

Summary of SC93074, *State of Missouri v. Jerry Ousley*

Appeal from the St. Louis circuit court, Judge John J. Riley

Argued and submitted September 12, 2013; opinion issued December 24, 2013

Attorneys: Ousley was represented by Roxanna A. Mason of the public defender's office in St. Louis, (314) 340-7662; and the state was represented by Timothy Blackwell of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals his conviction for forcible rape. In a 6-1 decision written by Chief Justice Mary R. Russell, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case. The trial court erred in excluding the testimony of the man's mother and grandmother in surrebuttal (to rebut or respond to the state's rebuttal evidence). Because this Court cannot conclude that admission of the testimony would not have affected the outcome of the trial, the man's conviction is reversed on this point. Because the man had a right to ask prospective jurors whether they could consider the possibility that two teenagers had consensual sexual intercourse, and the question he posed was not improper, the trial court abused its discretion in prohibiting him from asking it. The man fails, however, to prove clear error in an instruction the trial court used. Judge George W. Draper III dissents without opinion.

Facts: A 14-year-old girl was forcibly raped in December 1999. Almost 10 years later, Jerry Ousley's DNA profile was entered into a police database, triggering a match with samples collected from the girl's clothing the night of the rape. Ousley subsequently was indicted for forcible rape. On the Friday before trial, Ousley moved to endorse three witnesses – his mother, his grandmother and a hospital records custodian – and disclosed medical records for treatment he received for a gunshot wound three weeks prior to the alleged rape. The state moved to exclude the witnesses and medical records as a discovery sanction for late disclosure. The trial court excluded the testimony of Ousley's mother and grandmother but allowed him to offer the testimony of the records custodian and to admit the medical records. At trial, Ousley's primary defense was that, if he had sexual intercourse with the girl, it must have been consensual because his injuries rendered him incapable of forcible compulsion. He introduced the medical records showing he was treated in a hospital emergency room for a gunshot wound in early December 1999, and he testified that he spent the most of the following month in bed or on crutches and that, around the time of the alleged rape, he only was able to "limp and hop." In rebuttal, the state presented the testimony of the doctor who had treated Ousley. She testified that he did not require further treatment and that he should have recovered fully within three weeks. On cross-examination, she admitted that she did not have personal knowledge of Ousley's condition on the date of the alleged rape. Ousley then sought to offer his mother and grandmother as surrebuttal witnesses, arguing their personal observations of him would rebut the doctor's testimony. The state objected, and the trial court excluded their testimony. The jury convicted Ousley, and he was sentenced to 15 years in prison. He appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The trial court erred in excluding the testimony of Ousley's mother and grandmother in surrebuttal. The discovery rules provide no basis for excluding their testimony in surrebuttal, as the disclosure obligations do not apply to witnesses whose testimony will be in the nature of rebuttal or surrebuttal. Although Ousley did not endorse his mother and grandmother until the Friday before trial, witnesses offered in surrebuttal need not be endorsed. Although a defendant generally is not entitled to surrebuttal as a matter of right, here Ousley's primary defense was that his injuries rendered him incapable of forcible compulsion, making his physical condition at the time of the alleged rape a central issue to be resolved by the jury. Once the trial court exercised its discretion to admit the state's rebuttal evidence, its discretion to exclude Ousley's proffered surrebuttal evidence was limited. When the trial court allowed the state in rebuttal to present new evidence contradicting Ousley's testimony and undermining his primary defense on a central issue, the trial court should have allowed Ousley to respond with admissible surrebuttal evidence that directly contradicted the rebuttal evidence to protect his rights to a fair trial and to present a complete defense. There is no dispute that mother's and grandmother's testimony would have been relevant and admissible. Their testimony was not merely cumulative, and its corroboration of Ousley's testimony did not justify its exclusion. Had the jury believed the excluded testimony, it would have bolstered his defense of consent, rehabilitated his credibility and contradicted the state's evidence about a necessary element of the crime. As such, this Court cannot conclude that admission of the testimony would not have affected the outcome of the trial. Ousley's conviction is reversed on this point.

(2) The trial court abused its discretion in prohibiting Ousley from asking the prospective jurors whether they could consider the possibility that two teenagers had consensual sexual intercourse. After the prosecutor told the prospective jurors that Ousley was accused of raping a 14-year-old girl in 1999, several proposed jurors asked about Ousley's age at the time. The state then asked whether they automatically would believe there was no way it could have been forcible rape if Ousley and the girl were close to the same age. When Ousley subsequently sought to ask whether the proposed jurors automatically would rule out the possibility that two teenagers had consensual sex, the state objected that the question was improper, and the trial court sustained the state's objection. The question, however, was not improper. Because consent is a defense to the charge of forcible rape, Ousley had a right to explore whether prospective jurors had a potential bias about teenage sexual activity that would have led them to conclude a 14-year-old girl never could consent to sexual activity. Nor would Ousley's line of questioning have exposed the jury to a prejudicial presentation of facts not yet in evidence. At most, it would have exposed the jury to the fact that Ousley was a teenager at the time of the alleged rape. The proposed question was not argumentative, and it did not seek improper commitment from the prospective jurors. It merely sought to ensure, in light of the critical facts of the case, that the jury would follow the law and would not impose legal consequences if it believed the sex was consensual.

(3) Ousley fails to demonstrate how the trial court's failure to instruct the jury that it must find he "knowingly" committed the crime of forcible rape resulted in manifest injustice or a miscarriage of justice. At trial, both parties agreed to use the older forcible rape verdict director, which does not require a mental state.