Cite as 2010 Ark. 173

SUPREME COURT OF ARKANSAS

No. CR09-982

STATE OF ARKANSAS APPELLANT V. JEFF PARKER APPELLEE	**Opinion Delivered** April 15, 2010 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR 2009-349] HON. HERBERT WRIGHT, JUDGE REVERSED AND REMANDED.

JIM GUNTER, Associate Justice

This is an interlocutory appeal by the State from an order of the Pulaski County Circuit Court allowing an alleged rape victim's prior sexual conduct into evidence pursuant to the rape-shield statute, Ark. Code Ann. § 16-42-101 (Repl. 1999). On appeal, the State maintains that the trial court erred in allowing the alleged prior sexual conduct between the victim and appellee Jeff Parker into evidence for the purposes of proving consent because the issue of consent was irrelevant where the State had charged Parker with raping the victim while she was physically helpless under Ark. Code Ann. § 5-14-103 (Supp. 2009). We reverse the circuit court's decision and remand for trial.

Jeff Parker was charged by information on January 28, 2009, with raping A.G. on October 22, 2008, while she was incapable of consent because she was physically helpless. On May 29, 2009, Parker filed a motion to admit evidence of alleged prior sexual conduct between A.G. and him to support his consent defense. A hearing was held on June 24, 2009.

Three witnesses testified that they had attended several parties at Parker's home between September and October 2008 where they saw Parker and A.G. engaging in overt sexual activity. Furthermore, Parker testified that he had engaged in consensual sexual intercourse with A.G. several times during September and October 2008. A.G. took the stand and denied having had consensual sexual intercourse with Parker at any time. At the close of the hearing, Parker argued that the proffered testimony of the three witnesses and Parker was admissible to support his defense that A.G. consented to having sexual intercourse with him on October 22. In response, the State maintained that any prior sexual encounters between A.G. and Parker were not relevant because Parker was charged with raping A.G. while she was physically helpless and incapable of consent.

The circuit court entered an order on June 29, 2009, granting Parker's motion and allowing him to present evidence of his prior sexual encounters with the victim to support his defense of consent. Specially, the court found that "the evidence of the conduct between defendant and [the victim] . . . is relevant and the probative value of the evidence outweighs the inflammatory or prejudicial nature of the evidence." The State filed a timely notice of appeal from that order on July 6, 2009.

As a threshold matter, we ordinarily first review a State appeal in a criminal case pursuant to Rule 3 of the Arkansas Rules of Appellate Procedure–Criminal, which permits the State to take an interlocutory appeal from certain pretrial orders, including the grant of a motion to suppress evidence or a defendant's confession or the grant of a motion under Ark.

Code Ann. § 16-42-101(c) allowing evidence of a victim's prior sexual conduct in rape cases. As this court has frequently observed, there is a significant and inherent difference between appeals brought by criminal defendants and those brought on behalf of the State. *State v. Mancia-Sandoval*, 2010 Ark. 134, 361 S.W.3d 835. The former is a matter of right, whereas the latter is not derived from the constitution, nor is it a matter of right, but is granted pursuant to Rule 3. *Id.*, 361 S.W. 3d 835. We accept appeals by the State when our holding would be important to the correct and uniform administration of the criminal law. *Id.*, 361 S.W.3d 835. We do not permit State appeals merely to demonstrate the fact that the circuit court erred. *Id.*, 361 S.W.3d 835. Thus, where an appeal does not present an issue of interpretation of the criminal rules with widespread ramifications, this court has held that such an appeal does not involve the correct and uniform administration of the law. *Id.*, 361 S.W.3d 835.

However, this court has never required a "uniform administration of the law" analysis when the State is appealing the circuit court's decision to allow evidence of the rape victim's prior sexual encounters under the rape-shield statute. *See State v. Townsend*, 366 Ark. 152, 233 S.W.3d 680 (2006); *State v. Sheard*, 315 Ark. 710, 870 S.W.2d 212 (1994). Rather, this court has treated the State's appeal from an adverse ruling in a rape-shield hearing automatic without any Rule 3 "uniform administration of the law" analysis. We note that the rape-shield statute provides for an interlocutory appeal on behalf of the State and that such an appeal should be taken in accordance with Rule 36.10 of the Arkansas Rules of Criminal Procedure, which was superseded in 1996 by the Arkansas Rules of Appellate

Procedure–Criminal. Thereafter, in 1998, Rule 3 was amended to add that the State can file an interlocutory appeal from an adverse ruling under the rape-shield statute. Because this court has never required the "uniform administration of justice" analysis as it does in the State's appeals from the grant of a motion to suppress evidence or confessions, we treat this appeal by the State from an order allowing evidence under the rape-shield statute as automatically appealable without resort to our normal Rule 3 analysis.

We next turn to the merits of the State's argument on appeal. It contends that the circuit court erred in ruling that the victim's prior sexual conduct was admissible. Specifically, the State notes that the circuit court found the victim's prior sexual conduct relevant on the basis that Parker's defense was consent. However, the State maintains that any testimony regarding the victim's prior sexual activity was irrelevant because consent is no defense to rape where the victim was physically helpless at the time of the incident. In response, Parker asserts that his defense to the charge is that the victim consented to consensual sexual intercourse with him on October 22. He maintains that her previous sexual activity with him in September and on the night in question is relevant to that defense of consent. He argues that the State has offered no support for its contention that consent cannot be a defense in a rape case involving a possibly physically helpless victim.

Pursuant to Ark. Code Ann. § 5-14-103, a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is incapable of consent because she is physically helpless. Furthermore, under the rape-shield statute, evidence of a victim's

prior sexual conduct is generally inadmissible in a rape or sexual-assault trial. Ark. Code Ann. § 16-42-101(b) (Repl. 1999). However, the circuit court has discretion to admit this kind of evidence if, after a pretrial hearing, it finds the evidence relevant to prove a fact in issue and that the evidence's probative value outweighs its inflammatory or prejudicial nature. Ark. Code Ann. § 16-42-101(c)(2)(C).

The statute's purpose is to shield victims of rape or sexual abuse from the humiliation of having their sexual conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt. *Townsend*, 329 Ark. at 155, 953 S.W.2d at 683. Accordingly, the trial court is vested with a great deal of discretion in determining whether the evidence is relevant, and we will not overturn the trial court's decision unless it constitutes a clear error or a manifest abuse of discretion. *Id.*, 953 S.W.2d at 683.

We reverse the circuit court's decision in this case. Parker was not charged with forcible-compulsion rape. Rather, he was charged with raping A.G. while she was physically helpless. Pursuant to Ark. Code Ann. § 5-14-103(a)(2)(A), a person who is physically helpless at the time of the rape is "incapable of consent." If the State proves A.G. was physically helpless at the time of sexual intercourse with Parker, then testimony offered to support a consent defense is irrelevant because she was incapable of consent. Therefore, any prior sexual encounters between Parker and the victim—which might be relevant if consent was a defense—are irrelevant where the victim could not have consented due to being physically

helpless. Raising the defense of consent, when it is not available as a defense, does not make evidence of consent relevant. Because consent is not a fact in issue in Parker's prosecution, any evidence of the victim's alleged prior sexual encounters with Parker is irrelevant, and the circuit court abused its discretion in admitting that evidence.

Reversed and remanded.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellant.

Teresa Bloodman, for appellee.