SUMMARY
March 14, 2024

2024COA27

No. 21CA1808, *People v. Hood* — Crimes — Unlawful Sexual Behavior — Victim's and Witness's Prior History; Evidence — Relevancy and its Limits — Definition of "Relevant Evidence" — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

In this direct criminal appeal, a division of the court of appeals concludes that DNA from someone other than the defendant found on a victim's external genitalia is not, by itself, evidence of "specific instances of the victim's . . . prior or subsequent sexual conduct" deemed presumptively irrelevant under the rape shield statute, section 18-3-407(1), C.R.S. 2023. Because the district court concluded otherwise, it erred. The division also concludes that the DNA evidence was relevant under CRE 401 and not inadmissible under CRE 403 and that its exclusion was not harmless. As a result, the division reverses the defendant's judgment of conviction and remands the case to the district court for a new trial.

COLORADO COURT OF APPEALS **2024COA27**

Court of Appeals No. 21CA1808
Douglas County District Court No. 20CR318
Honorable Patricia D. Herron, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Clayton Angus Hood,

Defendant-Appellant.

JUDGMENT REVERSED
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE BROWN
Freyre and Johnson, JJ., concur

Announced March 14, 2024

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¶ 1 Defendant, Clayton Angus Hood, appeals his judgment of conviction on one count of sexual assault on a child by one in a position of trust and one count of unlawful sexual contact. He contends that (1) the district court erred by excluding certain DNA evidence under the rape shield statute, section 18-3-407, C.R.S. 2023; (2) the prosecution committed misconduct by misleading the jury and impermissibly shifting the burden of proof; and (3) his convictions should merge.

¶ 2 Because we conclude that the district court erred by excluding the DNA evidence and that the error is not harmless, we reverse Hood's judgment of conviction and remand the case to the district court for a new trial. Given our disposition, we do not address Hood's remaining contentions.

I. Background

¶ 3 In 2019, Hood moved in with his cousin, the cousin's daughter, and a few other family members. The daughter, K.H., testified at trial that in 2020, when she was fifteen years old, Hood came into her room one night after he had gone out drinking and sexually assaulted her. K.H. said that Hood digitally penetrated her vagina and then forcibly penetrated her vagina with his penis for

about an hour. K.H. testified that, before she went to school the following day, she showered and changed clothes. While at school, K.H. told her boyfriend about the assault and then called her father, J.H., to tell him.

¶ 4 The prosecution charged Hood with one count of sexual assault on a child by one in a position of trust and one count of unlawful sexual contact. A jury convicted Hood as charged, and the court sentenced him to concurrent indeterminate sentences of eight years to life in prison, with ten years of mandatory parole.

II. DNA Evidence

¶ 5 Hood contends that the district court erred by (1) misapplying the rape shield statute to exclude evidence that DNA from someone other than Hood was detected on the victim's external genitalia and (2) concluding that the probative value of the DNA evidence was outweighed by the danger of unfair prejudice under CRE 403. We agree.

A. Standard of Review

¶ 6 "We review a trial court's evidentiary rulings, including its determination of evidence's admissibility under the rape shield statute, for an abuse of discretion." *People v. Lancaster*, 2015 COA

93, ¶ 35. A court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or if it misconstrues or misapplies the law. *People v. Liggett*, 2021 COA 51, ¶ 16, *aff'd*, 2023 CO 22. We review de novo a trial court's interpretation of the rape shield statute. *See People v. Orozco*, 210 P.3d 472, 478 (Colo. App. 2009).

B. Additional Background

¶ 7 The same day K.H. disclosed the alleged assault, she went to a hospital and was examined by a sexual assault nurse examiner (SANE). The SANE took cheek, anal, external vaginal, and cervical swabs from K.H. The police sent the swabs from the SANE kit and a cheek swab from Hood to the Colorado Bureau of Investigation (CBI) for DNA testing. CBI's analysis of the swabs showed that Hood's DNA was not detected on the anal, external vaginal, or cervical swabs. But DNA from at least one male contributor other than Hood was detected on K.H.'s external vaginal swab.[1]

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[1] The parties appear to agree that there were *three* DNA profiles other than K.H.'s found on the external vaginal swab, including one male profile. But the expert reports and DNA analysis results are not in the record, and the relatively brief discussion of the issue at the motions hearing references only one male DNA profile (not

¶ 8 The prosecution filed a motion in limine to exclude evidence of the other DNA profile found on the victim's external vaginal swab under the rape shield statute, arguing that it (1) implicated specific instances of K.H.'s prior sexual conduct; (2) did not fall under any exception to the rape shield statute; and (3) had very little probative value but was highly prejudicial because it would encourage the jury to speculate about whose DNA was detected.

¶ 9 In response, defense counsel argued that there was no rape shield issue because both sides' experts would testify about DNA transfer, "DNA is transferred in nonsexual ways all the time," and the presence of DNA alone does not lead to the conclusion that it "got there through sex." Counsel also asserted that the evidence was not being offered to show that K.H. had sex with someone else — an alternate suspect defense — but to corroborate the defense theory that K.H. did not have sex *at all* on the night of the alleged assault. Counsel argued that the "*mere presence* of DNA" was

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Hood's) found on the swab. Because we are unable to confirm from our review of the record that three other DNA profiles were detected, our analysis is based on the presence of just one other male DNA profile. Still, our analysis would be supported all the more if there were multiple DNA profiles detected that were not Hood's.

important because K.H. took a shower after the alleged assault and, without the other DNA evidence, the prosecution could mislead the jury to believe that no DNA was present and that K.H. had simply washed away Hood's DNA.

¶ 10 After hearing arguments at a motions hearing, the district court agreed with the prosecution. It reasoned,

> [T]he exculpatory part is the fact that he was excluded on the swab, and that information should come in. But the additional information about there being potentially someone else's DNA is highly prejudicial. The inference that that raises I think is probably protected by rape shield. If I am wrong about that, then certainly under a 403 analysis it is very prejudicial. So that will be excluded.

The court directed defense counsel "not [to] leave the impression that there was another source."

C. The District Court Erred by Excluding the DNA Evidence

¶ 11 We conclude that the district court abused its discretion by excluding the DNA evidence because the evidence does not fall under the rape shield statute, is relevant under CRE 401, and is not inadmissible under CRE 403.

¶ 12 The purpose of Colorado's rape shield statute is "to protect sexual assault victims from humiliating public fishing expeditions

into their past sexual conduct." *People v. Cook*, 2014 COA 33, ¶ 36. To that end, the statute creates a presumption that evidence of "specific instances of the victim's . . . prior or subsequent sexual conduct" is irrelevant except in certain instances.[2] § 18-3-407(1); *People v. Williamson*, 249 P.3d 801, 802 (Colo. 2011). The term "sexual conduct" encompasses "a broad range of behaviors related, but not limited, to sexual contact and intercourse." *Williamson*, 249 P.3d at 803. But "evidence does not become inadmissible under . . . the rape shield statute simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct." *People v. Cobb*, 962 P.2d 944, 951 (Colo. 1998).

¶ 13 We conclude that evidence that someone else's DNA was present on the outside of K.H.'s vagina does not constitute evidence of a "specific instance[]" of K.H.'s "prior or subsequent sexual conduct" such that it is presumptively irrelevant under the rape shield statute. § 18-3-407(1). The DNA evidence was not offered to

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[2] Section 18-3-407(1), C.R.S. 2023, also deems presumptively irrelevant opinion or reputation evidence of a victim's sexual conduct, but neither party argues that the DNA evidence at issue falls under these other categories.

show that someone else sexually assaulted K.H. or that K.H. engaged in any sexual conduct on any occasion. Indeed, there was no suggestion that K.H. had sexual contact after she showered and no evidence about how or when the other DNA got onto her body.

¶ 14 Instead, the defense sought to introduce the evidence to show that other DNA was found on K.H.'s vagina — however it got there — even *after* she showered. That someone else's DNA was still present on K.H.'s body undermined the prosecution's theory that the only reason Hood's DNA was not detected there was because K.H. showered or her body otherwise naturally expelled it. Counsel even offered, during the motions hearing, not to elicit the fact that the DNA found was of a male contributor to reduce any indirect inference that its presence might be related to a sexual encounter.

¶ 15 We do not go so far as to adopt Hood's suggestion that the only DNA evidence that might implicate the rape shield statute is that drawn from sexual biological fluids such as semen or seminal fluid. *See Williamson*, 249 P.3d at 803 (defining sexual conduct broadly). But the mere presence of someone else's DNA on a person's external genitalia, standing alone, does not amount to

evidence of "specific instances of . . . prior or subsequent sexual conduct." § 18-3-407(1).

¶ 16 We are not persuaded otherwise by the People's contention that the DNA evidence "raised a reasonable inference of prior sexual conduct" because the district court was also presented with evidence at the motions hearing that K.H. had an intrauterine device (IUD) and that her boyfriend would sometimes sneak into her bedroom. Although these facts might suggest that K.H. engaged in sexual conduct, they were divorced from the DNA evidence (for example, there was no evidence that the DNA found on K.H. belonged to her boyfriend). Moreover, these facts were admitted at trial notwithstanding the rape shield statute because they were framed in a nonsexual context. The prosecution elicited testimony from the SANE that IUDs have various medical purposes beyond contraception. And as both parties agreed at the motions hearing, K.H. testified that she initially thought it was her boyfriend in her room instead of Hood without mentioning that her boyfriend snuck in sometimes.

¶ 17 We also note that evidence that four other DNA profiles were found on K.H.'s underwear, which no doubt touched her vagina,

was not subject to a rape shield analysis at all and was admitted at trial. True, Hood's DNA was among the profiles found on K.H.'s underwear. But we fail to see why the other DNA evidence found on K.H.'s underwear and the DNA evidence found on K.H.'s vagina would be treated differently for purposes of the rape shield statute.

¶ 18 Accordingly, we conclude that the court misapplied the rape shield statute to exclude the DNA evidence. But that does not end our analysis. Even if the DNA evidence was not presumptively irrelevant under the rape shield statute, it must still be admissible under standard evidentiary rules. *See People v. Garcia*, 179 P.3d 250, 254 (Colo. App. 2007).

¶ 19 The Colorado Rules of Evidence favor the admissibility of relevant evidence unless otherwise prohibited by constitution, statute, or rule. CRE 402; *Kaufman v. People*, 202 P.3d 542, 552 (Colo. 2009). Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable. CRE 401. Still, even 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." CRE 403; *see also Cook*, ¶¶ 38-39. "In reviewing the trial court's determination, we

assume the maximum probative value that a reasonable fact finder might give the evidence and the minimum unfair prejudice to be reasonably expected." *People v. Clark*, 2015 COA 44, ¶ 18 (quoting *People v. James*, 117 P.3d 91, 94 (Colo. App. 2004)); *see also People v. Dist. Ct.*, 869 P.2d 1281, 1285-86 (Colo. 1994) (applying this standard to review the court's exclusion of evidence under CRE 403).

¶ 20 We conclude that the excluded DNA evidence is relevant to a material fact. *See* CRE 401; *Cook*, ¶¶ 38-39. That other DNA was detected on K.H.'s vagina after she showered makes it less probable that Hood's DNA was simply washed off or naturally expelled. *See* CRE 401. Thus, the DNA evidence makes it less probable that Hood touched K.H.'s vagina and less probable that Hood sexually assaulted K.H. *Id.* Of course, whether Hood sexually assaulted K.H. was a material fact.

¶ 21 Furthermore, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice or misleading the jury. *See* CRE 403. We disagree with the district court's reasoning that the only "exculpatory part [of the evidence] is the fact that [Hood] was excluded on the swab" from

K.H.'s external genitalia. Rather, evidence that at least one other DNA profile was present also undermined the prosecution's theory that Hood's DNA was not found on or inside K.H. because she showered after the alleged sexual assault or naturally expelled all foreign DNA from her body. It also supported Hood's defense that he did not have sexual contact with K.H. And the probative value of the DNA evidence was increased by the prosecution's presentation of evidence and argument that showering or natural expulsion was the most likely reason why Hood's DNA was not detected on or inside K.H.

¶ 22 The district court reasoned that the mere presence of the other DNA on K.H.'s vagina was highly prejudicial, but that ruling appears to be based on "[t]he inference that [the evidence] raises," which the court determined "is probably protected by rape shield." But we have concluded that the DNA evidence is not covered by the rape shield statute because it is not evidence of a specific instance of K.H.'s sexual conduct. We acknowledge that the evidence might indirectly cause the jury to infer that K.H. engaged in sexual conduct, *see Cobb*, 962 P.2d at 951, but there were other nonsexual explanations for how the DNA could have transferred to K.H., as

even the prosecution's expert witness explained (and as discussed further below).

¶ 23 Assuming the maximum probative value that a reasonable fact finder might give the evidence and the minimum unfair prejudice to be reasonably expected from it, as we must, *see Clark*, ¶ 18, we conclude that the court abused its discretion by excluding the DNA evidence under CRE 403. *See Liggett*, ¶ 16.

D. The District Court's Error Requires Reversal

¶ 24 Under harmless error review, we reverse only if the error "affects the substantial rights of the parties." *Hagos v. People*, 2012 CO 63, ¶ 12; *see also* Crim. P. 52(a).[3] An error affects a party's substantial rights if it "substantially influenced the verdict or

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[3] Hood contends that the standard of reversal should be constitutional harmless error. Because we conclude that the error requires reversal under the nonconstitutional harmless error standard, we do not decide whether excluding the evidence amounted to a constitutional violation. *See Hagos v. People*, 2012 CO 63, ¶ 12 (explaining that reversal under the nonconstitutional standard is more difficult because it "requires that the error impair the reliability of the judgment of conviction to a greater degree than the constitutional harmless error standard requires" (citing *Krutsinger v. People*, 219 P.3d 1054, 1058 (Colo. 2009))); *People v. Presson*, 2013 COA 120M, ¶¶ 16-17 (declining to address whether constitutional harmless error review applied where reversal was required under either harmless error standard).

affected the fairness of the trial proceedings." *Hagos*, ¶ 12 (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986)).

¶ 25 A reviewing court must look at "the overall strength of the state's case, the impact of the improperly admitted or excluded evidence on the trier of fact, whether the proffered evidence was cumulative, and the presence of other evidence corroborating or contradicting the point for which the evidence was offered." *People v. Vanderpauye*, 2021 COA 121, ¶ 39 (quoting *People v. Casias*, 2012 COA 117, ¶ 64), *aff'd*, 2023 CO 42.

¶ 26 For two reasons, we conclude that the district court's error in excluding the DNA evidence was not harmless. *See Hagos*, ¶ 12; Crim. P. 52(a).

¶ 27 First, the court's ruling and the prosecution's presentation of the evidence and argument gave the jury an incomplete and misleading view of material evidence and minimized the exculpatory value of the fact that Hood's DNA was not found on K.H.'s genitalia. At trial, a forensic scientist from CBI who was qualified as an expert in DNA, DNA testing, and forensic biology testified about how DNA can be transferred. The expert testified that "touch DNA" is left behind when a person touches a surface, and whether and how

much DNA is detected depends on the texture of the surface, how long the contact was, and whether the person sheds more DNA than others. The expert also explained that "transfer DNA" can occur, for example, when one individual shakes another's hand or touches an object with "a rich source of DNA" and then touches another object, transferring that DNA.

¶ 28 The expert testified that Hood's DNA was not found on any of the swabs taken from K.H.'s body and was specifically excluded from the external vaginal swab. However, the prosecution elicited testimony from the expert that showering between a sexual assault and a SANE examination could "help get rid of some of the DNA." The expert further testified that how long DNA would be present for a SANE to swab would depend on how quickly the individual's body "gets rid of a foreign DNA profile." Notably, K.H. and three other witnesses all mentioned that she showered after the assault and before being examined by the SANE.

¶ 29 Against this backdrop, the jury heard there was no foreign DNA found on or inside of K.H. But that is not factually accurate — there *was* DNA found on K.H., it just was not Hood's DNA.

¶ 30 Then the prosecutor argued in closing that because K.H. showered and possibly expelled Hood's DNA, the fact that his DNA was not found did not mean anything. In particular, the prosecutor argued,

> To say that because [Hood's] DNA is not inside [K.H.] even though it's been 12 hours since the assault; and even though she showered, and even though, as [the expert witness] told you, every woman's body will handle DNA differently, and she can't tell you how [K.H.]'s body handled it, I don't know if anyone has the ability to tell you that.
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> . . . .
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> To say again because there was no DNA there was no sex is speculation.

¶ 31 The excluded DNA evidence was therefore critical for the jury to properly understand the significance of the absence of Hood's DNA. The presence of the other DNA undermined the prosecution's theory that Hood's DNA was not present because K.H. showered or expelled it naturally. Without the excluded DNA evidence, the jury was given the misleading impression that K.H. washed off or expelled *all* DNA from that part of her body. That impression was false. And the court deprived Hood of the only means of testing that part of the prosecution's case by excluding the DNA evidence and

"directing" defense counsel to "not leave the impression that there was another source," including through the questioning of witnesses. *See People v. Golden*, 140 P.3d 1, 4-7 (Colo. App. 2005) (court reversibly erred by barring a defendant from questioning a victim about a prior committed romantic relationship under the rape shield statute when defendant could not otherwise establish the victim's possible motive to lie).

¶ 32 Second, the facts and evidence were highly disputed. There was no physical evidence of the alleged assault on K.H.'s body despite K.H.'s statements that it lasted over an hour and involved violent thrusting. The SANE testified that she observed one injury on K.H.'s back but no visible injuries on the inside or outside of her vagina.

¶ 33 The DNA evidence was inconclusive. As noted, Hood's DNA was not found on or inside K.H.'s body. K.H. testified that Hood did not wear a condom, but no sperm cells were found on or in K.H. or her underwear. And although K.H.'s sheets were collected, they were not tested for DNA. Still, K.H. told the SANE that Hood did not ejaculate inside her. And an expert testified that sperm cells

could be washed off and that it would depend on the conditions of the environment whether sperm cells would remain on fabric.

¶ 34 One expert testified that four DNA profiles, including Hood's and K.H.'s, were found on K.H.'s underwear. But the expert clarified on cross-examination that Hood's DNA was the lowest contributor out of the four profiles found, with a contribution of just ten percent. By comparison, two other unidentified profiles contributed forty-five percent and seventeen percent respectively, and K.H. contributed twenty-eight percent. The expert also testified that it was possible that Hood's contribution could have been transfer DNA and agreed that transfer DNA is common when people live in the same house.

¶ 35 Then there was testimony that K.H.'s DNA was found on a cutting from black shorts J.H. found in Hood's room; Hood's sperm was present on the cutting. However, K.H. testified that Hood was wearing blue or green shorts during the alleged assault. And K.H.'s DNA was only a one percent contributor on the cutting and was excluded from tests done on the shorts outside of the cutting.

¶ 36 True, there was evidence of consciousness of guilt, but there was no confession. The prosecution presented evidence of a pretext

call that J.H. made to Hood. During the call, J.H. told Hood to be one hundred percent honest with him, that he was extremely disappointed, and that he knew what happened with K.H. Hood responded by repeatedly stating that he did not remember what happened other than he got sick and threw up. J.H. reiterated K.H.'s allegations and falsely claimed the assault was audio- and video-recorded, and Hood eventually said, "I won't deny anything to you. If that's what happened, that is what happened."

¶ 37 K.H. testified that Hood told her "he might actually kill himself" if she told anyone about the assault. Then the prosecution presented evidence that, after the pretext call, the police found Hood unresponsive in his bedroom, face down in a pile of vomit, with one belt around his neck connected to a second belt around his wrists. The lead detective on the case testified he believed Hood tried to take his own life.

¶ 38 Because the evidence was highly disputed, the DNA evidence that was excluded became that much more important. Accordingly, we conclude that the exclusion of the DNA evidence "substantially influenced the verdict or affected the fairness of the trial

proceedings" and requires reversal. *Hagos*, ¶ 12 (quoting *Tevlin*, 715 P.2d at 342); *see also Vanderpauye*, ¶ 39.

III. Disposition

¶ 39 We reverse Hood's judgment of conviction and remand to the district court for a new trial.

JUDGE FREYRE and JUDGE JOHNSON concur.