IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KEVIN A. SLATS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12313 Trial Court No. 1JU-12-01353 CR MEMORANDUM OPINION No. 6821 — September 11, 2019

Appeal from the Superior Court, First Judicial District, Juneau, Louis J. Menendez, Judge.

Appearances: Renee McFarland, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Coats, Senior Judge.[*]

Judge HARBISON.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

In this appeal, Kevin A. Slats challenges his conviction for first-degree sexual assault.[1] Slats argues that the superior court erred in limiting the introduction of evidence of the victim's sexual history. He also argues that the superior court's failure to instruct the jurors that they had to unanimously agree to convict Slats was structural error requiring reversal of Slats's conviction.

For the reasons we explain in this opinion, we conclude that the superior court's decision excluding evidence of the victim's sexual conduct was not an abuse of discretion. Additionally, because the jurors were polled after they returned their verdict, any error in failing to instruct the jury on the need for unanimity was cured by the superior court.

Underlying incident

According to L.W.'s trial testimony, on the morning of November 10, 2012, she was drinking in a park with several friends, including Slats. At that time, L.W. was homeless and staying in either her boyfriend's car or at Glory Hall,[2] an emergency shelter in Juneau. After a few hours, L.W. prepared to leave the park, and Slats asked to accompany her, saying he wanted to talk. The two walked up a trail to a flat area near an oil tank.

L.W. testified that, shortly after they arrived, Slats grabbed her. L.W. struggled with him and asked what he was doing. Slats responded that L.W. owed him. He removed L.W.'s pants and penetrated her anus with his penis. L.W. testified at trial that Slats also digitally penetrated her vagina — possibly by "fisting" — and performed cunnilingus on her (although she was inconsistent in reporting these sexual acts).

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[1] AS 11.41.410(a)(1).

[2] At the time of this incident, Glory Hall was called the Glory Hole.

L.W. walked to the police station to report the assault. Her then boyfriend, David Lindoff, went with her. After interviewing L.W., police officers asked her to show them where the sexual assault occurred and then they took L.W. to the hospital.

At the hospital, a nurse performed a sexual assault examination on L.W. and treated her injuries. The sexual assault examination revealed semen near L.W.'s anus, and subsequent DNA testing revealed that Slats was a likely match to this semen.

L.W. later testified that she was menstruating at the time of the sexual assault. She said that the assault was so painful that she was unable to walk normally for several days afterward and that she needed to take a prescribed stool softener and had to use a medical donut cushion to ease the pain of sitting.

Slats was charged with two counts of first-degree sexual assault — one count for digital penetration of L.W.'s vagina and one count for penile penetration of L.W.'s anus.[3] His defense at trial was that he engaged in consensual anal sex with L.W., but he did not penetrate her vagina at all. The jury acquitted Slats of digitally penetrating L.W.'s vagina but convicted him of penetration of her anus with his penis, rejecting his consent defense.

The superior court's decision excluding evidence of the victim's sexual conduct was not an abuse of discretion

On appeal, Slats argues that the superior court improperly prevented him from presenting evidence of L.W.'s sexual conduct. Among other things, Slats wanted to present evidence that (1) L.W. routinely engaged in acts of anal penetration and fisting with her boyfriend; (2) L.W. was known to engage in prostitution; and (3) later, after the assault, L.W. went to a hotel with two men, presumably to have sex with them. Slats

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[3] *See* AS 11.41.410(a)(1).

argues that this evidence was not barred by the rape shield statute because it had situational relevance to his defense.

Alaska's rape shield law, Alaska Statute 12.45.045, provides in part:

> (a) In prosecutions for the crimes of sexual assault in any degree . . . evidence of the sexual conduct of the complaining witness, occurring either before or after the offense charged, may not be admitted nor may reference be made to it in the presence of the jury except as provided in this section. . . . If the court finds that evidence offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and that the probative value of the evidence offered is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness, the court shall make an order stating what evidence may be introduced and the nature of the questions that may be permitted.[4]

In accordance with AS 12.45.045, Slats filed a pretrial application seeking to introduce evidence of L.W.'s prior sexual activity.

Slats argued below that the specific acts of sexual assault that were alleged by L.W. — vaginal penetration by fisting and anal penile penetration — were "horrific-sounding" and "arguably deviant." Slats contended that evidence that L.W. routinely consented to such acts was relevant to overcome any belief the jury might have that such acts are *per se* nonconsensual. But the judge found that Slats had failed to make a case for situational relevance. Instead, the judge found that Slats was seeking to use the evidence in the manner prohibited by the rape shield law — to demonstrate that L.W. was an "unchaste woman . . . [who] doesn't deserve the protections of the law" simply because "she engages in varied sexual activity."

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[4] AS 12.45.045(a).

Slats challenges this ruling on appeal. He argues that since L.W. was menstruating at the time of the alleged assault, evidence that she previously engaged in anal sex with her boyfriend while menstruating would tend to show that she consented to anal sex with Slats.

An appellate court will reverse a superior court's ruling on the admissibility of evidence only upon a showing of an abuse of discretion.[5] In this case, the superior court was tasked with weighing the probative value of the evidence against the danger of undue prejudice and confusion of the issues. The trial judge was understandably concerned that the jury might presume consent simply because L.W. engaged in "varied sexual activity." And the probative value of the evidence was diminished by the fact that none of the prior sexual activity involved sex between L.W. and Slats, but rather involved L.W.'s sexual conduct with her boyfriend. Given all of these considerations, we conclude that exclusion of this evidence does not constitute an abuse of discretion.[6]

Slats next argues that the superior court erred in denying his request to introduce evidence that L.W. had previously engaged in prostitution. Slats contends that he offered evidence that L.W. traded sex for money or alcohol not to show that L.W. acted in conformity with that behavior but rather to show that L.W. fabricated the allegations against Slats in retaliation for his failure to pay her as agreed.

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[5] *Kvasnikoff v. State*, 674 P.2d 302, 304-05 (Alaska App. 1983) (quoting *Eben v. State*, 599 P.2d 700, 710 (Alaska 1979)).

[6] *See id.* at 306 (holding that the superior court did not abuse its discretion when it excluded evidence that the male victim of a homosexual rape had previously engaged in prior, consensual homosexual acts in part because those acts had not involved the defendant and the evidence risked making the trial about the sexuality of the victim).

Although in some cases, evidence that the victim routinely engaged in prostitution might be relevant for the purpose described by Slats,[7] in this case there was no evidence that the sexual acts between Slats and the victim were acts of prostitution. Slats did not offer to testify or to present any witnesses who would testify that the encounter between Slats and L.W. was an act of prostitution. In the absence of any such evidence, the evidence of L.W.'s prior acts of prostitution had no probative value. For this reason, we conclude that the superior court did not abuse its discretion when it denied Slats's motion to introduce this evidence.

Slats's last argument on appeal relating to the admission of evidence concerns his request to introduce evidence about L.W.'s alleged sexual conduct with two or more men shortly after the sexual assault. Slats argues that this conduct was relevant to impeach L.W.'s claim that she had been anally raped and that she was in significant pain for days as a result.

To support this argument below, Slats sought to admit the testimony of L.W.'s former boyfriend, David Lindoff. Slats provided a copy of a transcript of a police interview of Lindoff. In that interview, Lindoff told police that on the night of the sexual assault, L.W. left where they were staying and returned early in the morning with alcohol. According to Lindoff, when Lindoff asked her how she got the alcohol, she

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[7] *See, e.g.*, *Commonwealth v. Harris*, 825 N.E.2d 58, 73 (Mass. 2005) (holding that a court has the discretion to allow impeachment of the credibility of a sexual assault complainant by prior convictions of prostitution, but in exercising that discretion, the purposes of the rape shield statute should be considered); *Brewer v. U.S.*, 559 A.2d 317, 320-21 (D.C. 1989) (suggesting that if defendant testified that complainant agreed to sex for money on the occasion in question, evidence that complainant engaged in prior acts of prostitution might be admissible); *State v. Quinn*, 592 P.2d 778, 781 (Ariz. App. 1978) (holding that such evidence is admissible only where, (a) defendant alleges the complainant actually consented to an act of prostitution, and (b) the trial judge determines that the evidence is more probative than prejudicial).

purportedly stated "I met two guys downtown, and I went to their hotel room." Slats argued that Lindoff implied in the interview that this meant L.W. had sex with the two men to obtain the alcohol, although he did not tell the police that L.W. explicitly told him that.

The superior court denied Slats's motion during the pretrial hearing, but the court noted that Slats could renew his request during trial.

During trial, Slats did in fact renew his request to introduce this evidence. The superior court granted Slats's request in part. The court ruled that Slats could introduce evidence that contradicted L.W.'s testimony that she was in significant pain after the sexual assault. But the court ruled that this evidence could not include the allegation that L.W. had sex with the two men.

As a general matter, we agree with Slats that evidence that a rape victim engaged in consensual sex with two men immediately after an alleged sexual assault could be probative of whether the assault occurred, and therefore admissible. But Slats did not offer such evidence. Slats's only evidence regarding the alleged post-assault sexual activity was David Lindoff's proposed testimony. Significantly, Lindoff did not claim that L.W. told him that she had sex with the men. Instead, his proposed testimony about what happened between her and the two men was based on his own speculation that they had sex.

Moreover, although the superior court prohibited Slats from introducing the speculative claim that L.W. had sex with two men, the court's ruling did not prohibit Slats from offering evidence that L.W. was otherwise acting in a manner inconsistent with being in severe pain as she alleged. In other words, under the court's ruling, Lindoff could have testified that L.W. went out drinking with two men after the assault.

The only evidence that the court excluded was Lindoff's speculation that L.W. had sex with the men.

Given the narrowness of the court's ruling and the speculative nature of the proposed testimony, we find no abuse of discretion.

The superior court's error in failing to instruct the jury on the need for unanimity was harmless beyond a reasonable doubt

Slats raises a final argument on appeal relating to the instructions given to the jury. He notes that the court's instructions did not include an instruction that the jury had to unanimously agree on their verdict in order to find Slats guilty, and he argues that although his attorney did not object to this mistake, this was a structural error requiring reversal of his conviction.

We agree with Slats that the superior court's failure to instruct the jurors concerning the requirement of unanimity was obvious error. However, we disagree that this failure to instruct the jury was structural error requiring reversal of Slats's conviction. Instead, we conclude that this error was cured when, upon the announcement of the jury's verdicts, the court polled the jurors individually. The court asked each juror, "Is this your true and correct verdict?" Each juror responded, "Yes."

In *Roberts v. State* we addressed a similar problem and concluded that, although the judge's failure to instruct the jury on unanimity was obvious error, it was cured when the jurors were individually polled upon the announcement of the verdicts.[8] There, as here, the trial court failed to give the jury a unanimity instruction but the audio showed that the trial judge had directed an individualized inquiry to each juror. We concluded that had there been one or more dissenting jurors they would have spoken up

[8] *Roberts v. State*, 394 P.3d 639, 641 (Alaska App. 2017).

during the polling process.[9] In doing so, we noted that a majority of jurisdictions that have dealt with this question have concluded that a judge's failure to instruct the jury on the requirement of a unanimous decision is cured when the individual jurors are polled and they each affirm that they concur in the announced verdicts.[10] We reach the same conclusion here.

Conclusion

The judgment of the superior court is AFFIRMED.

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[9] *Id.* at 641-42.

[10] *Id.* at 642 (citing *Fountain v. State*, 275 A.2d 251, 252 (Del. 1971); *State v. Plantin*, 682 N.W.2d 653, 662 (Minn. App. 2004) (collecting cases); *State v. Kircher*, 525 N.W.2d 788, 791-92 (Wis. App. 1994) (collecting cases)).