

SUPREME COURT OF COLORADO

People v. Salazar

272 P.3d 1067 (Colo. 2012) · Decided March 19, 2012

SUMMARY

The Colorado Supreme Court held that the trial court abused its discretion by admitting evidence of an alleged alternative suspect's prior sexual conduct in a sexual-assault prosecution. The court concluded that the evidence had minimal probative value on identity and posed a substantial risk of confusing or misleading the jury under CRE 403, made its rule absolute, and remanded for further proceedings.

CASE DETAILS

COURT	Supreme Court of Colorado
WRITING FOR THE COURT	Justice Boatright
JURISDICTION	Colorado
DECIDED	March 19, 2012
DISPOSITION	writ_granted
PROCEDURAL POSTURE	The People sought original relief under C.A.R. 21 from a trial-court order admitting evidence of an alternative suspect's alleged prior sexual conduct in a prosecution for sexual assault on a child.
STANDARD OF REVIEW	Relevancy determinations are reviewed for abuse of discretion. Abuse of discretion occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Colorado
PARTIES	The People of the State of Colorado v. Yrineo Salazar

TOPICS

relevance evidence appellate jurisdiction interlocutory appeal standard of review

PRACTICE AREAS

Colorado criminal law criminal evidence appellate procedure

QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court should exercise original jurisdiction under C.A.R. 21 to review the trial court's pretrial evidentiary ruling.
2. Whether evidence of an alternative suspect's alleged prior sexual conduct with someone other than the victim was relevant and admissible to challenge the victim's identification.
3. Whether the evidence, even if relevant under the rape shield statute, was subject to exclusion because its probative value was substantially outweighed by the danger of confusing the issues and misleading the jury.
4. Whether the trial court abused its discretion by admitting the evidence.

HOLDINGS

1. The Colorado Supreme Court properly exercised original jurisdiction to review the trial court's evidentiary ruling because the People could not obtain an interlocutory appeal and an erroneous evidentiary ruling might not have an adequate remedy on appeal.
2. Evidence that an alternative suspect had motive or opportunity, combined with alleged prior sexual conduct that is not distinctive or unusual enough to constitute a perpetrator signature, is not sufficiently relevant to connect that suspect to the charged offense.
3. The evidence was not admissible under the rape shield statute's physical-evidence exception because that exception is limited to evidence concerning the source or origin of semen, pregnancy, disease, or similar physical evidence; identity evidence that does not concern such physical aspects must proceed under the statute's material-issue provision.
4. Even assuming the alleged prior sexual conduct was relevant under section 18-3-407(2), it had to be excluded because its minimal probative value was substantially outweighed by the danger of confusing the issues and misleading the jury.

KEY QUOTATIONS

“However, the right to present a defense is not absolute; the Constitution requires only that the accused be permitted to introduce all relevant and admissible evidence.” (272 P.3d at 1072)

“The circular nature of the relevancy argument in this case is that the evidence offered to connect A.G. to the assault against M.L. requires an inference of propensity based on previous sexual acts with another person.” (272 P.3d at 1074)

“The danger of confusing the issues and misleading the jury substantially outweighs the minimal probative value, if any, of prior sexual conduct evidence to the identity of the perpetrator in this case.” (272 P.3d at 1075)

FACTUAL BACKGROUND

The prosecution alleged that Salazar sexually assaulted M.L., an eight-year-old child, while she was staying at her maternal grandparents' home. M.L. identified Salazar, her uncle by marriage, but her disclosures contained inconsistencies regarding what she saw, when she saw him, and whether she was wearing her prescription glasses; the lighting was also limited. Salazar sought to introduce testimony that M.L.'s grandfather, A.G., had

previously sexually abused A.G.'s daughter in a similar manner and had been present in the house during the alleged assaults, arguing that A.G. could have been the perpetrator.

PROCEDURAL HISTORY

Salazar was charged with sexual assault on a child and sexual assault on a child pattern of abuse. Before trial, he moved to introduce evidence that the alleged alternative suspect, A.G., had sexually abused A.G.'s daughter, who was the defendant's relative, and argued that the evidence supported misidentification and showed A.G.'s motive and opportunity. After an evidentiary hearing, the trial court found the evidence admissible under the rape shield statute and relevant to identity. The People petitioned for relief under C.A.R. 21 because no interlocutory appeal was available and an erroneous admission of the evidence might not be adequately remedied on appeal.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The rule was made absolute, and the case was remanded to the trial court for further proceedings consistent with the opinion, including exclusion of the challenged evidence under the principles stated by the Supreme Court.

CASES CITED

- People v. Null, 233 P.3d 670, 675 (Colo. 2010)
- People v. Harris, 43 P.3d 221, 225, 227 (Colo. 2002)
- Yusem v. People, 210 P.3d 458, 463 (Colo. 2009)
- People v. Melillo, 25 P.3d 769, 774 n. 3 (Colo. 2001)
- Holmes v. South Carolina, 547 U.S. 319, 324-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)
- Krutsinger v. People, 219 P.3d 1054, 1061 (Colo. 2009)
- People v. Flowers, 644 P.2d 916, 917-20 (Colo. 1982)
- People v. Welsh, 80 P.3d 296, 307 (Colo. 2003)
- People ex rel. R.L., 660 P.2d 26, 28 (Colo. App. 1983)
- Stull v. People, 140 Colo. 278, 344 P.2d 455 (1959)
- People v. Bueno, 626 P.2d 1167, 1168-70 (Colo. App. 1981)
- People ex rel. K.N., 977 P.2d 868, 872-73 (Colo. 1999)
- People v. Williamson, 249 P.3d 801, 802 (Colo. 2011)
- People v. MacLeod, 176 P.3d 75, 76-77, 81 (Colo. 2008)
- People v. Mulligan, 193 Colo. 509, 518, 568 P.2d 449, 456 (1977)
- People v. Perez, 972 P.2d 1072, 1074-75 (Colo. App. 1999)
- People v. Villa, 240 P.3d 343, 354 (Colo. App. 2010)

OPINION

BOATRIGHT, J.

Justice BOATRIGHT

delivered the Opinion of the Court.

T1 In this original proceeding under C.AR. 21, we consider the trial court's admissibility determination as to testimony regarding specific instances of a purported alternative suspect's prior sexual conduct, which the defendant sought to introduce to challenge the alleged victim's identification in a case alleging sexual assault on a child. The People petitioned for relief from the trial court's order finding the evidence admissible. We issued a rule to show cause. Because the trial court abused its discretion when it determined that the probative value of the alleged prior sexual conduct was not substantially outweighed by the danger of such evidence to confuse the issues and mislead the jury, we make the rule absolute and remand the case to the trial court for further proceedings consistent with this opinion.

I. Facts and Procedural History

12 The prosecution has charged Yrineo Salazar with sexual assault on a child, in violation of section 18-3-405(1), C.R.S (2011), and sexual assault on a child pattern of abuse, in violation of section 18-3-405(2)(d), C.R.S. (2011). The charges arise out of allegations by ML., who was eight years old at the time, that the defendant sexually assaulted her when she stayed at her maternal grandparents' house. The defendant is M.L.'s uncle by marriage to M.L.'s maternal aunt, T.S. The defendant, T.S., and their children, were visiting from out-of-state and also staying at the grandparents' house.¹

13 ML. first disclosed sexual abuse to a Safe Touch educator at her school following a presentation that included "good touch/bad *1069touch" scenarios. Using age appropriate language, she told the educator that someone had touched her vagina under her underwear. She said she did not tell anyone because it was her "mom's brother" and she was afraid she would never see that part of the family again.

T4 After school that day, ML. described several incidents to her mother. The mother recounted that M.L. told her that "T. Junior" (the defendant) had touched her. ML. said she did not tell anyone because it was "T. Junior" and she did not want anyone, including her aunt, to be mad at her or not believe her. ML. told her mother that she was sleeping in the living room at her grandparents' house with her cousin. They had left the television on. She said she felt something weird and she opened her eyes a little; she could see a figure, but could not see his face clearly. She did see a grey shirt and red shorts. ML. told her mother that "T. Junior" touched her "in her middle parts" with his fingers and he also touched her "butt." She knew it was the defendant because he was the only tall man in the house. ML. also stated that he did this on two occasions, and almost on a third; on the third occasion, a baby in the house started crying and ML. woke up and saw the defendant sitting in a chair in the living room. ML. indicated that she clearly saw the defendant on at least one occasion but the mother's account is inconsistent as to whether ML. saw the defendant

on the second occasion when she woke up to someone touching her, or on the third occasion when the baby woke her up.

15 According to M.L.'s mother, ML. wears prescription glasses for distance but ordinarily does not wear them while she sleeps. ML.'s mother did not know if M.L. was wearing her glasses on the nights of the alleged incidents. The mother indicated that, around this time, M.L. was spending two or three nights a week at her grandparents' house so that they could take her to school in the morning.

16 ML. also underwent a forensic interview. In this interview she described three incidents. With regard to the first incident, M.L. stated that she had been watching television when she fell asleep on the air mattress in her maternal grandparents' living room. She described being digitally anally and vaginally penetrated. She described the assailant's clothing as a grey shirt and red shorts. ML. stated that she was informed by her grandmother that the defendant had turned the television off because the grandmother went into the living room and it was off. ML. did not know how the grandmother knew it was the defendant who turned the television off.

T7 As to the second incident, M.L. described a different night when she was vaginally penetrated but not anally penetrated. She stated that she saw the defendant's face clearly. ML. also described a third incident on yet a different night when someone attempted to remove her shorts. She was not touched but awoke to find the defendant sitting in a chair in the living room.

18 Prior to trial, the defendant filed a motion to pierce the rape shield statute and noticed his intent to introduce evidence regarding specific instances of a witness's prior sexual conduct. In his motion, the defendant asserted that A.G., M.L.'s maternal grandfather, had sexually abused his daughter, ML.'s aunt TS., in a similar fashion from the ages of approximately four to nine years old. The defendant further claimed that A.G. was present in the house at the time of the incidents and is similar in appearance to the defendant. The defendant argued that the evidence was relevant because A.G. had committed similar offenses, had both motive and opportunity to commit the offense in this case, and identity was an issue.

19 The trial court held a hearing at which T.S. testified to sexual abuse she allegedly suffered as a child. She stated that she was subjected to anal and vaginal intercourse and digital vaginal penetration. T.S. did not recall digital anal penetration. She identified A.G. as the perpetrator. T.S. indicated that when she was sixteen she told her mother about the abuse and confronted her father. There is no evidence that charges were ever brought against A.G. At the conclusion of the hearing, the court found T.S. to be credible. The court identified two issues in the defendant's motion: (1) whether the defendant *1070 would be permitted to introduce evidence of an alternate suspect, namely A.G.; and (2) whether evidence of A.G.'s alleged prior sexual conduct would be admissible pursuant to the rape shield statute, section 18-8-407, C.R.S. (2011). The trial court ruled that the evidence was admissible.

T10 Although M.L. identified the defendant as the perpetrator, the trial court determined that the perpetrator's identity was at issue because, based on the totality of the circumstances, the jury

could infer that M.L. misidentified the defendant. In its ruling, the court noted the following circumstances relating to M.L.'s identification: (1) inconsistencies between M.L.'s disclosures to her mother and during the forensic interview; (2) that M.L. was not wearing her glasses during the incidents; (3) that it was dark except for limited ambient light; (4) that M.L. initially disclosed observing only a grey shirt and later disclosed observing red shorts; (5) that the defendant intended to introduce evidence that he was not wearing a grey shirt on the night of the allegations, but rather was wearing a black shirt; (6) that the maternal grandmother told M.L. that the defendant turned off the television, inferentially influencing M.L.'s ability to accurately recall; (7) that M.L. was inconsistent regarding her ability to observe the defendant during the first incident; and (8) that M.L. was inconsistent with regard to where and when she observed the defendant sitting in a chair. Based on these circumstances, the court concluded that the jury could infer that M.L. misidentified the defendant in the first incident and such misidentification could create a reasonable doubt as to the identity of the perpetrator in the second incident. Moreover, even if misidentification of the perpetrator could only be inferred as to the first incident, that misidentification could affect the pattern of abuse charge. The court ruled that evidence of A.G.'s alleged prior sexual conduct was relevant, not only because it could touch upon A.G.'s motive and opportunity to commit the charged offense, but also because the totality of the circumstances created an issue of identity in the case.

[11 The trial court then considered whether evidence of A.G.'s uncharged acts was admissible under the rape shield statute, section 18-3-407. It noted that evidence of a witness's sexual conduct is presumptively irrelevant, but identified three circumstances in which such evidence is admissible. The court listed these in its order:

1. The court may admit evidence of the victim's sexual contact with the defendant. § 18-3-407(1)(a).
2. The court may admit evidence of specific instances of sexual activity to prove that the acts charged were not committed by the defendant. § 18-3-407(1)(b); *People v. MacLeod*, 176 P.3d 75, 76 (Colo.2008).
3. Upon a sufficient offer of proof, the court may admit certain evidence (including specific instances of sexual conduct...), if that evidence is relevant to a material issue. § 18-3-407(2) and *MacLeod*, 176 P.3d at 76-77.

The court acknowledged that, even if the evidence falls within one of these exceptions, it still must be excluded pursuant to CRE 403 if its probative value is outweighed by the danger of unfair prejudice or confusion of the issues.

{ 12 The trial court ruled that evidence of A.G.'s alleged prior sexual conduct was admissible under both the second and third exceptions to the rape shield statute's presumption of irrelevance because it constituted circumstantial evidence that the offenses against M.L. were committed by someone other than the defendant and was relevant to the material issue of identity. The court stated that there would be a level of confusion as to whether A.G. did, in fact, commit sexual

assault against T.S., and as to whether evidence of AG's prior acts against T.S. would be probative of identity in this case. Nevertheless, given the circumstantial identification, the court determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice or confusion of the issues. Hence, the trial court granted the defendant's motion to introduce evidence of an alternate suspect, including specific instances of A.G.'s alleged prior sexual conduct. The People petitioned for relief under C.A.R. 21 and, after consideration of the issue, we reverse.

*1071II. Jurisdiction

113 We may exercise our original jurisdiction under C.A.R. 21 to review an abuse of discretion where the remedy on appeal would not be adequate. C.A.R. 21(a)(1);, *People v. Null*, 233 P.3d 670, 675 (Colo.2010). Here, the People cannot seek an interlocutory appeal of the trial court's admissibility determination. See C.A.R. 4.1(a). However, if the evidence is improperly admitted, there may not be a remedy on appeal. See *Null*, 233 P.3d at 675 (noting potential double jeopardy implications if evidence is wrongly excluded from trial). Under these circumstances, we conclude that it is appropriate to exercise our original jurisdiction. We review a trial court's relevancy determinations for an abuse of discretion, which occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair. *People v. Harris* 43 P.3d 221, 225 (Colo.2002).

III. Analysis

114 This case involves the intersection of competing evidentiary considerations: a defendant's right to present a complete defense, including relevant evidence of an alternate suspect; the use of prior transaction evidence similar to that contemplated by CRE 404(b) for defensive purposes; the presumption of irrelevance with regard to a witness's prior sexual conduct under Colorado's rape shield statute; and general evidentiary principles of relevancy and probativeness. The defendant seeks to introduce evidence of A.G.'s alleged prior sexual conduct involving T.S., which is presumed irrelevant under the rape shield statute, on grounds that M.L. misidentified him. The defendant contends that he and A.G. are similar in appearance and that A.G.'s prior sexual conduct and presence in the house suggest motive and opportunity to commit the offense in this case.

T15 Identity is thus an issue. It is an element of the charged offenses that the prosecution must prove, and the defendant denies that he committed the acts charged. We must, therefore, determine whether the defendant's proffered identity evidence is admissible. We have not written on the precise question of whether an alternative suspect's prior sexual conduct with someone other than the victim might be relevant to the identity of the perpetrator of the charged offense and, therefore, both admissible as alternative suspect evidence and not barred by the rape shield statute. We begin by reviewing the evidentiary principles applicable to this question.

116 Unless otherwise provided by constitution, statute, or rule, all relevant evidence is admissible. *Yusem v. People*, 210 P.3d 458, 463 (Colo.2009). Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. However,

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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." CRE 408. These principles generally guide all of a trial court's evidentiary rulings. See *People v. Melillo*, 25 P.3d 769, 774 n. 3 (Colo.2001) (discussing interplay between CRE 401, CRE 408, and the rape shield statute).

\$17 Considerations of relevancy and probativeness affect even a criminal defendant's constitutional right to present a defense. The Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Krutsinger v. People*, 219 P.3d 1054, 1061 (Colo.2009). Consistent with this right, a defendant may present evidence that another person might have committed the charged offense. See *Holmes*, 547 U.S. at 325-27, 126 S.Ct. 1727; *People v. Flowers*, 644 P.2d 916 (Colo.1982). However, the right to present a defense is not absolute; the Constitution requires only that the accused be permitted to introduce all relevant and admissible evidence. *Harris* 43 P.3d at 227. Thus, a trial court may exclude evidence of an alternative suspect, "which has only the most minimal probative value, and which requires a jury to engage in *1072undue speculation as to the probative value of that evidence." *People v. Welsh*, 80 P.3d 296, 307 (Colo.2003); see also *People ex rel. R.L.*, 660 P.2d 26, 28 (Colo.App.1983) (noting that evidence must create more than an unsupported inference or possible ground for suspicion).

118 A defendant may seek to introduce evidence of other similar offenses, arguing that someone else is responsible for those offenses, and, therefore, more likely to be the person responsible for the offense charged against the defendant. CRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Subject to very narrow exceptions, evidence of prior similar acts when offered by the prosecution is inadmissible as proof of the accused's guilt with respect to the crime charged. CRE 404(b); see also *Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1959), superseded by rule of evidence, CRE 404(b). This is due to the "inherent tendency [of similar transaction evidence] to prejudice the jury against the defendant and to induce it to find him guilty on the basis of his past activities rather than on [evidence of] the present charge." *People v. Bueno*, 626 P.2d 1167, 1169 (Colo.App.1981) (citing *Stull*, 140 Colo. 278, 344 P.2d 455). However, concerns regarding unfair prejudice to the defendant are inapplicable when the defendant himself offers similar transaction evidence for defensive purposes. See *Flowers*, 644 P.2d 916, 919 (Colo.1982). Accordingly, the admissibility of similar transaction evidence offered by the defendant is decided on a cases-by-case basis, according to general relevancy considerations. *Id.*

{ 19 In addition to these general limits on a criminal defendant's ability to present evidence of an alternate suspect, Colorado's rape shield statute, which addresses evidence of the sexual conduct of a witness, comes into play given the alternative suspect evidence the defendant seeks to introduce

in this case.² Under the rape shield statute, evidence of the prior or subsequent sexual conduct of a witness is presumptively irrelevant and therefore inadmissible. § 18-8-407(1); *People ex rel. K.N.*, 977 P.2d 868, 872 (Colo.1999). There are two explicit statutory exceptions to this presumption: (1) evidence of the witness's prior or subsequent sexual conduct with the accused pursuant to section 18-3-407(1)(a); and (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or similar evidence pursuant to section 18-3-407(1)(b). In addition, a proponent of sexual conduct evidence that does not fall within one of these two exceptions may overcome the presumption of irrelevance and inadmissibility if, after following the procedures specified in section 18-3-407(2), the trial court finds that the evidence is relevant to a material issue in the case. § 18-3-407(2); *People v. Williamson*, 249 P.3d 801, 802 (Colo.2011). However, evidence that falls under any of these three statutory provisions is not automatically admissible: it remains subject to the usual rules of evidence, including CRE 403's mandate that a trial court balance the probative value of evidence offered against the possibility of unfair prejudice, confusion of the issues, and potential to mislead the jury. *Harris*, 43 P.3d at 225-26; see also *Melillo*, 25 P.3d at 774, n. 3 (noting that an admissibility determination of any relevant evidence, "whether relevant under the rape shield statute or otherwise, necessarily involves an examination under CRE 403").

{ 20 The two explicit statutory exceptions are not applicable to this case.³ Under section 18-3-407(2), "the proponent must make a successful offer of proof, [and] convince[] the trial court that the otherwise irrelevant evidence of the witness's sexual history is relevant and material to the present case." *People v. MacLeod*, 176 P.3d 75, 76-77 (Colo. 2008); see also § 18-8-407(2) The trial court's relevancy determination under section 18-3-407(2) is based on the general relevance principle embodied in CRE 401. See *MacLeod*, 176 P.3d at 81 (noting that the rape shield statute "is an extension of CRE 401 and 408, which are rules of relevancy"); *People ex rel. K.N.*, 977 P.2d at 873 (defining relevance under section 18-3-407(2) in terms of CRE 401). The defendant seeks to introduce evidence of A.G.'s alleged prior sexual conduct to challenge M.L.'s identification. Hence, we must determine the relevance of the proffered evidence to the identity of the perpetrator in this case.

T21 Although we have not previously directly addressed the precise combination of evidentiary issues raised by the evidence the defendant seeks to introduce in this case, several cases provide useful guidance. In *People v. Mulligan*, 193 Colo. 509, 568 P.2d 449 (1977), the defendant sought to introduce evidence that others had motive to commit the offense for which he was charged. We held that evidence of another person's motive or opportunity to commit an offense, "is not admissible without proof that such other person committed some act directly connecting him with the crime." *Id.* at 518, 568 P.2d at 456 (internal quotation and citation omitted); see also *People v. Perez*, 972 P.2d 1072, 1074-75 (Colo.App.1998) (holding that evidence of an alternative suspect, who was on probation for an unrelated misdemeanor sexual assault and living in the same house as the victim, was properly excluded without evidence of some act connecting the alternative suspect

to the crime charged). In other words, motive and opportunity, alone, do not make such evidence relevant. The rule is premised on the need to place reasonable limits on collateral issues and to avoid encouraging the jury to speculate. See *People ex rel. R.L.*, 660 P.2d at 28.

122 In *People v. Bueno*, 626 P.2d 1167 (Colo.App.1981), the court of appeals enunciated the current analysis applicable to similar transaction evidence offered by the defense. Although the defendant could not specifically identify an alternative suspect in the armed robbery for which he was charged, he sought to introduce evidence of a similar offense in the area on the following day from which the jury could infer an alternate suspect. *Id.* at 1169. Three eyewitnesses to the first robbery described the suspect as an "unshaven Spanish-American male, 56 to 57 in height with curly black hair, approximately 30 years of age, and missing his two front lower teeth." *Id.* at 1168. The offense was committed with a single-barrel, sawed-off shotgun. *Id.* One eyewitness identified the defendant in a photographic array and again in a lineup. *Id.* at 1168-69. All three identified the defendant at trial. *Id.* at 1169. Eyewitnesses to the second robbery described the suspect as an "unshaven Spanish-American male, about 80 years old, C[sic] 8 tall, and missing two teeth in his lower jaw." *Id.* at 1168. The robbery was also committed with a single-barrel, sawed-off shotgun. *Id.* Based on the similarity of the two offenses, the defendant argued that the same person probably committed both robberies. *Id.* at 1169. He sought to introduce testimony that an eyewitness to the second burglary had actually excluded the defendant from two separate lineups making it less probable that he had committed the first robbery. *Id.*

123 The court of appeals held that the admissibility of similar transaction evidence when offered by the defense must be decided on a case-by-case basis, according to general relevancy considerations. *Id.* at 1170. The court explained that "[i]f all the similar acts and circumstances, taken together, may support a finding that the same person was probably involved in both transactions, then evidence that the defendant did not commit the second transaction is relevant and admissible." *Id.* Given the similarities in the description of the suspects, that both robbers used single-barrel sawed-off shot-guns, and that both robberies occurred in the same part of town on consecutive days, the court of appeals determined that evidence of the second robbery was relevant and admissible. *Id.*

124 In *People v. Flowers*, we adopted the court of appeals' more lenient general relevance standard for the admissibility of similar transaction evidence offered by the defense but, based on the facts and circumstances of that case, found that the evidence was properly excluded by the trial court. 644 P.2d at 919-20. In *Flowers*, the defendant was charged with first degree sexual assault for an incident in which the perpetrator broke a window in the rear of a duplex, climbed the stairs to the victim's second-floor bedroom, threatened her with a knife, forced her to perform fellatio on him, and raped her. *Id.* at 917. The defendant sought to introduce evidence that nine victims of other sexual assaults in the area-which involved entry into a residence through a back window, threats of use of a knife or similar weapon, tying of the victims' hands, sexual assault including fellatio, and theft of money or credit cards-could not identify him as their assailant, and physical evidence

excluded him as the assailant in one of those cases. Id. at 919. Like the defendant in Bueno, he argued that this evidence tended to prove that another person committed the other assaults and therefore was relevant to establish that the victim in his case misidentified him. Id. at 918. The People opposed the introduction of this evidence in part on grounds that the nine other crimes were dissimilar and that allowing evidence that the victims in those crimes had been unable to identify the defendant would turn his trial into a trial of the other nine cases. Id. at 919.

1 25 We agreed with the trial court's determination in Flowers that "the details of the other crimes were not distinctive or unusual enough to represent the 'signature' of a single individual, but were features common to most sexual assaults and merely would demonstrate that there was more than one person committing sexual assaults in the area." Id. at 920. Taken together, "[the similar acts and circumstances, [did] not support a finding that the same person probably was involved in all the cases, and therefore, the threshold standard for relevancy of such evidence was not met." Id. Moreover, even if the evidence was relevant, we found that testimony concerning the witness identification in nine other sexual assault cases would tend to confuse the issues in the case before the jury and unduly delay the trial Id.

1 26 In this case, evidence of A.G.'s alleged prior sexual conduct with T.S. is of questionable relevance to the identity of the perpetrator against M.L. The argument for relevance is based on an inference of propensity combined with A.G.'s presence in the house on the nights of the alleged incidents. Neither factor, standing alone, is relevant. The acts and circumstances of A.G.'s prior alleged acts and the acts and circumstances of the assaults on M.L. are not distinctive or unusual enough to support a finding that the same person probably was involved in both cases. As in Flowers, A.G.'s alleged offenses against T.S. and the assaults against M.L. both involve conduct common to sexual assaults, rather than the signature of a single perpetrator. Likewise, evidence of opportunity, based on A.G.'s presence in the house, is also inadmissible, without some act connecting A.G. to the charged offense. Mulligan, 193 Colo. at 518, 568 P.2d at 456. The circular nature of the relevancy argument in this case is that the evidence offered to connect A.G. to the assault against M.L. requires an inference of propensity based on previous sexual acts with another person. Together, the combination of opportunity and propensity may establish, at best, a very tenuous relevancy connection. See Perez 972 P.2d at 1074-75 (applying Flowers and upholding the exclusion of alternative suspect evidence that depended on a combination of opportunity and propensity because the acts and circumstances of the similar crime did not reveal a "signature" that would connect the alternative suspect to the crime charged).

T 27 Even assuming that evidence of A.G.'s alleged prior sexual conduct is relevant under section 18-3-407(2), it should have been *1075excluded under CRE 408. There is no evidence that T.S.'s allegations of abuse were ever reported to or investigated by law enforcement and no evidence that A.G. was ever charged criminally. The prosecution undoubtedly would seek to rebut allegations by T.S. that A.G. sexually abused her as a child, shifting the focus of the trial from the sexual assault against M.L. to A.G.'s alleged abuse of T.S. The danger of confusing the issues and misleading the

jury substantially outweighs the minimal probative value, if any, of prior sexual conduct evidence to the identity of the perpetrator in this case.

128 The trial court considered that the circumstantial nature of M.L.'s identification of the perpetrator in the first incident strengthened the probative value of evidence of A.G.'s alleged prior sexual conduct, causing the probative value of the evidence to outweigh the danger of unfair prejudice or confusion of the issues. In doing so, the trial court placed too much weight on the circumstantial evidence of identification and underestimated the risk of confusion of the issues material to this case, i.e. whether the defendant committed the acts charged. Accordingly, we conclude that the trial court abused its discretion in granting the defendant's motion to introduce evidence of an alternative suspect's prior sexual conduct.

T 29 Nothing in our opinion should be read to preclude the defendant from otherwise seeking to challenge M.L.'s identification on other grounds, including credibility and reliability, with evidence regarding the similar appearance of men in the house, evidence that M.L. uses prescription glasses and may not have been wearing them during the alleged assaults, evidence that the lighting was limited, evidence of inconsistent statements, and evidence of any susceptibility of M.L. to misidentification.

IV. Conclusion

130 Because the trial court abused its discretion in finding that the probative value of specific instances of the witness's prior sexual conduct was not substantially outweighed by the danger of such evidence to mislead the jury and confuse the issues, we make the rule absolute. We remand for further proceedings consistent with this opinion.

Chief Justice BENDER dissents.

. In addition to M.L., who is a minor, we refer to the other non-parties in this case by their initials to protect their privacy and because their full names are not relevant to our resolution of the issue.

. We note that the defendant intends to introduce evidence of A.G.'s alleged sexual conduct through T.S. Potentially, the prosecution would call A.G. to rebut T.S.'s testimony. Thus, the rape shield statute is implicated as to both T.S.'s testimony and A.G.'s likely rebuttal testimony.

. The trial court found that evidence of A.G.'s prior uncharged sexual conduct fell within the second statutory exception and was relevant to a material issue in the case under § 18-3-407(2). The trial court misapplied the second statutory exception, which allows evidence of specific instances of sexual activity to show "the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse," offered to prove that the acts charged were or were not committed by the defendant. This is a narrow statutory exception for evidence addressing physical aspects of the charged offense. See *People v. Villa*, 240 P.3d 343, 354 (Colo.App.2009). The trial court appears to have read the exception to apply to all evidence relevant to identity., The *1073exception is not so broad. Evidence of prior sexual conduct that may be relevant to identity but does not address the source or origin of semen, pregnancy, disease, or other similar physical

aspects of the charged offense, would fall under section 18-3-407(2) and be subject to all the procedural protections that section entails.

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