IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ARTHUR JOSEPH OJEDA,
Defendant-Appellant.

Supreme Court Case No. CRA10-011
Superior Court Case No. CF0208-09

OPINION

Cite as: 2011 Guam 27

Appeal from the Superior Court of Guam
Argued and submitted July 11, 2011
Hagåtña, Guam

Appearing for Defendant-Appellant:
Anthony R. Camacho, *Esq.*
GCIC Bldg., Ste. 808
414 W Soledad Ave.
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:
Jonathan R. Quan, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
287 W O'Brien Dr.
Hagåtña, GU 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Defendant-Appellant Arthur Joseph Ojeda appeals from convictions of five counts of First Degree Criminal Sexual Conduct, as a First Degree Felony, and nine counts of Second Degree Criminal Sexual Conduct, as a First Degree Felony. Ojeda argues that the Superior Court violated his Sixth Amendment rights because the trial court, relying on Guam's rape shield statute, 6 GCA § 8207, restricted him from eliciting relevant information regarding prior sexual assault of the victim. He further submits that such violation of his constitutional rights was not harmless error beyond a reasonable doubt, and therefore, his conviction must be reversed.

[2] We conclude that the proffered evidence was admissible under the rape shield statute. We hold that the trial court should have allowed broader cross-examination of the minor to satisfy Ojeda's Sixth Amendment rights to confrontation and to present a defense. The constitutional infringement by the restriction of cross-examination of M.A.D.C. was not harmless beyond a reasonable doubt. Therefore, we reverse the judgment of the trial court, vacate Ojeda's convictions, and remand this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] In 2009, after a presentation of "Good Touch, Bad Touch" at her school, M.A.D.C. reported to her family that she had been a victim of sexual abuse, naming her grandmother's boyfriend, Rey Hermosilla, and Ojeda as the perpetrators. Transcript ("Tr.") at 50 (Jury Trial - Day 3, Dec. 9, 2009). After revealing this to her mother, M.A.D.C. was taken to the Guam Police Department to provide information about her alleged abuse by Ojeda, but not about Hermosilla. M.A.D.C. was also taken to the Guam Department of Mental Health & Substance

Abuse Healing Hearts Crisis Center for a forensic medical exam. During the examination, M.A.D.C. reiterated that she was sexually abused by Hermosilla and Ojeda. According to a report prepared by a nurse at Healing Hearts, the victim disclosed the information about Hermosilla to family members, but did not report the same to the Guam Police Department. During the forensic examination, a nurse at Healing Hearts observed scar tissue on M.A.D.C.'s hymen, but was unable to make a determinative estimate of cause or time of occurrence.

[4] Ojeda was indicted on five charges of first and second degree criminal sexual conduct against M.A.D.C., alleged to have taken place between April 2008 and March 2009. Thereafter, Hermosilla was indicted by a grand jury on five charges of criminal sexual conduct against M.A.D.C., alleged to have taken place between January and December 2005. Plaintiff-Appellee People of Guam ("People") filed a motion *in limine* to exclude evidence of the alleged prior sexual assault by Hermosilla. The People primarily relied on Rule 412 of the Guam Rules of Evidence in its motion *in limine*.

[5] The trial court denied the People's motion *in limine* to exclude the evidence of prior acts of sexual conduct committed upon M.A.D.C. under Rule 412, finding that the evidence sought did not go to M.A.D.C.'s past sexual *misconduct*. The trial court instead granted Ojeda's motion to admit evidence under 6 GCA § 8207(b)(1)(i) of a prior act of sexual assault to show an alternative source of M.A.D.C.'s alleged injury. In its ruling, the trial court concluded that Ojeda failed to comply with the 15-day notice requirement of 6 GCA § 8207(c). Nevertheless, the trial court acknowledged that the evidence of prior sexual assault by Hermosilla was relevant and important to Ojeda's defense. Accordingly, the trial court allowed Ojeda to introduce the evidence through cross-examination of the nurse and social worker from Healing Hearts who physically examined and interviewed M.A.D.C. The trial court, however, restricted Ojeda from

eliciting the information through his cross-examination of M.A.D.C. Likewise, the trial court prohibited Ojeda from introducing the allegations against Hermosilla through the testimony of the investigating police officer.

[6] At trial, M.A.D.C. testified that Ojeda sexually assaulted her on five separate occasions. Although Ojeda was restricted from questioning M.A.D.C. about the allegations against Hermosilla, M.A.D.C. at one point mentioned Hermosilla. M.A.D.C.'s mother, grandmother, a social worker, a nurse, and a police officer testified for the People. Ojeda challenged the People's evidence and presented witnesses in his own defense. He also elicited evidence regarding Hermosilla's prior sexual assault of the victim through cross-examination of the nurse and social worker from Healing Hearts.

[7] The jury found Ojeda guilty on five counts of First Degree Criminal Sexual Conduct, as a First Degree Felony, and nine counts of Second Degree Criminal Sexual Conduct, as a First Degree Felony. Ojeda then timely appealed his convictions.

II. JURISDICTION

[8] This court has jurisdiction over an appeal from a final judgment of conviction pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-54 (2011)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[9] Matters concerning alleged violations of the Sixth Amendment's Confrontation Clause are reviewed *de novo*. *People v. Jesus*, 2009 Guam 2 ¶ 16 (citing *People v. Salas,* 2000 Guam 2 ¶ 11; *Lilly v. Virginia,* 527 U.S. 116, 136-37 (1999); *United States v. Ballesteros-Selinger,* 454 F.3d 973, 974 n.2 (9th Cir. 2006); *United States v. Nielsen,* 371 F.3d 574, 581 (9th Cir. 2004); *United States v. Murillo,* 288 F.3d 1126, 1137 (9th Cir. 2002); *United States v. Ortega,* 203 F.3d

675, 682 (9th Cir. 2000)). Evidentiary rulings relating to violations of the Confrontation Clause are reviewed *de novo*. *Salas*, 2000 Guam 2 ¶ 11 (citing *United States v. George*, 960 F.2d 97, 99 (9th Cir. 1992)) (reviewing matters concerning the Confrontation Clause and hearsay evidence *de novo*). The issue of whether the evidence of a prior sexual assault should have been excluded or restricted is reviewed for an abuse of discretion. *United States v. Bear Stops*, 997 F.2d 451, 454, 457 (8th Cir. 1993) (reviewing for abuse of discretion district court's refusal to admit basic factual details of prior sexual assault of alleged victim); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on [the] cross-examination [of a prosecution witness] . . . ."). In addition, issues of statutory interpretation are reviewed *de novo*. *People v. Manley*, 2010 Guam 15 ¶ 12 (citing *Quichocho v. Macy's Dep't Stores, Inc.*, 2008 Guam 9 ¶ 13).

IV. ANALYSIS

A. Notice Requirements under Guam's Rape Shield Statute

[10] Under Guam's rape shield statute, 6 GCA § 8207, "evidence of specific instances of a person's past sexual conduct is not admissible in any trial if an issue in such trial is whether such person was a victim of criminal sexual conduct . . . ." 6 GCA § 8207(b) (2005). There are, however, exceptions to the rape shield statute. Section 8207(b)(1) allows the introduction of evidence of specific instances of a person's past sexual conduct "[i]f such evidence . . . is evidence of sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of . . . *injury*." 6 GCA § 8207(b)(1)(i) (emphasis added).

[11] Admission of evidence of a victim's past sexual conduct to show an alternative source of injury pursuant to section 8207 is an issue of first impression for this court. At present, forty-

eight states, the military, and the federal government have enacted rape shield statutes that generally limit the admission of evidence concerning prior sexual experience of a victim in a sexual assault case.[1] Section 8207 is substantially similar to the rape shield statutes of the majority of states, as well as Rule 412 of the Federal Rules of Evidence. The consensus among the courts is that the laws were generally designed to reverse the common-law rule allowing a defendant in a sexual assault prosecution to introduce evidence of the victim's prior sexual conduct to establish the victim's consent and support a general attack on the complainant's credibility. *Michigan v. Lucas*, 500 U.S. 145, 146 (1991). The statutes also guard against excessive cross-examination and harassment of the victim regarding prior sexual experience. *Id.*

[12] Consistent with these public policies, section 8207 limits the admission of evidence of a victim's past sexual experience in prosecutions for sexual assault. When a defendant seeks to admit such evidence for any purpose under section 8207(b)(1), the trial court must determine whether the proffered evidence is relevant and must weigh the probative value of the evidence against its prejudicial effect. 6 GCA § 8207(c)(3) (2005). The statute provides the following procedure for the admission of past sexual behavior evidence:

> If the person accused of criminal sexual conduct intends to offer under subsection (b) of this Section, evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen (15) days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence. . . .

[1] The remaining two states, Arizona and Utah, have judicial decisions that accomplish the same goal by excluding past conduct evidence in general. For a complete citation list of these statutes and decisions, see Kim Steinmetz, Note, *State v. Oliver: Children With a Past; The Admissibility of the Victim's Prior Sexual Experience In Child Molestation Cases*, 31 Ariz. L. Rev. 677, 680 nn.18-19 (1989).

6 GCA § 8207(c)(1). The notice-and-hearing requirement protects "rape victims . . . against surprise, harassment, and unnecessary invasions of privacy," as well as "against surprise to the prosecution." *Lucas*, 500 U.S. at 149-50.

[13] The People contend that Ojeda's failure to comply with the procedural mandates of section 8207 bars him from introducing evidence of the alleged victim's prior sexual assault through cross-examination of M.A.D.C. In support of their contention, the People primarily rely on *People v. Bamba*, No. 89-00040A, 1990 WL 320353 (D. Guam App. Div. 1990), where the appellate division held that the trial court properly excluded a statement made by the minor regarding an alleged prior sexual abuse based on Bamba's non-compliance with the procedural requirements of section 8207(c).

[14] Notwithstanding the decision in *Bamba*, we find that the trial court in the instant case did not err in considering Ojeda's motion to admit the evidence despite his failure to strictly comply with the procedural requirements of section 8207. In so concluding, we rely on the Ninth Circuit's rationale in *LaJoie v. Thompson*, 217 F.3d 663 (9th Cir. 2000), where the court held that, in some cases, a defendant's failure to comply with a rape shield statute's notice requirement will not justify the severe sanction of preclusion of the evidence. In *LaJoie*, the defendant was accused of sexual abuse of a minor. *Id.* at 665. Undisputed evidence, however, showed that the child suffered sexual abuse by several other men prior to residing with the defendant. *Id.* There was evidence to suggest that defense counsel had ample notice of the prior sexual assaults. *Id.* at 675 (Ferguson, J., dissenting). The defendant, however, did not file his notice of intent to offer evidence under the state's rape shield statute until seven days before

trial.[2] *Id.* at 665. Although the trial court found the evidence potentially admissible, it nevertheless granted the State's motion to exclude the evidence because the defendant failed to give the required 15-day notice of intent to introduce such evidence. *Id.* at 666.

[15] On appeal, the Ninth Circuit recognized that a defendant's failure to comply with a rape shield statute's notice requirement might "'in some cases justify the severe sanction of preclusion'" of the evidence, *id.* at 669 (quoting *Lucas*, 500 U.S. at 153), which is determined by the courts on a case-by-case basis. *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 414-15 & 415 n.19 (1988)). The Ninth Circuit held that the Oregon Supreme Court misapplied the test articulated in *Michigan v. Lucas*. *Id.* at 670. Specifically, in balancing defendant's interests in presenting the evidence against the interests served by the notice requirement, the Ninth Circuit found that none of the interests justifying the notice requirement would have been abridged had defendant been allowed to use the evidence.[3] *Id.* at 671-72. It determined that the probative value of the evidence in defendant's case disproportionately outweighed the purposes of the notice requirement, and that the evidence would not be unduly prejudicial. *Id.* at 672-73. The Ninth Circuit concluded that the trial court violated defendant's Sixth Amendment rights because preclusion of the evidence was arbitrary and disproportionate to the purposes behind the procedural requirement. *Id.* at 673.

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[2] The defendant sought to introduce evidence of the minor's history of sexual abuse for three purposes: (1) to provide an alternate source of the minor's ability to explain sexual acts; (2) to offer an alternative explanation for the medical evidence of abuse that the prosecution would be offering; and (3) to support defendant's argument that the minor's allegations were false and were invited by caseworkers. *Id.* at 665-66.

[3] The Ninth Circuit noted that the purposes of the notice requirement – allowing time for the proffered evidence to be carefully screened and preventing undue trial delay – would not have been affected by admission of such evidence because the trial court was able to screen the evidence within the time available and was able to determine which portions of the files were relevant. *Id.* at 672. Furthermore, the court stated that the interest in preventing unfair surprise to the prosecution is not implicated because the prosecutor in LaJoie's case had just finished trying the rape case of Watkins and was familiar with all the details of the minor's past sexual abuse. *Id.* The court further recognized that LaJoie's failure to give the 15 days' notice was not willful or strategic, but rather neglectful. *Id.*

[16] Upon review of the record, it appears that Ojeda did not comply with the procedural requirements of section 8207(c). He claims that the allegations of sexual abuse by Hermosilla were not made available until three days before trial. However, the information regarding Hermosilla could have been obtained earlier through exercise of due diligence. During the motion *in limine* hearing, defense counsel conceded that he received a copy of the Healing Hearts report on October 2, 2009, which described M.A.D.C.'s sexual abuse allegation against Hermosilla. Because Ojeda was in possession of this report, the allegations regarding Hermosilla cannot be considered "newly discovered evidence" under section 8207(c). Ojeda failed to comply with the 15-day notice requirement.

[17] Nevertheless, the People and the alleged victim were not adversely impacted by Ojeda's failure to comply with the procedural requirements. Section 8207's interest in preventing unfair surprise to the prosecution was not implicated because the People were clearly aware of the allegations against Hermosilla, as they brought the motion to exclude this evidence. Further, there was no evidence that the failure to comply with the 15-day notice requirement was willful or strategic, rather than neglectful, on the part of Ojeda's counsel. *See id.* at 672 (citing *Taylor*, 484 U.S. at 417 (finding that counsel's willful misconduct in violating discovery rules justified harsh sanction of preclusion)). Finally, we recognize that section 8207's notice requirement "also provide[s] protection against harassment of the alleged victim by giving the victim fair warning about what evidence of her past sexual activity would be introduced and by allowing a victim to cease worrying 15 days before trial about what evidence of her past sexual activity would be introduced." *Id.* In this case, however, M.A.D.C. was likely aware that she may be called to testify about her allegations against Hermosilla at Hermosilla's trial, and in fact, she referred to Hermosilla during her testimony in Ojeda's trial. Given these circumstances, we

conclude that the interests protected by section 8207's procedural requirements are outweighed by the potential probativeness of M.A.D.C.'s excluded testimony, to be discussed in further detail below. As such, we find no error in the trial court's consideration of Ojeda's motion to admit the evidence of sexual abuse by Hermosilla.

B. Sixth Amendment Confrontation Clause

[18] We now turn to the crux of the issue of whether Ojeda's constitutional rights were violated, that is, whether the substantive purposes served by Guam's rape shield statute required the exclusion or restriction of M.A.D.C.'s testimony regarding her allegations of sexual abuse by Hermosilla. At trial, the following exchange occurred between the People's counsel, Kimberli Raines, and the People's witness, Ann Paro Rios from the Healing Hearts Clinic:

[Ms. Rios:]	I also examined the hymen . . . .
	. . . . If you were to use a six o'clock, I found a tear there. So we call it "healed transection." So, just imagine if somebody were to tear this or cut it, that's what I found on her hymen.
	. . . .
[Ms. Raines:]	Okay. So you're saying you found a healed transection at the six o'clock mark?
[Ms. Rios:]	Yes, I did.
[Ms. Raines:]	Okay. Now what exactly does that mean?
[Ms. Rios:]	In what I found through my training, and there's been research studies that an injury at that location -- the six o'clock portion -- portion of the vagina is highly specific for blunt force trauma. Specifically, saying penetration. So, if you were to take a piece of paper, and keep poking it – If you were to make a circle and keep poking it, poking it, poking it, and having that tear, that would be blunt force trauma.
[Ms. Raines:]	So based on your opinion, would a healed laceration or healed transection at six o'clock be consistent with blunt force trauma to her vaginal area?
[Ms. Rios:]	Yes.
[Ms. Raines:]	Would a healed transection at the six o'clock area be consistent with penal [sic] penetration?

[Ms. Rios:] Yes.

[Ms. Raines:] So in your opinion, would a healed transection at six o'clock have been caused by penal [sic] penetration?

[Ms. Rios:] Yes.

[Ms. Raines:] Now in your report, you -- you reported some findings? What were your findings? Now let me ask a more specific question. Your findings say "abnormal genital exam consistent with history, with positive findings."

[Ms. Rios:] Okay.

[Ms. Raines:] What does that mean?

[Ms. Rios:] Usually with abnormal -- And this is being consistent with another child. So you have -- "Abnormal" is that I found something which would be that -- that transection, which is also the positive finding. So we're looking at a normal 10 year old or a normal child with -- without a history of sexual abuse, and then, [M.A.D.C.]. So that -- that's why it would be abnormal. With her history, she was saying that there was penal [sic] penetration. So that's the history, and then the finding is the healed transection at six o'clock.

[Ms. Raines:] Okay. So that basically means your findings are consistent with what [M.A.D.C.] said happened to her?

[Ms. Rios:] Yes.

[Ms. Raines:] Okay. Well let me ask you this. For example, if there was only, say, contact with the vagina, touching of the vagina, would you expect to find that same type of injury?

[Ms. Rios:] Not necessarily. If it's just touching? No. But if there's maybe digital penetration with the finger, it – it would depend on the amount. Like I said, blunt force trauma could be anything. It could be a pen. It could be a penis. It could be an object, but it depends on the amount of force, and that's not what we ask.

[Ms. Raines:] Okay. So it would be just from touch -- a hand touching the vagina?

[Ms. Rios:] No. It could be just like this.

[Ms. Raines:] Okay. It has to be penetration?

[Ms. Rios:] Yes.

[Ms. Raines:] And, so in your opinion, it would take blunt force trauma to cause this type of injury?

[Ms. Rios:] Yes.

Tr. at 11-15 (Jury Trial – Day 3). On cross-examination by Ojeda's counsel, Ms. Rios explained that she could not determine when the healed transection occurred, and that it could have happened during any period of time.

[19] Relying on section 8207, the trial court ruled that evidence of a prior sexual assault by Hermosilla, when proffered to establish an alternative source of M.A.D.C.'s hymenal injuries, was relevant to Ojeda's defense. ER at 8 (Tr. of Mot. in Limine Arguments, Dec. 3, 2009). Nevertheless, the court denied Ojeda's request to cross-examine M.A.D.C. about the Hermosilla sexual assault, because the court found that cross-examining M.A.D.C. regarding the prior sexual assault would be injurious to her. The trial court stated: "[I]n consideration of a [sic] young age of the victim and the pending criminal case in which the victim will be required to testify in the next case involving the other defendant, the Court will not put the victim to have to testify twice concerning the prior sexual assault." Tr. at 86 (Jury Trial – Day 1, Dec. 4, 2009). The trial court also denied Ojeda's request to introduce the allegations against Hermosilla through the testimony of a police officer, finding that the testimony was inadmissible hearsay. Ojeda argues that the trial court's application of section 8207 was too restrictive, infringed upon his right to a *meaningful* defense, and violated the Confrontation Clause of the Sixth Amendment.

[20] The Sixth Amendment's Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The Sixth Amendment is applicable to Guam by virtue of the Organic Act of Guam. 48 U.S.C.A. § 1421b(u) (West 2003); *Jesus*, 2009 Guam 2 ¶ 23. Furthermore, the Organic Act of Guam concomitantly provides that "[i]n all criminal prosecutions the accused

shall have the right . . . to be confronted with the witnesses against him . . . ." 48 U.S.C.A. § 1421b(g) (West 2003); *Jesus*, 2009 Guam 2 ¶ 23.

[21] In *Davis v. Alaska*, 415 U.S. 308 (1974), the U.S. Supreme Court made clear that the right of confrontation means more than "being allowed to confront the witness physically. 'Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination.'" *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)). The Confrontation Clause, therefore, "provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15, 18-19 (1985) (per curiam)). The rights to confront and cross-examine witnesses and to call witnesses in one's behalf are said to be "essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," which includes the right to present witnesses favorable to the defense. *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (citations and internal quotation marks omitted); *see also* Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 604-06 (1978) (distinguishing confrontation, which guarantees examination of adverse witnesses, and compulsory process, which permits defendant's right to call and examine witnesses for defense). "Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witness at trial and the right to put before a jury evidence that might influence the determination of guilt." *Ritchie*, 480 U.S. at 56. Because

cross-examination is an important tool in enforcing the right to confront, any limits placed on cross-examination require a constitutional analysis.

[22] The rights to confront and cross-examine however, are not absolute, and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295 (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972)). "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *People v. Kitano*, 2011 Guam 11 ¶ 39 (quoting *United States v. Owens*, 484 U.S. 554, 559 (1988)) (alterations in original). Furthermore, states may "exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted." *Crane*, 476 U.S. at 690 (citing *Chambers*, 410 U.S. at 302). In *Delaware v. Van Arsdall*, the Supreme Court discussed the rationale of allowing limits to a defendant's Sixth Amendment right:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's [cross-examination] of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

475 U.S. at 679 (1986); *see also* Fed. R. Evid. 403.[4] In *Lucas*, the Supreme Court recognized that a defendant's Sixth Amendment rights may be constitutionally limited by a rape shield statute. *Lucas*, 500 U.S. at 149. "To the extent that [the rape shield statute] operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse

[4] Rule 403 of the Federal Rules of Evidence states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

witnesses and present a defense is diminished. This does not necessarily render the statute unconstitutional." *Id.* While a defendant's rights may be narrowed, the Court remarked that such restrictions "'may not be arbitrary or disproportionate to the purposes they are designed to serve."' *Id.* at 151 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). The Court noted that rape shield statutes represent a valid legislative determination that rape victims deserve heightened protection against harassment, surprise, unnecessary invasions of privacy, and undue delay. *Id.* at 149-50. Therefore, when the prosecutor seeks to exclude evidence under a rape shield statute, the victim's, as well as the state's interests must be balanced with the defendant's Sixth Amendment rights. *LaJoie*, 217 F.3d at 669 (citations ommitted). Thus, in reviewing the trial court's decision, we must analyze two issues. First, we must ascertain, apart from the rape shield statute, whether the evidence was relevant to the defense. 6 GCA § 8207(c)(3). If the evidence is relevant, we then must decide whether its probative value substantially outweighed its prejudicial effect. *Id.* If so, its exclusion violated Ojeda's constitutional rights.

[23] Through the testimony of Ms. Rios from Healing Hearts, the People introduced evidence indicating that M.A.D.C.'s "healed transection" was consistent with her having been sexually abused. In general, "a victim's virginity, or lack thereof, has no relevance in a sexual assault prosecution." *People v. Prentiss*, 172 P.3d 917, 923 (Colo. App. 2006). Nevertheless, where, as here, the prosecution introduces evidence of physical injury to suggest that a sexual assault occurred, the victim's physical condition becomes an issue. *Id.* By introducing evidence that M.A.D.C. had a healed transection consistent with penetration, the People introduced corroborating evidence of M.A.D.C.'s testimony that she was sexually assaulted. Without evidence indicating another possible source of M.A.D.C.'s healed transection, the jury likely presumed that the physical injury to the ten-year-old girl was caused by the alleged assault

committed by Ojeda. The absence of testimony of the victim's prior sexual experience substantially hampered Ojeda's efforts to rebut the inference that the jury was asked to draw that he caused her injury.

[24] The People argue that Ojeda's constitutional rights were not violated because he was able to introduce evidence of the prior sexual assault by Hermosilla through cross-examination of the Healing Hearts nurse and social worker. During trial, the following exchange occurred between Peter Sablan, Ojeda's counsel, and Leticia Piper, social worker at Healing Hearts:

[Mr. Sablan:]	Did you happen to ask [M.A.D.C.] whether someone else gave her red touches?
	. . . .
[Ms. Piper:]	. . . Her Uncle Rey.
	. . . .
[Mr. Sablan:]	Did she tell you how her Uncle Rey's related to her?
[Ms. Piper:]	Her grandma's ex-boyfriend.
[Mr. Sablan:]	And what did she tell you about what her Uncle Rey did?
	. . . .
[Ms. Piper:]	She had mentioned that he had given her red touches to her -- her *bebe* on more than one occasion.
[Mr. Sablan:]	Did she tell you how old she was when this happened?
	. . . .
[Ms. Piper:]	She was in the second grade.
[Mr. Sablan:]	Did this surprise you, that she made another allegation?
[Ms. Piper:]	No.
[Mr. Sablan:]	Okay. And did you ask her about her clothing?
	. . . .
[Ms. Piper:]	She said that her Uncle Rey had opened her zipper, and then he put his hand inside, and he had took -- taken off her shorts and her panty.
[Mr. Sablan:]	And did she indicate that he touched her vagina?
[Ms. Piper:]	Yes.

. . . .

[Mr. Sablan:] And where did that happen?

[Ms. Piper:] It happened at her grandmother's house.

[Mr. Sablan:] And that's when she told you it happened, in the second grade?

[Ms. Piper:] Yes.

[Mr. Sablan:] Did she tell you there's another incident that occurred?

. . . .

[Ms. Piper:] She had said that there was another time that something had happened, and she remembered that it was when they were at the rabbit cage, outside, and he had told her to put her hand on his *ding-ding*.

. . . .

[Mr. Sablan:] Did you ask her if she told anyone about her Uncle Rey?

. . . .

[Ms. Piper:] She had told an aunt, her Aunt Char, Auntie Char, and then her aunt had then gone and told her grandmother.

. . . .

[Ms. Piper:] I had recommended that the mom go and make that second report to the police.

[Mr. Sablan:] Did you indicate in your report that there was possible digital and penile penetration?

[Ms. Piper:] Yes.

. . . .

[Mr. Sablan:] That allegations that she made about her Uncle Rey was not included in the police report?

[Ms. Piper:] Yes.

[Mr. Sablan:] So you knew this was something different?

[Ms. Piper:] Yes.

[Mr. Sablan:] And this was something that happened way early on, earlier than the investigation that you were presently conducting?

[Ms. Piper:] Yes.

[Mr. Sablan:] And then you knew that more investigations needed to be conducted; is that correct?

[Ms. Piper:] Yes.

[Mr. Sablan:] And is that why you instructed the mother to go back to the police department?

[Ms. Piper:] Yes.

[Mr. Sablan:] To make a new report?

[Ms. Piper:] Yes.

Tr. at 168-74 (Jury Trial – Day 2).

[25] Likewise, the Healing Hearts nurse, Ann Paro Rios, testified as follows:

[Ms. Rios:] [M.A.D.C.] came in with an original disclosure of Uncle Art, and then while we were in the examination room -- and like I said, this one really, you know, not knowing all the specifics, but it just – it – it -- I remember it, because it was right after one of our outreaches to the – a presentation to the school, and -- and, you know, it was just a -- or, you know, "Has -- Has anything -- Have you ever been examined?" And a lot of times some kids have doctors that do a full examination, and some they -- they don't, and that's where she had disclosed that there was an Uncle [Rey] that had -- had touched her.

[Mr. Sablan:] Now when she disclosed this to you, did she tell you that he had touched her *bebe*?

[Ms. Rios:] Yes.

[Mr. Sablan:] Did she say that she touched his *ding-ding*?

[Ms. Rios:] Yes.

[Mr. Sablan:] Okay. But she didn't say that Uncle [Rey] had put his *ding-ding* inside her vagina, did she?

[Ms. Rios:] No, she did not.

[Mr. Sablan:] Okay. And she only talked about him touching her with his hand?

[Ms. Rios:] Yes.

[Mr. Sablan:] So she never told you that there was any type of penal [sic] penetration with Uncle [Rey]?

[Ms. Rios:] No.

[Mr. Sablan:] And do you remember when this assault happened with Uncle [Rey]?

[Ms. Rios:] In the second grade.

[Mr. Sablan:] Okay. And when you were examining her, the day she came in, was she in the fourth grade?

[Ms. Rios:] I believe so. Yes, fourth grade.

. . . .

[Ms. Rios:] We did the no-harm contract, and then since we had another disclosure with Uncle [Rey], I encouraged the mom that she needs to go up to the police department and report this -- this other incident.

. . . .

[Mr. Sablan:] And can you tell the jury what she indicated happened to her with Uncle [Rey]?

[Ms. Rios:] She identified -- identified Uncle [Rey] as Grandma's ex-boyfriend, and that she was told to touch his "*ding-ding*," is what she describes his penis, and that he touched her *bebe* -- her vagina, and then she said "He opened my zipper, then he put his hand inside."

[Mr. Sablan:] Did she say anything about another incident?

[Ms. Rios:] . . . . She indicated another time in a rabbit cage.

. . . .

[Ms. Rios:] That she was told to touch his *ding-ding*, and he touched her *bebe* –

[Mr. Sablan:] Okay.

[Ms. Rios:] -- and put his hand -- his hand inside.

. . . .

[Ms. Rios:] Yes. That's what she had told us, second grade.

[Mr. Sablan:] And then, did you also indicate in your report that she complained of positive pain?

[Ms. Rios:] She complained about pain for both -- for both disclosures.

[Mr. Sablan:] Again she -- But this was immediately after you were talking about Uncle [Rey]; right?

[Ms. Rios:] Yeah. When we ask them if they -- during an incident, "Do you remember any pain," anything that they would recall about that incident, and that's always – that's always a question.

[Mr. Sablan:] What did she say about bleeding?

[Ms. Rios:] She couldn't -- She couldn't remember.

[Mr. Sablan:] She couldn't remember bleeding?

[Ms. Rios:] No.

Tr. at 18-27 (Jury Trial – Day 3).

[26] The People contend that the admitted evidence[5] falls within the degree of information approved by the Eighth Circuit in *United States v. Bear Stops* cited by Ojeda. The defendant in *Bear Stops*, who was on trial for sexual assault of a six-year-old boy, sought to introduce evidence showing that the child had been abused by three older boys. *Id.* at 453-54. The defendant contended that such evidence provided an alternative explanation for the prosecution's evidence showing that the victim displayed behavioral characteristics and physical injury consistent with sexual abuse. *Id.* at 453. Finding that such evidence was collateral, would confuse the jury, and would subject the child to "further difficult questioning regarding such sensitive matters," the district court only allowed a few "sanitized" references to the prior assaults. *Id.* at 455-56.

[27] In reversing the district court's ruling, the Eighth Circuit held that the evidence regarding the previous abuse was "so sanitized" that it was insufficient to effectuate the purpose for which the information was offered. *Id.* at 455. The Eighth Circuit's primary concern was the absence of the basic information of the assault by the three boys; specifically, the type of sexual assault and the time period during which it occurred. *Id.* at 457. Such information, the court held, was constitutionally required for the defendant to receive a fair trial. *Id.* The Eighth Circuit concluded that the district court's failure to allow the admission of such evidence and to permit cross-examination regarding the abuse,[6] though not arbitrary restrictions on the defendant's

[5] The People note that Ojeda's counsel discussed at length the alleged prior sexual assault by Rey Hermosilla during closing arguments. Ojeda correctly points out that the trial court informed the jury that opening statements and closing arguments are not evidence and that they are intended only to assist the jurors to understand the evidence and to apply the law.

[6] The Eighth Circuit recognized that the basic information regarding the assault by the three boys did not necessarily have to come directly from the victim: To avoid intrusion on [the victim's] privacy, testimony about the basic facts of the incident could have been introduced through [the victim's] mother who discovered the sexual

rights to confrontation and to present evidence, were disproportionate to the purposes they were designed to serve, and, thus, unconstitutional. *Id.* at 455; *see also Tague v. Richards*, 3 F.3d 1133, 1139 (7th Cir. 1993) (concluding that because the "state introduced [evidence showing that the victim was not a virgin] with the hope that the jury would infer [that defendant] caused the hymenal condition," it was constitutional error for state court to apply the state's rape shield statute to preclude testimony that indicated that victim's father had molested victim several years before charged crimes); *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991) (where prosecution specifically relied on enlarged hymen as evidence of molestation, Confrontation Clause required admission of evidence of another source of that condition).

[28] The inquiry of whether the rape shield statute as applied violates a defendant's constitutional rights requires a case-by-case examination. *See Tague*, 3 F.3d at 1137 (quoting *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993)). In the instant case, the trial court acknowledged that the proffered evidence of sexual assault by Hermosilla was relevant and probative, as it could have provided an alternative explanation for the physical injury to M.A.D.C.'s hymen. We agree. The possibility that another individual caused the injury to M.A.D.C. could have opened the door to reasonable doubt of Ojeda's guilt. With the physical evidence proving that M.A.D.C. suffered injury to her hymen but without an alternative explanation for that injury, the jury may have been led directly to conclude that Ojeda was the perpetrator of the sexual abuse and convicted him largely on that basis.

[29] We find that the trial court's restrictions on Ojeda's right to confront M.A.D.C. were not arbitrary. The trial court carefully considered the interest of protecting M.A.D.C. from repeated

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assault by the three older boys and stopped it, or through any other witness other than [the victim] who had knowledge about it. Because of both its relevance and its uncontroverted nature, the evidence would also be a likely candidate for stipulation.
Bear Stops, 997 F.2d at 457.

inquiry into the sexual assaults by Hermosilla, especially considering that she had to endure not one but two sexual assault trials. We share the concerns expressed by the trial court. The Confrontation Clause does not compel the admission of evidence that will harass and prejudice the victim, confuse the jury, jeopardize the witness' safety, or is repetitive or only marginally relevant. *Van Arsdall*, 475 U.S. at 679. We affirm the cautions expressed by the Supreme Court of New Jersey in addressing a similar issue in *State v. Budis*, 593 A.2d 784 (N.J. 1991):

> When assessing the prejudicial effect of such evidence, the court should consider the likely trauma to the child and the degree to which admission of the evidence will invade the child's privacy. Such prejudice may be diminished if the evidence can be adduced from sources other than the child. In the present case, as the Appellate Division suggested, the evidence could have been elicited from another witness, the official documents involving the convictions arising out of the prior abuse, or by stipulation. If the victim is questioned about the prior abuse, the court should guard against excessive cross-examination.

State v. Budis, 593 A.2d 784, 790-91 (N.J. 1991). Here, we recognize that the interest in protecting M.A.D.C., only ten years old at the time of trial, is compelling. We also acknowledge the potential embarrassment and discomfort to M.A.D.C. that would result from being forced to relive the assault or assaults by Hermosilla. We conclude, however, that the restrictions placed on Ojeda's rights to confront M.A.D.C. and to put on a full defense were disproportionate to the purposes these restrictions are designed to serve.

[30] We agree with the People that the jury had learned at least some very basic information about the victim's allegations against Hermosilla. Merely providing bare information about a prior sexual assault against the victim, however, does not pass constitutional muster if the evidence does not provide sufficient information for a meaningful defense. Although the testimony of the Healing Hearts' witnesses introduced the jurors to a possible alternative perpetrator, "Uncle Rey," there was very little definitive evidence regarding the exact types of

sexual assault alleged to have been committed by Hermosilla. In fact, the only time penetration by Hermosilla was ever suggested was when the defense counsel asked Leticia Piper if her report indicated "that there was possible digital and penile penetration," to which she responded "Yes." Tr. at 173 (Jury Trial – Day 2). The other evidence at trial suggested to the jury that the only person who might have penetrated and injured M.A.D.C. was Ojeda, leaving the jury to infer that he caused her injury. Without sufficient information to determine whether the alleged assaults by Hermosilla involved penetration, which could have provided a potential alternative explanation for the injury to M.A.D.C.'s hymen, a "serious risk of a conviction on erroneous reasoning" remained. *Bear Stops*, 997 F.2d at 457. Thus, to ensure a fair trial, Ojeda should have been afforded the opportunity to elicit conclusive evidence of the type of assault perpetrated by Hermosilla. While this opportunity might have been realized through a less restricted cross-examination of M.A.D.C., the information also could have been presented in a stipulation on the matter. Because the jury was not presented with conclusive evidence of the type of assault committed by Hermosilla, Ojeda was deprived of his right to put on a complete and meaningful defense. Any prejudice[7] to M.A.D.C. is far outweighed by the probativeness of the excluded evidence, and the restrictions on Ojeda's right to confront M.A.D.C. were disproportionate to the purposes they are designed to serve.

[31] Lastly, Ojeda urges this court to use the harmless error test articulated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to determine whether the trial court's error necessitates

[7] We note that the risk of the excluded evidence in this case causing undue prejudice to the alleged victim is diminished by the nature of such evidence.

> The evidence is distinguishable from evidence of an adult or sexually-mature minor's sexual history which could be improperly used by the jury in deciding whether she was raped. Rather, the evidence in this case concerned non-consensual sexual abuse of a young child; thus, the jury was unlikely to draw an unfavorable and unwarranted impression of the alleged victim.

LaJoie, 217 F.3d at 673.

overturning his conviction. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The *Brecht* harmless error standard, however, applies only in federal habeas corpus proceedings. In fact, the point of *Brecht* is to establish a new and different measure of harmless error for federal habeas corpus proceedings. *Id.* at 627-38; *see also* James S. Liebman & Randy Hertz, *Brecht v. Abrahamson: Harmful Error in Habeas Corpus Law*, 84 J. Crim. L. & Criminology 1109 (1994). To justify the distinction between the harmless error rule that applies on direct appeal and the different one that applies in habeas corpus, the *Brecht* majority pointed to "the State's interest in the finality of convictions that have survived direct review within the state court system" and concerns of "comity and federalism." *Brecht*, 507 U.S. at 1111.

[32] In *Van Arsdall*, the U.S. Supreme Court articulated that violations of the Confrontation Clause are subject to harmless error analysis as defined in *Chapman v. California*, 386 U.S. 18 (1967). The Court explained application of the rule in the context of a Confrontation Clause issue:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was *harmless beyond a reasonable doubt.* Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684 (emphasis added) (citing *Harrington v. California*, 395 U.S. 250, 254 (1969); *Schneble v. Florida*, 405 U.S. 427, 432 (1972)). *Compare United States v. King*, 36 F.3d 728, 732-34 (8th Cir. 1994) (holding that Confrontation Clause violation caused by admitting testimony over hearsay objection was harmless error because other evidence against defendant overwhelming), *with United States v. Anderson*, 881 F.2d 1128, 1140 (D.C. Cir. 1989)

(finding Confrontation Clause violation caused by denying cross-examination of key prosecution witness not harmless error beyond a reasonable doubt because witness' highly damaging testimony not cumulative and prosecution's case otherwise weak), *and State v. Atkinson*, 80 P.3d 1143, 1151-53 (Kan. 2003) (finding error in refusing to allow defendant to cross-examine alleged rape victim about prior consensual relationship with defendant was not harmless because alleged victim's testimony and credibility were key to overall strength of prosecution's case, and evidence of relationship was integral part of and essential to plausibility of defendant's defense).

[33] Weighing these factors, we find that the restriction of cross-examination of M.A.D.C. was not harmless beyond a reasonable doubt. To assume that the damaging potential of cross-examination was fully realized would mean that M.A.D.C. would testify that the alleged sexual abuse by Hermosilla involved penetration. In turn, this testimony would have explained the physical evidence of injury to M.A.D.C.'s hymen. We acknowledge that M.A.D.C. testified in great detail about the incidences of sexual assault by Ojeda. Although there were some inconsistencies with regards to place and time, such mistakes or confusion could be attributed to M.A.D.C.'s age. We further acknowledge that apart from inquiry into the sexual abuse by Hermosilla, Ojeda was allowed to extensively cross-examine M.A.D.C. on all other matters. Finally, we recognize that the jury was not entirely unaware of the allegations against Hermosilla, as both Ann Paro Rios and Leticia Piper testified about his alleged assaults. While M.A.D.C.'s testimony did not need to be corroborated, the lack of corroborating evidence directly pointing to Ojeda's guilt meant that M.A.D.C.'s testimony and credibility were key to the overall strength of the prosecution's case. Indeed, the descriptions provided by Rios and Piper regarding the alleged abuse by Hermosilla were based on descriptions made to them by M.A.D.C., and no other witness had direct knowledge of the type of assault allegedly perpetrated

by Hermosilla. When the effect of restricting meaningful inquiry into the prior sexual behavior is considered under these circumstances, we find that the constitutional infringement by the restriction of cross-examination of M.A.D.C. was not harmless beyond a reasonable doubt.

V. CONCLUSION

[34] We hold that the proffered evidence was admissible under the rape shield statute and that the trial court should have allowed broader cross-examination of the minor or provided some other adequate remedy to satisfy Ojeda's Sixth Amendment rights to confrontation and to present a defense. We find that the restriction of cross-examination of M.A.D.C. was not harmless beyond a reasonable doubt. Accordingly, Ojeda's convictions are **REVERSED** and the Judgment is ordered to be **VACATED**. The case is **REMANDED** for a new trial and for further proceedings consistent with this opinion.

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice