriately granted the motion in limine concerning Chang's earlier conversations with A.S.

First, Chang insists that the district court violated his constitutional right to present a defense when it excluded evidence of his past conversations about having a sexual encounter with A.S. (Appellant's Brief, 14-19.) The standard of review for evidentiary challenges is well-established. First, the reviewing court determines if the evidence is relevant. *State v. Woolverton*, 284 Kan. 59, 63, 159 P.3d 985 (2007). If the evidence passes this threshold test, the second consideration is if the district court abused its discretion when applying the relevant rules of evidence. 284 Kan. at 64.

There exists, however, an exception to this general principle, as appellate review of an evidentiary challenge is unlimited when the exclusion of that evidence infringes on the defendant's right to present a defense. *State v. Bridges*, 297 Kan. 989, 996, 306 P.3d 244 (2013). After all, excluding evidence that supports the defendant's theory of the case potentially strips them of their right to a fair trial. 297 Kan. at 996. That said, the defendant's right to present their chosen defense is not without its outer bounds, and their evidence remains subject to the usual rules of evidence, discovery statutes, and judicial precedent. 297 Kan. at 996-99.

Still, as implied earlier, most fundamental rule of evidence is that the information presented at trial must be relevant. *Woolverton*, 284 Kan. at 63. Relevant evidence is evidence with "any tendency in reason to prove any material fact." K.S.A. 60-401(b). In other words, evidence must help establish "'a particular point'" with legal significance to the case in order to

be relevant. *State v. Reid*, 286 Kan. 494, 504-05, 186 P.3d 713 (2008). Furthermore, relevant evidence must also have "some material or logical connection between the asserted facts and the inference or result they are intended to establish." 286 Kan. at 494, Syl. ¶ 1. Whether evidence is material is a question of law and subject to unlimited review, while the logical connection (or probative value) is reviewed for an abuse of discretion. *State v. Houston*, 289 Kan. 252, 262, 213 P.3d 728 (2009).

Here, Chang insists that his conversations with A.S. help establish that she consented to his touching on the night in question. (Appellant's Brief, 14-16.) In fact, the connection is tenuous at best. First, it is important to note that the messages at issue are not contained in the record. As such, the only indication of their contents is counsel's description. Nonetheless, rather than demonstrating consent, the provided description indicates that A.S. did not want to engage Chang in a sexual encounter. After all, she declined to take Chang's virginity and suggested that she needed to be drunk in order to have intercourse with him. (R. V, 4-5.) Certainly, refusing to have intercourse with someone is a far cry from consent. Similarly, sending sexually charged text messages is not the same as consenting to sexual activity. Even if A.S. had flirted with Chang throughout the texts or indicated some romantic or sexual interest in him, that behavior is unrelated to the question of if she consented to him touching her on the night in question. The fact that she refused his overtures just reinforces this conclusion.

Second, the discussion with the district court makes clear that these messages predated the actual assault by at least a few days. (R. V, 4-5.) It cannot fairly be said that a conversation that concluded long before the night in question is relevant to the issue of consent. The question presented to the jury is whether A.S. consented to Chang's behavior at the time of the touching, not whether she had considered consenting to similar behavior at some nebulous point in the past.

Chang relies on a rape-shield case, *State v. Perez*, 26 Kan. App. 2d 777, 995 P.2d 372 (1999), to bolster his argument. (Appellant's Brief, 16-17.) There, a teenage victim claimed that the defendant raped her in a car with another man present. 26 Kan. App. 2d at 779. The defendant, on the other hand, said that they had engaged in consensual touching in the car without having sex. 26 Kan. App. 2d at 779. To that end, he proposed to introduce evidence that the victim had sex with multiple men at a party where other people could see. 26 Kan. App. 2d at 779. While the defendant insisted that this evidence showed consent and a lack of credibility from the victim, the district court excluded the evidence. 26 Kan. App. 2d at 779. On appeal, however, this Court determined that this exclusion infringed on the defendant's right to present a defense. 26 Kan. App. 2d at 789. The court emphasized:

> "[The defendant] is merely arguing that evidence of the isolated sexual incidents engaged in by [the victim] *only hours before the alleged rape* is relevant to show that [the victim's] version of the events . . . [is] not credible. *The close proximity in time between the incidents at the party and the car* indicate that [the victim's] sexual behavior at the party is relevant to . . . why she would consent to sexual foreplay with [the defendant] while [another person] was in the car." (Emphasis added.) 26 Kan. App. 2d at 782.

The court also observed that the victim's behavior at the party shared many similarities to the defendant's version of events. 26 Kan. App. 2d at 782.

As mentioned earlier, the messages in this case predated the touching by days rather than mere hours. There is also no indication that the contents of those messages bear any factual similarities to the actual events of that night. Instead, the text messages contained a general discussion of potential future sexual activity. While again in a rape-shield context, our Supreme Court has upheld the exclusion of this sort of general sexual evidence in the past. See, e.g., *State v. Lackey*, 280 Kan. 190, 220-21, 120 P.3d 332 (2005), *overruled on other grounds by State v. Davis*, 283

Kan. 569, 158 P.3d 317 (2006) (affirming exclusion of distant-in-time instances of victim's dissimilar sexual conduct with other men). As such, *Perez* is inapplicable to the instant case.

Third, an individual consents to sexual contact like the touching in this case or they do not. Sexual battery requires only that the victim does not consent; there is no requirement that the defendant know that the victim is not consenting. K.S.A. 2018 Supp. 21-5505(a), (c). Chang continues to insist that his defense relied on implied consent—that is, the notion that A.S.'s behavior demonstrated that he could touch her sexually on the night in question. The overall thrust of his argument, however, is that he had every reason to think that A.S. consented even if, internally, she did not. But regardless of how Chang interpreted A.S.'s behavior, the fact remains that he touched her entirely without her permission while she slept. This fact is not altered by the earlier text messages. The prosecutor put it best:

> "[A.S.'s] knowledge about him having some sort of attraction, whether it be him asking . . . for her to take his virginity or him having a crush on her or him feeling physically attracted to her . . . none of that is relevant towards any of the elements in the case." (R. VI, 271.)

In the end, consent requires voluntary yielding, approval, or permission. See Black's Law Dictionary 368 (10th ed. 2014). It is not permanent; even the most explicit and enthusiastic consent can be withdrawn at any time. See *State v. Flynn*, 299 Kan. 1052, Syl. ¶ 1, 329 P.3d 429 (2014) (observing that nonconsensual sexual intercourse is accomplished "when a person communicates his or her withdrawal of consent after penetration and the other person continues the intercourse through compulsion"). In light of these principles, it is clear that text messages where A.S. demurred sexual contact weeks before the night in question have no bearing on the issue of consent.

But even if the district court abused its discretion in excluding this testimony, the error is clearly harmless. The exclusion of evidence requires reversal only when "there is a reasonable

probability that the error . . . affect[ed] the outcome of the trial in light of the entire record." *State v. Longstaff*, 296 Kan. 884, 895, 299 P.3d 268 (2013). Text messages or no, Chang still presented a robust consent defense at trial. He testified that he believed A.S. knew that he had feelings for her, and he detailed all the ways in which her behavior suggested that she consented to his touching. In the past, our Kansas courts have found that excluding certain evidence did not prevent the defendant from presenting their theory of the case when they still had the opportunity to testify about the same information. See, e.g., *Bridges*, 297 Kan. at 998; *State v. Gaona*, 293 Kan. 930, 954, 270 P.3d 1165 (2012).

At trial, the jury weighed this evidence against A.S.'s account of the night: her desire to sleep, her shock at waking up to Chang's hands, her fleeing the room and immediately disclosing the assault to her friends. (R. VI, 151-56, 158-59, 213-25.) They also heard Chang admit that A.S. had never expressly told him that he could touch her in that manner, and he recognized that she did not actually respond when he fondled her breasts or shoved his hands in her pants. (R. VII, 332, 342-44.) And, perhaps most importantly, A.S. testified that she never consented and that she had actually been asleep when Chang initially groped her breasts. (R. VI, 154-56, 159.)

Evidence from other sources also supported A.S.'s testimony. For example, Azhar remembered A.S. crying hysterically after she left Chang's room, and she detailed a text message where Chang apologized for his behavior. (R. VI, 213-15.) The investigator from the university recounted A.S.'s statement, which substantially matched her account of the night in question. (R. VI, 237-41.) As such, and considering that Chang still had an opportunity to argue consent, the district court did not abuse its discretion by excluding these communications.

II. The district court properly limited Chang from cross-examining A.S. about their earlier conversations.

Similarly, Chang insists that the district court committed reversible error by not allowing him to cross-examine A.S. about the sexual text messages. (Appellant's Brief, 20-22.) For the most part, the district court has discretion to set reasonable limits on cross-examination. *State v. Wells*, 296 Kan. 65, 86, 290 P.3d 590 (2012). In fact, the United States Supreme Court has held that trial courts have "wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues . . . or interrogation that is repetitive or only marginally relevant." *Delaware v. VanArsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). This principle applies to cross-examination for impeachment purposes, as well. *State v. Sampson*, 297 Kan. 288, 301, 301 P.3d 276 (2013). And impeachment or not, when a district court's decision to limit cross-examination is challenged on appeal, it is reviewed for an abuse of discretion. *State v. Tague*, 296 Kan. 993, 1005, 298 P.3d 273 (2013).

On appeal, Chang argues that A.S. opened the door to impeachment with the text messages twice: first, when she said Chang "had never made advances in the past at all," and second, when she said she had no reason to believe he had a romantic interest in her. (Appellant's Brief, 21-22; R. VI, 159, 172-73, 177-78, 193-94.) Importantly, however, the evidence presented in cross-examination is still required to be admissible—and, by extension, relevant. *Tague*, 296 Kan. at 1005; *State v. Stafford*, 296 Kan. 25, 44, 290 P.3d 562 (2012). Credibility is always relevant at trial. See *State v. Ross*, 280 Kan. 878, 886, 127 P.3d 249 (2006).

That said, the text messages are not at all relevant to impeach A.S. on the lack of advances from Chang. A.S. clarified that, to her, *advances* referred to physical overtures. (R. VI, 176.) She specifically testified that Chang had never tried to kiss her, limiting their contact to

hugs. (R. VI, 176.) No matter their contents, text messages do not qualify as the advances she described. The existence of these messages does little to prove that she lied about the lack of advances; at best, they are consistent with her testimony that Chang never pursed her physically.

As for her remark that she had no reason to believe that Chang had a romantic interest in her, Chang never tried to introduce the text messages to impeach that particular element of her testimony. (R. VI, 177.) Instead, he immediately transitioned into asking unrelated questions about her romantic life, her contacts with Chang, and the plan for that evening. (R. VI, 177-78.) In other words, Chang never raised this particular argument with the district court. Absent certain exceptions, our appellate courts will not consider an issue for the first time on appeal. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). To invoke one of those exceptions, the appealing party must provide "'an explanation why the issue is properly before the court.'" 301 Kan. at 1043. As Chang is entirely silent on the issue of preservation, he has abandoned this argument. 301 Kan. at 1044.

But, again, the text messages are not connected to A.S.'s credibility on this point. Without the actual messages, it is impossible to know the context surrounding their discussion about engaging in a sexual encounter or A.S. taking Chang's virginity. Expressing a desire to have sex with someone is not the same as demonstrating romantic interest. It is just as likely that Chang asked A.S. to be his first sexual partner because of their long-standing friendship and comfort with one another. Chang even tacitly admitted that he never directly told A.S. how he felt. (R. VII, 320-22.) Chang's suggestion that A.S. lied when she said she had no reason to believe he had a romantic interest in her is not supported by the evidence. As such, the messages have little connection to her credibility. The district court did not abuse its discretion by refusing this impeachment.

Finally, as with the last argument, any error stemming from this decision is clearly harmless. Again, exclusion of this evidence only requires reversal if there exists "a reasonable probability that the error . . . affect[ed] the outcome of the trial in light of the entire record." *Longstaff*, 296 Kan. at 895. Throughout the trial, Chang worked hard to discredit A.S.'s account of the night in question; he thoroughly cross-examined the State's witnesses and elicited testimony suggesting that A.S. either lied about or misremembered that night. Put simply, Chang successfully challenged A.S.'s credibility even without this particular piece of evidence. And again, the mere fact that Chang possibly had some romantic or sexual interest in A.S. does not bear on any of the issues in this case. It certainly does not suggest that A.S. consented to him touching her while she slept. As such, the exclusion of irrelevant text messages did not affect the trial's outcome.

III. The prosecutor did not commit reversible error during closing arguments.

In his last substantive issue, Chang argues that the prosecutor misrepresented the facts and misstated the law in his closing argument. (Appellant's Brief, 23-27.) In the recent past, our Supreme Court established an improved two-step framework for evaluating claims of prosecutorial error. *State v. Sherman*, 305 Kan. 88, 106-09, 378 P.3d 1060 (2016). First, "the appellate court must decide whether the prosecutorial acts . . . fall outside the wide latitude afforded to prosecutors." 305 Kan. at 109. If the prosecutor indeed exceeded this latitude, the "court must next determine whether the error prejudiced the defendant[]" by applying "the traditional constitutional harmlessness inquiry." 305 Kan. at 109.

Here, Chang claims the prosecutor misstated the evidence when talking about consent. (Appellant's Brief, 23-24.) Specifically, he points to four times that the prosecutor challenged the jury to carefully consider the relationship A.S.'s behavior and consent, asking things like, "But does the fact that [A.S.] is going to sleep in her friend's bed mean that she has consented to

him touching her breasts and vagina?" (R. VII, 374.) Chang's sharp focus on these questions overlooks the greater context of the State's closing argument. Whenever he discussed the actual touching, the prosecutor made clear that Chang never reached A.S.'s vagina. (R. VII, 366, 369.) He only shifted to talking about Chang's obvious goal—that is, actually touching A.S. there—when speaking about consent. (R. VII, 374, 398, 401.) This change is not a misrepresentation of the evidence. Instead, it simply asks the jury if A.S. consented to any of Chang's behavior, including the place he clearly wanted to touch. In fact, A.S. testified that she felt Chang trying to touch her vagina but that she clenched her legs to stop him. (R. VI, 158.) Chang never actually challenged this testimony at trial; if anything, he accepted the premise that he had intended to touch A.S.'s vagina during cross-examination. (R. VII, 339-40.) And, importantly, A.S. testified that she did not consent to him touching either her breasts or vagina. (R. VI, 159.)

It is improper for the prosecutor to argue facts that are not in evidence. *State v. Ly*, 277 Kan. 386, Syl. ¶ 4, 85 P.3d 1200 (2004). That said, challenged comments need to be considered in context rather than isolation. *State v. Pribble*, 304 Kan. 824, 833-84, 375 P.3d 966 (2016). Here, the prosecutor's comments clearly highlight that A.S.'s behavior did not show that she consented to either the actual or aspirational touching. The prosecutor is not misleading or confusing the jury, especially as he accurately describes the actual touching. In short, the prosecutor did not argue facts not in evidence.

As for the alleged misstatement of law, Chang clearly relied on the argument that A.S. consented. The root of his entire defense suggested that by staying over with someone she should have suspected had a romantic interest in her, she permitted the touching. To that end, Chang highlighted all of the behaviors that he believed showed consent: sleeping in his room, borrowing his clothes, changing near him, climbing into his bed, staying still when he touched

her, and not protesting or pushing him away. (R. VII, 380-87.) These social cues, he insisted, indicated that he could touch A.S.'s breasts and reaching into her pants. (R. VII, 385-87.)

In rebuttal, the State challenged this premise:

> "Do you believe . . . that this woman got in the bed and that meant he could touch her vagina? No conversation. No talking about it. She is in the bed and that is consent. Is that a reasonable view to have of this situation?
>
> "*You know, this implied consent that [defense counsel] talked about, that is not in your instructions.* You didn't hear that term. That is a term that he has made up and is using with you. And it's really an argument that is a way of saying, well, she said yes without actually saying yes. *Because all the evidence you heard is that not only did she not say yes, but it was never discussed. The defendant just did it to her, took it upon himself and started touching her.*
>
> "So there is no such thing as implied consent . . . [T]here is either consent or there is not. Did she consent? I mean, *implied consent sounds like a way of saying, well, he thought she consented by her actions. But she told you she didn't consent. And her actions tell you she didn't consent.*
>
> "Remember that instruction that said it's not a defense that he wasn't aware she didn't consent. So please keep that in mind. *It's not a defense for him to say, 'I thought she consented.'*" (Emphasis added.) (R. VII, 398-99.)

After some discussion of A.S.'s behavior that night, the prosecutor returned to the theme of implied consent:

> "This idea that, well, maybe he misread her cues. Getting back to this idea that, well, if he thought she consented, then that makes it okay. That doesn't make it okay. *It's not about, well, maybe he thought she consented but she really didn't. She didn't consent. That is that element. There is no element that asks was he confused and thought she consented.*" (R. VII, 403.)

First, as these comments indicate, the prosecutor is not suggesting that an individual cannot consent to sexual activity through their actions instead of their words. Instead, he is pushing back against the most insidious element of Chang's defense: that because A.S.'s behavior suggested to him that she consented, he did not assault her and cannot be held accountable. A.S.'s actual mindset, according to Chang, is more-or-less irrelevant. Placed in this context, it is clear that the prosecutor is explaining that Chang's interpretation of her behavior is irrelevant.

Second, it is unclear if implied consent exists in this particular context. For one, there is no reference to implied consent in the sexual battery statute. K.S.A. 2018 Supp. 21-5505. Meanwhile, it is well-settled law that a victim's past sexual encounters, including with the defendant, does not demonstrate consent to the behavior charged as a crime. See *State v. Berriozabal*, 291 Kan. 568, 586, 243 P.3d 352 (2010). Continuing a sexual encounter after a participant withdraws their consent transforms it into a sexual assault. See *Flynn*, 299 Kan. at 1066-67. And at least one panel of this Court has rejected an implied-consent challenge to the sufficiency of the evidence for rape. *State v. Quintero*, No. 96,786, 2008 WL 2186070, at *8 (Kan. App. 2008) (unpublished opinion). While not directly on point, the court easily found that the victim's testimony did not support this argument. 2008 WL 2186070, at *8.

A misstatement of law by the prosecutor denies the defendant a fair trial when it confuses or misleads the jury in some manner. *State v. Hall*, 292 Kan. 841, 849, 257 P.3d 272 (2011). The nature of Chang's argument and the prevailing caselaw suggests that the prosecutor's comments are not misleading. Undoubtedly, an individual can consent to sexual activity through a variety of nonverbal cues. But nonverbal consent is still, by definition, consent. Muddying this concept by suggesting there is a second, more malleable kind of consent is not only contrary our Kansas law, but it runs the very real risk of confusing the jury. In the end, the comments at issue simply existed to unravel Chang's claim that his perception of consent controlled the outcome of the case and to clarify the nature of consent in Kansas.

Regardless, any potential errors stemming from the State's closing argument are harmless. As a rule, "prosecutorial error is harmless if the State proves beyond a reasonable doubt that the error . . . did not affect the outcome of the trial in light of the entire record." *State v. Sean*, 306 Kan. 963, 973, 399 P.3d 168 (2017) (internal quotation marks omitted). As explained

earlier, the only significant issue in this case concerned whether A.S. consented to Chang's behavior. Both A.S. and Chang testified that he touched A.S.'s breasts and placed his hand in her pants. Since the location of the touching is not an element of the crime, it cannot fairly be said that any misstatement about where Chang ultimately touched affected the outcome of the trial. See K.S.A. 2018 Supp. 21-5505(a). Moreover, the alleged misstatement is minor, as Chang's hand came incredibly close to A.S.'s vagina. It is undisputed he touched beneath her underwear and along her bikini line. Finally, the district court instructed the jury that while the "[s]tatements, arguments, and remarks of counsel are intended to help you . . . in applying the law," they are not evidence. (R. I, 31.) Jurors are presumed to follow the district court's instructions. *State v. Rogers*, 276 Kan. 497, 78 P.3d 793 (2003). In short, this error had no bearing on the jury's decision.

As for the alleged misrepresentation of law, the jury heard significant evidence that demonstrated A.S. did not consent. Apart from A.S.'s testimony that she woke up to the touching and never consented, they heard about her emotional reaction to the events of that night and her report to the university investigator. Similarly, Chang testified about how he and A.S. had not talked about having a sexual encounter that night. (R. VII, 339-42.) He admitted that she never responded or seemed receptive to his touching—a fact that ultimately led him to stop. (R. VII, 330-33.) Even if implied consent for sexual encounters exists in Kansas, it is clear that A.S.'s nonverbal cues did not show her intent to engage Chang in sexual activity that night. Instead, all the testimony indicates that she came to his room with plans to sleep, and while she laid in bed, Chang touched her without her permission. The prosecutor's explanation of the law would not have changed the jury's verdict.

IV. The cumulative error doctrine does not require reversal of Chang's conviction.

Finally, Chang asks this Court to apply the cumulative error doctrine and reverse his conviction. (Appellant's Brief, 28-29.) This doctrine requires the appellate court to consider

whether the errors substantially prejudiced the defendant, depriving him of a fair trial. In assessing the effect of any errors, this Court examines them in the context of the entire record, considering how the trial judge dealt with the errors as they arose, the nature and number of errors, any interrelationship between those errors, and the overall strength of the evidence. *State v. Holt*, 300 Kan. 985, 1007, 336 P.3d 312 (2014). That said, a single error cannot constitute cumulative error, and this Court will not apply the cumulative error doctrine when the record fails to support the errors alleged on appeal. *State v. Williams*, 299 Kan. 509, 566, 324 P.3d 1078 (2014).

As explained earlier, the district court did not err by excluding the text-message evidence. Similarly, the prosecutor did not misstate the law or facts during his closing argument. As such, the cumulative error doctrine does not apply in this case. Moreover, reversal is not required even if this Court finds error in these decisions. The excluded evidence and misstatements in closing are not interrelated. And, as previously discussed, the State presented overwhelming evidence that Chang committed the crime charged. In short, the errors at trial did not substantially prejudice Chang, and reversal is not justified.

CONCLUSION

The only disputed element at trial revolved around the issue of consent. The text-messages that Chang wanted to admit into evidence had no bearing on this question, and A.S.'s testimony never opened the door to their admission. Additionally, the prosecutor did not misstate the evidence or prevailing law during closing argument. As such, the State respectfully requests that this Court affirm his conviction.

Respectfully submitted,

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I certify that on January 14, 2019, I sent a copy of the foregoing brief to Derek Schmidt, Attorney General, Solicitor Division, for approval and filing, as well as e-mailing a copy to:

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183 P.3d 860 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Baltazar QUINTERO, Appellant.

No. 96,786.
|
May 23, 2008.

Appeal from Wyandotte District Court; J. Dexter Burdette, Judge.

Attorneys and Law Firms

Patrick D. Quirk, of Kansas City, for appellant.

Constance M. Alvey, assistant district attorney, Jerome A. Gorman, district attorney, and Paul J. Morrison, attorney general, for appellee.

Before BUSER, P.J., GREEN and CAPLINGER, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Baltazar Quintero was convicted of one count each of kidnapping and rape and two counts of misdemeanor battery. He appeals his convictions of kidnapping and rape, asserting the district court erred in denying his motion for a mistrial due to the erroneous admission of testimony implying he possessed drugs. Further, Quintero contends the district court erred in denying his motion for directed verdict, claiming the evidence was insufficient to sustain his kidnapping and rape convictions.

We conclude that even viewing the evidence in a light most favorable to the prosecution, a rational factfinder could not have found that Quintero took or confined the victim by force, threat, or deception with the intent to hold the victim to facilitate rape. Therefore, we reverse Quintero's kidnapping conviction. However, we reject Quintero's remaining arguments and affirm his rape conviction.

Factual and procedural background

The following facts are primarily derived from the trial testimony of the victim, L.C.

On September 13, 2004, L.C. accompanied her friend, Tina Cruces, to the home of Cruces' boyfriend, Baltazar Quintero, to make a payment on a vehicle Quintero had helped her acquire and to retrieve some items for Cruces' and Quintero's infant child. Cruces' 11–year–old brother, Juan Fierro, also accompanied Cruces and L.C. When the three arrived at Quintero's home, Quintero grabbed Cruces by the arm, pulled her out of the car, and took her into the house. L.C. and Fierro followed.

Inside the home, Quintero and Cruces began arguing, and Quintero hit Cruces. L.C. intervened, asking Quintero to stop hitting Cruces. Quintero responded by hitting L.C. in the face with his fist, bruising L.C.'s cheek. L.C. then attempted to walk toward the front door, but Quintero pushed her into another door near the stairs and told her to stay on the stairs.

Quintero then grabbed an electrical power strip, pulled it out of the wall, and used it to hit Cruces. Cruces fell back on Fierro, and Quintero then hit both Fierro and Cruces with the power strip. Quintero also grabbed a beer bottle and hit Fierro in the face with the bottle. Quintero and Cruces then went to the bedroom, while L.C. and Fierro remained in the living room.

While Cruces and Quintero were in the bedroom, Fierro "kept motioning [L.C] with his eyes." He looked at L.C. and then looked at the door, as though he were trying to tell L.C. to go. L.C. did not want to leave Cruces alone because she was afraid of what Quintero would do to Cruces. L.C. felt that she could have walked out of the house while Quintero and Cruces were in the bedroom, but she did not think about walking out the door because she was worried about Cruces.

Later, L.C. heard both Quintero and Cruces yell for her from the bedroom. L.C. voluntarily went to the bedroom, where Quintero asked L.C. to "come inside." L.C did so because she was scared and did not know what to do. L.C. testified at trial that Quintero got up from the bed—at which point she realized he was naked from the

waist down—and shut the door and turned off the light. However, L.C. was reminded on cross-examination that she had testified at preliminary hearing that she, not Quintero, shut the door. L.C. then explained that she shut the door because Cruces was shouting and Quintero had Cruces in a headlock.

***2** Although Quintero spoke English as a second language, Cruces acted as a "translator" for Quintero, asking L.C. to have sex with Quintero and Cruces. L.C. told Quintero, through Cruces, that she (L.C.) loved her husband. Quintero repeatedly whispered "it's okay" in L.C.'s ear and pushed himself up against L.C.

Cruces told Quintero in English, "[S]he's [L.C.'s] not like that. She loves [her husband]." At some point, Quintero lightly pushed on L.C.'s stomach. L.C, who was several months pregnant at the time, was concerned that Quintero might hurt her baby. Quintero then pulled L.C.'s pants down to her knees, pulled off her shirt, and unhooked her bra.

L.C, who cried throughout the encounter, sat down on the bed, grabbed Cruces' hand, and said "please make this stop." Cruces said, "I know," and began crying too. Quintero then moved towards L.C. and tried to lie on top of her, causing her to lie back on the bed. Quintero engaged in sexual intercourse with L.C, although L.C. never consented. Quintero tried to push Cruces' breast into L.C.'s mouth, and when L.C refused, Quintero bit L.C on her breast, leaving a bite mark. Quintero also attempted to force L.C to put her breast in Cruces' mouth, but Cruces refused.

After Quintero had finished, L.C asked permission from Quintero to go to the bathroom. Quintero agreed and L.C. went to the bathroom, where she continued crying and cleaned herself off. Thereafter, Quintero left the house, followed by Cruces, L.C, and Fierro. As they left, Cruces said to Quintero, "I can't believe you fucken did that to [L.C]"

Cruces, L.C., and Fierro initially drove to Cruces' aunt's house, but left there when the aunt refused to contact the police. They then drove to Cruces' mother's house, where the police were called. Cruces and L.C. eventually went to the hospital with a friend of Cruces, but only after they drove around for a period of time looking for Quintero, at Cruces' request.

Quintero was charged with one count of raping L.C, one count of kidnapping L.C, and two counts of misdemeanor battery.

During his jury trial, Quintero moved for a mistrial based upon the admission of testimony implying he possessed drugs. Quintero refused the court's offer for a curative instruction, and the motion was denied. After the State rested, Quintero moved for a directed verdict on the kidnapping and rape charges. Both motions were denied. The jury convicted Quintero on all four counts.

Quintero timely moved for a new trial and to arrest judgment on the kidnapping conviction for lack of jurisdiction. Both motions were denied. Quintero was sentenced to 214 months' imprisonment.

Quintero timely appealed his convictions.

Denial of Motion for Mistrial

Quintero first contends the district court abused its discretion by denying his motion for a mistrial based upon the following testimony:

"Q. [The prosecutor] Do you remember [Quintero] saying anything to you when you all walked out that door that night?

***3** "A. [Cruces] No, besides go to the hospital.

"Q. Just to go to the hospital? Do you remember you saying anything to [Quintero]?

"A. Okay. Yeah. I do.

"Q. What did you say to [Quintero]?

"A. I asked him if I could get some candy.

"Q. What?

"A. Candy.

"Q. I can't understand what you're saying.

"[THE COURT]: Speak louder, please.

"A. If I can get some candy.

"Q.... And what's candy?

"A. It's a drug.

"Q. Okay. And what did he tell you?

"A. No.

"Q. Had—what kind of drug is candy?"

At this point, defense counsel interrupted and the trial court called counsel to the bench. The trial court asked the prosecutor, "What are you doing?" The prosecutor responded that this was the first time she had heard about the drugs. Further, the prosecutor maintained that she had expected Cruces to respond to the question about whether Cruces said anything to Quintero by stating she told Quintero: "I can't believe you did this to [L.C.]." The court *sua sponte* sustained an objection to the testimony, finding the follow-up questions regarding "candy" were irrelevant.

Quintero moved for a mistrial on the basis that this was the first time he had heard Cruces' reference to "candy" and pointing out that the State had numerous opportunities to question Cruces before her testimony. Quintero also suggested the prosecutor emphasized Cruces' testimony by asking follow-up questions about "candy."

The court refused to grant a mistrial, but asked defense counsel if he wanted the court to admonish the jury or simply move on. Defense counsel responded that it was too late for admonishment as there had been "too much prejudice." Further, defense counsel stated that admonishment would draw too much attention to Cruces' statement.

A mistrial should be granted if prejudicial conduct makes it impossible to proceed with the trial without injustice to the defendant. K.S.A. 22–3423(1)(c); *State v. White,* 284 Kan. 333, 342–43, 161 P.3d 208 (2007). We review the denial of a motion for mistrial under an abuse of discretion standard. The party alleging the abuse bears the burden of proving that his or her substantial rights to a fair trial were prejudiced. 284 Kan. at 342, 161 P.3d 208. Discretion is abused when no reasonable person would take the view adopted by the district court. *State v. Moses,* 280 Kan. 939, 945, 127 P.3d 330 (2006).

We focus on three factors in determining whether the district court abused its discretion in denying a mistrial: (1) whether a limiting instruction was given; (2) the degree of prejudice; and (3) whether the erroneous admission of evidence affected the outcome of the trial. *State v. Sanders,* 263 Kan. 317, 323, 949 P.2d 1084 (1997). Generally, an admonition cures the prejudice of improperly admitted evidence. If the court sustains an objection to the evidence and provides an admonition, reversal is not required unless the remark was so prejudicial as to be incurable. *State v. Tatum,* 281 Kan. 1098, 1113, 135 P.3d 1088 (2006). Additionally, juries "will be presumed to have disregarded evidence about which an objection is sustained." *State v. Rice,* 261 Kan. 567, 592–93, 932 P.2d 981 (1997).

***4** Here, Quintero points out that the trial court failed to admonish the jury or give a curative instruction, and he suggests this failure permitted the jury to factor irrelevant and prejudicial testimony into their deliberations. Quintero further asserts the second prong of *Sanders* was met here, as the degree of prejudice was so great that the trial court interrupted the prosecutor's questioning and admonished the prosecutor. Finally, Quintero asserts that the evidence against him was not overwhelming, given the trial court's subsequent comment that the case was "not the strongest" the court had heard.

The State points out that while no admonition was given, the trial court *sua sponte* granted an objection to the testimony and instructed counsel not to further inquire into the subject. And, significantly, Quintero refused the district court's offer to admonish the jury and failed to request other curative measures. Finally, the State contends the testimony was not so egregious or prejudicial to warrant a new trial, because the evidence was overwhelming and Quintero failed to show substantial prejudice.

In light of Quintero's refusal of the trial court's offer to provide a curative instruction or admonish the jury, Quintero cannot establish the first prong of *Sanders.* Further, although we do not agree that the evidence was overwhelming, Quintero has not established substantial prejudice. Cruces' response to the prosecutor's question, by all accounts, was unexpected. Further, the prosecutor's follow-up questions were quickly halted.

Moreover, we note that Cruces' statement that she requested "candy" from Quintero as she was leaving his home may actually have favored the defendant. The statement could certainly be viewed as evidence that

Cruces was not concerned about what had just happened to L.C. inside the home.

Because Quintero has not shown that Cruces' testimony substantially prejudiced his right to a fair trial, we conclude the district court did not abuse its discretion in denying Quintero's motion for mistrial.

Sufficiency of the Evidence

Quintero next argues the evidence was insufficient to find him guilty of kidnapping and/or raping L.C., and the district court erred in denying his motion for directed verdict.

A motion for directed verdict at the close of the State's evidence is essentially a motion for judgment of acquittal and is reviewed as a challenge to the sufficiency of the evidence. *State v. Wilkins,* 267 Kan. 355, 365, 985 P.2d 690 (1999); see also *State v. Cavaness,* 278 Kan. 469, 479, 101 P.3d 717 (2004) (motions for judgment of acquittal are reviewed for sufficiency of the evidence).

> "When the sufficiency of the evidence is reviewed in a criminal case, this court must consider all of the evidence, viewed in a light most favorable to the prosecution, and determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Parker,* 282 Kan. 584, 597, 147 P.3d 115 (2006).

*5 When determining sufficiency of the evidence, this court does not reweigh the evidence, pass on witnesses' credibility, or resolve conflicts in the evidence. *State v. Pham,* 281 Kan. 1227, 1252, 136 P.3d 919 (2006).

(1) Kidnapping

Kidnapping is defined as the taking or confining of a person by force, threat, or deception, with the intent to hold the person "to facilitate flight or the commission of any crime." K.S.A. 21–3420(b). Quintero was charged with kidnapping L.C. "by force, threat or deception, to facilitate flight or the commission of a crime, to-wit: rape, in violation of K.S.A. 21–3420." The jury was appropriately instructed that the State was required prove Quintero took or confined L.C. by force, threat, or deception with the intent to rape her.

Quintero argues the evidence did not show that he "took or confined" L.C. by force, threat or deception. Further, he contends that even if the evidence showed a "taking or confinement," it did not show that he did so with the intent to rape L.C.

In his appeal brief, Quintero points out that the State has not clarified "when the alleged 'taking and/or confinement' of [L.C] is supposed to have occurred." He maintains he did not "take" or "confine" L.C, as L.C. voluntarily drove with Cruces to his residence, voluntarily came into the residence, and voluntarily entered the bedroom.

The State's response brief seems to utilize the terms "take" and "confine" interchangeably, and the State does not clearly suggest that either act occurred here. Rather, citing *State v. Bourne,* 233 Kan. 166, 169, 660 P.2d 565 (1983), the State points out that the movement by a victim from one room to another may constitute a taking. However, the State does not provide any corresponding reference to the record to establish that L.C. was "moved" by the defendant from one room to the next, or was moved at all. While L.C. did walk from the living room to the bedroom, the State does not suggest she did so as a result of force, threat, or deception by the defendant.

Citing *State v. Holloman,* 240 Kan. 589, 594, 731 P.2d 294 (1987), the State also argues the defendant need not physically "take" a person to a separate area to constitute a "taking." *Hollomon* does not suggest, however, that a "taking" may be accomplished without physical movement. In fact, *Holloman* seems to specifically reject that notion. Instead, the court there found that while two of the child victims were not "taken" by the defendant to an area under a bridge, once they got there, they were "confined" by the defendant by threat or force. 240 Kan. at 494, 731 P.2d 842. Specifically, the children testified the defendant demanded that they sit against a wall, told them not to move because he had a gun, and threatened to tie them up by their shoelaces.

Further, without benefit of authority, the State suggests "a 'taking' can begin from the moment fear is instilled in the victim." The State impliedly suggests that a "taking or confinement" may be accomplished by instilling fear in the victim. Yet K.S.A. 21–3420(b) requires a taking or confining *by* force, threat or deception—not fear.

*6 Moreover, the State does not point to any action on the part of the defendant suggesting that he confined L.C. by force, threat, or deception. The State implies that L.C. was confined by force in the living room when Quintero hit her, pushed her into the door, and told her to stay there. Citing *State v. Buggs,* 219 Kan. 203, 547 P.2d 720 (1976), Quintero responds that this argument is flawed because no "nexus" exists between Quintero's use of force in the living room and his intent to rape L.C.

In *Buggs,* our Supreme Court held that K.S.A. 21–3420(b) does not require a particular distance of removal, nor a particular time or place of confinement. However,

> "if a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> "(*a*) Must not be slight, inconsequential and merely incidental to the other crime;
>
> "(*b*) Must not be of the kind inherent in the nature of the other crime; and
>
> "(*c*) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." 219 Kan. at 216, 547 P.2d 720.

See also *State v. Fisher,* 257 Kan. 65, 78, 891 P.2d 1065 (1995) (movement of victims from safe to back office did not make robbery substantially easier to commit or lessen the risk of detection); *State v. Kemp,* 30 Kan.App.2d 657, 659–61, 46 P.3d 31, *rev. denied* 274 Kan. 1116 (2002) (movement of robbery victims into one room within the house was slight, inconsequential, and incidental to the robbery and had no significance independent of the robbery).

It is undisputed that Quintero pushed and hit L.C. in the living room in response to L.C.'s attempts to intervene when Quintero was hitting Cruces. The record contains no evidence, however, to suggest that Quintero's use of force or "confinement" of L.C. in the living room was made with the intent to subsequently rape L.C. Significantly, even L.C. testified that following the altercation in the living room, when Quintero and Cruces went into the bedroom, L.C. could have left the house but chose not to because she feared for Cruces.

Thus, even assuming the defendant "confined" L.C. by use of force in the living room, it was incidental to the subsequent crime of rape, and clearly was not done with the intent to lessen the risk of detection of the subsequent crime.

We therefore conclude that while the evidence may have been sufficient to establish Quintero confined L.C. in the living room by force, a rational factfinder could not have found that Quintero took or confined L.C. by force, threat, or deception with the intent to facilitate rape. Therefore, we reverse Quintero's kidnapping conviction.

(2) Rape

Quintero also contends the evidence was insufficient to prove rape because L.C. impliedly consented to sexual intercourse with Quintero, and L.C. was not overcome by the use of force or fear.

*7 By definition, rape is sexual intercourse with a victim, who did not consent, and the victim was overcome by force or fear. K.S.A. 21–3502(a)(1)(A). Quintero was charged with raping L.C, who did not consent to sexual intercourse and was overcome by force or fear, in violation of K.S.A. 21–3502. Further, the jury was instructed that the State must prove Quintero had sexual intercourse with L.C, and L .C. did not consent and was overcome by force or fear.

Here, the parties stipulated that Quintero and L.C. engaged in sexual intercourse. Accordingly, our discussion is limited to the issues of whether the evidence was sufficient to establish that L.C. did not consent to sexual intercourse with Quintero and that she was overcome by force or fear.

To determine whether the victim was overcome by force or fear, we consider the entire record. *State v. Borthwick,* 255 Kan. 899, 911, 880 P.2d 1261 (1994). Fear is subjective, and if the victim testified that she was overcome with fear, the evidence is sufficient to present to the jury. 255 Kan. at 913–14, 880 P.2d 1261. Further, K.S.A. 21–3502 does not require: (1) the victim to tell the defendant she does not consent, physically resist the defendant, and then endure intercourse against her will; or (2) the defendant to physically overcome the victim in the form of a beating or physical restraint. The statute merely requires a jury to find the victim did not consent and was overcome by force

or fear to facilitate the sexual intercourse. 255 Kan. at 914, 880 P.2d 1261.

The evidence, viewed in the light most favorable to the prosecution, supports the State's claim that L.C. did not consent because she was overcome by fear of Quintero. L.C. repeatedly testified that while she never specifically refused to have sexual intercourse with Quintero, she never consented to intercourse. L.C. testified she did not attempt to physically resist or fight Quintero because she was afraid he would hit her again as he had hit her earlier, and as he had hit Cruces. Further, L.C. testified at one point that Quintero pushed on her stomach and she was afraid he would hurt her unborn child. L.C. testified she asked Cruces, who was "translating" for Quintero, to "make him stop" and Cruces told Quintero that L.C. was "not like that" and loved her husband. L.C. testified that she cried throughout the incident, and that Cruces was crying too.

Additionally, L.C.'s actions following intercourse with Quintero were consistent with her assertion that she was raped. For instance, L.C. asked permission of Quintero to get up and go to the bathroom, where she cleaned herself off and continued crying. Also, L.C. and Cruces went to Cruces' aunt's home to call the police, but when the aunt refused to allow them to call from her home, they went to Cruces' mother's home, where the police were called. Although L.C.'s husband arrived, L.C. refused to go with him because he did not believe that L.C. had been raped by Quintero. Ultimately, a friend of Cruces took Cruces and L.C. to the hospital. Although Cruces had the friend drive around for a period of time looking for Quintero, L.C. testified she told the friend to hurry to the hospital.

***8** The testimony of the emergency room physician at the University of Kansas Medical Center, as well as L.C.'s hospital records, verify that L.C. was crying when she arrived at the hospital at 2:39 a.m. on September 13, 2004, and that she had bruising and swelling under her left eye and cheek, redness to her upper chest area, bite marks on her breast, and a linear bruise on her left thigh.

Further, the officer who responded to the hospital's report of rape testified that Cruces told him her boyfriend assaulted both Cruces and L.C. The officer's report indicated Quintero took Cruces to the bedroom and attempted to have L.C. and Cruces perform sexual acts on each other, but L.C. did not participate. L.C. told the officer Quintero removed L.C.'s and Cruces' clothes after they refused to perform sexual acts upon one another. L.C. also told the officer she did not resist or fight Quintero out of fear of physical violence against her.

Quintero argues the evidence established that L.C. closed the door to the bedroom, indicating her willingness and implied consent to sexual intercourse.

However, as discussed, L.C. testified she went to the bedroom after being called there by Cruces and Quintero, and she was not aware of why she was being called into the bedroom. Further, L.C. conceded under cross-examination that she closed the door to the bedroom, but stated she did so because Quintero had Cruces in a headlock and Cruces was yelling.

The record does not support Quintero's claim that L.C. should have suspected that Quintero intended to have sexual intercourse with her, or that she somehow impliedly consented to sexual intercourse with Quintero.

Additionally, Quintero contends L.C.'s testimony was impeached on several points, and that Cruces' testimony was inconsistent with L.C .'s testimony. Quintero essentially asks that we reweigh evidence and reassess witness credibility—actions this court is not permitted to undertake. See *Pham,* 281 Kan. at 1252, 136 P.3d 919. Moreover, the jury was not bound to accept Cruces' version of the facts, which favored Quintero. Significantly, we note that Cruces and Quintero had a child together, and Cruces testified that at the time of trial, she and Quintero were still in a relationship.

Finally, relying upon *State v. Matlock,* 233 Kan. 1, 660 P.2d 945 (1983), Quintero argues L.C.'s conduct was inconsistent with her claim of rape. In *Matlock,* the court held that a rape conviction can be sustained based upon the uncorroborated testimony of the victim so long as that testimony is clear and convincing. However, "where [the victim's] testimony is so incredible and improbable as to defy belief, the evidence is *not* sufficient to sustain a conviction" 233 Kan. at 3, 660 P.2d 945; see also *Borthwick,* 255 Kan. at 904–05, 880 P.2d 1261 (rape victim's testimony needs no corroboration unless it is so incredible and improbable as to defy belief).

The facts of this case are simply not analogous to those in *Matlock,* where the court found the victim's testimony

to be unbelievable and insufficient to uphold the rape conviction. 233 Kan. at 4–6, 660 P.2d 945. The *Matlock* court listed numerous factors casting doubt on the victim's testimony, the most egregious of which indicated the victim waited 15 months to report the rape, voluntarily moved with the defendant after the alleged rape, and demonstrated "friendly feelings" toward him following the rape. 233 Kan. at 4–5, 660 P.2d 945. The court also noted a lack of corroborative factors usually found in rape cases, *i.e.,* the lack of an outcry by the victim, the lack of signs on the victim's body or clothing indicating a struggle, the failure of the victim to complain at the earliest possible opportunity, the lack of a reasonable opportunity to commit forcible rape under the circumstances, the lack of a physical examination of the victim, and the lack of evidence of sperm on the victim's body, clothing, or bedding. 233 Kan. at 5, 660 P.2d 945.

***9** Here, while L.C. did not "cry out" during the rape, she did object to Cruces, who was translating, and she testified she did not resist because of her justified fear of Quintero, who had already beaten Cruces and hit L.C. And while L.C. and Cruces did not arrive at the hospital until several hours after the rape, they left Quintero's home planning to contact the police and go to the hospital. Further, L.C.'s testimony explains the several-hour delay, which simply does not compare to the 15–month delay in *Matlock,* And, significantly, the hospital report, physician's testimony, officer's testimony, and police report all corroborated L.C.'s account of the rape, as well as her physical injuries.

Viewing the evidence in the light most favorable to the State, we conclude the evidence was sufficient to sustain Quintero's rape conviction and that conviction is affirmed.

Affirmed in part, reversed in part, and remanded with directions to vacate the kidnapping sentence, and resentence the defendant.

All Citations

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