IN THE COURT OF APPEALS OF IOWA
No. 7-464 / 06-0809
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,
vs.

MICHAEL LEONARD WHITWORTH,
Defendant-Appellant.

Appeal from the Iowa District Court for Marion County, Gary G. Kimes, Judge.

Michael Whitworth appeals the district court's exclusion of the victim's prior sexual behavior in his trial for first-degree kidnapping and third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and A. Patricia Houlihan, Assistant Attorneys General, and Terry E. Rachels, County Attorney for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury found Michael Whitworth guilty of first-degree kidnapping and third-degree sexual abuse in connection with his treatment of a woman named Allicia. Iowa Code §§ 710.2 and 709.4(1) (2005). On appeal, Whitworth maintains the district court abused its discretion in excluding evidence of Allicia's prior sexual behavior. Specifically, he argues "the victim opened the door to the issue of her prior activity with individuals other than her boyfriend by volunteering statements of her faithfulness to her boyfriend." We find it unnecessary to address whether the victim "opened the door," because we conclude the evidence was irrelevant.

Our analysis begins and ends with a rule of evidence that has come to be known as Iowa's rape shield law. The rule states in pertinent part:

> Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence is either of the following:
> (1) Admitted in accordance with rules 5.412(*c*)(1) and 5.412(*c*)(2) and is constitutionally required to be admitted.

Iowa R. Evid. 5.412(*b*)(1). This rule excludes most evidence of "a victim's past sexual behavior," but contains a narrow exception for evidence that is "constitutionally required to be admitted." *Id.* Whitworth pins his hat on this exception. However, as the State points out, "[e]vidence that is irrelevant is not constitutionally required to be admitted." *State v. Clarke*, 343 N.W.2d 158, 161 (Iowa 1984). Relevance must be assessed against the elements of the crime. *State v. Kraker*, 494 N.W.2d 687, 690 (Iowa 1993).

The jury was instructed that the State would have to prove the following elements

of third-degree sexual abuse:

> 1. On or about the 12th—13th day of October, 2005 the defendant performed a sex act with [Allicia].
> 2. The defendant performed a sex act
> a. By force or against the will of [Allicia] or
> b. With [Allicia's] consent or acquiescence gained by threats of violence toward any person.

Allicia testified Whitworth engaged in several sex acts over a two-day period. On the first day, he fingered her in her vaginal area, causing her to bleed. Before this incident, he barricaded the doors to her apartment, punched her in the eye and around her mouth, and used his fists on her back. Allicia testified she was "really terrified." On the second day, Whitworth had sexual intercourse with her at least five times. Allicia testified that, during the acts, she was thinking "I just hope I survive this and I hope he doesn't go after people that I truly love because it was the scariest thing that ever happened to me."

Whitworth availed himself of his right to cross-examine Allicia. He vigorously questioned her in an effort to elicit an admission that she consented to the sex acts and thereby undermine the "by force" or "by threats" elements of the State's case. He was unsuccessful in this effort.

We conclude evidence of Allicia's past sexual behavior would not have had "any tendency to make the existence of" either element less probable. Iowa R. Evid. 5.401 (defining "relevant evidence"); *Kraker*, 494 N.W.2d at 689 ("Consent to a sex act with one person does not imply consent to a sex act with another person."). Because the evidence was irrelevant, it was not constitutionally required to be admitted. *Kraker*, 494 N.W.2d at 689; *Clarke*, 343

N.W.2d at 161. Accordingly, the district court did not err in excluding proffered evidence of Allicia's past sexual behavior.

AFFIRMED.