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ADVANCE SHEET HEADNOTE  
June 23, 2026

2026 CO 53

**No. 24SC542, *People v. Gerle*—Rules of Evidence—Rape Shield Statute—Relevance.**

The supreme court reviews a decision of a division of the court of appeals, which reversed the defendant's judgment of conviction based on the trial court's exclusion of evidence regarding certain text messages between the defendant and the victim. The supreme court concludes that evidence regarding the text messages—which reflected the defendant's and the victim's fantasies concerning a consensual sexual bondage, discipline, dominance, submission, sadism, and masochism ("BDSM") encounter—was inadmissible under C.R.E. 401 and C.R.E. 402 given the specific facts of this case.

While a prior act may be relevant to charged conduct, the prior act at issue in this specific case involved a consensual BDSM encounter that was explicitly sexual in nature. No evidence indicated that the defendant and the victim planned or were otherwise engaged in a consensual sexual BDSM encounter during the four-day incident which led to the defendant being charged with first and second

degree assault and false imprisonment. Because of the dissimilarity between the text messages and the charged conduct, the messages do not make it more probable that the victim consented to being confined or less probable that the defendant intended to confine and assault the victim. Thus, the text messages were inadmissible.

Accordingly, the judgment of the court of appeals is reversed.

**The Supreme Court of the State of Colorado**  
2 East 14th Avenue • Denver, Colorado 80203

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**2026 CO 53**

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**Supreme Court Case No. 24SC542**  
*Certiorari to the Colorado Court of Appeals*  
Court of Appeals Case No. 23CA481

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**Petitioner:**

The People of the State of Colorado,

v.

**Respondent:**

Donald Louis Gerle.

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**Judgment Reversed**

*en banc*

June 23, 2026

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**JUSTICE BERKENKOTTER** delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ, JUSTICE BOATRIGHT, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE SAMOUR,** and **JUSTICE BLANCO** joined.

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 Donald Louis Gerle was charged with first and second degree assault and false imprisonment. *See* § 18-3-202(1)(a), C.R.S. (2025); § 18-3-203(1)(g), C.R.S. (2025); § 18-3-303(1), C.R.S. (2025). The People alleged that he repeatedly beat the victim, his wife, between November 12, 2021, and November 15, 2021; confined her in a closet during the last fourteen hours of the assaults; and caused her to suffer serious bodily injury and other significant injuries, including two black eyes, two broken ribs, plate-sized bruises on her body, and a collapsed lung.

¶2 At trial, Gerle sought to introduce texts that he and the victim had exchanged on November 8, three days before the charged incident began. The texts reflected that the two had previously engaged in sexual bondage, discipline, dominance, submission, sadism, and masochism (“BDSM”) role-playing. Gerle claimed that the texts were probative of the consent element of his false imprisonment charge as well as the intent element of all three charges. The People objected, arguing that the texts should be excluded under Colorado’s rape shield statute, § 18-3-407, C.R.S. (2025), and under CRE 401, 402, and 403.

¶3 The trial court sustained the objection, ruling that discussion of sexual BDSM-related evidence violated the rape shield statute and that the texts were not relevant because they did not relate to the time during which the charged conduct occurred. The court accordingly barred defense counsel from mentioning BDSM

in their opening statement, limited counsel’s questioning of the victim regarding the text messages, and declined to admit the texts as evidence.

¶4 Gerle was convicted at trial and appealed, arguing that the trial court erroneously (1) applied the rape shield statute, (2) denied his request for a mistrial, and (3) excluded evidence during his cross-examination of the victim—which cumulatively warranted reversal.

¶5 A division of the court of appeals concluded that the trial court erred in applying the rape shield statute because Gerle had not been charged with sexual assault. *People v. Gerle*, No. 23CA481, ¶¶ 22, 25 (July 11, 2024). It then determined that the trial court erred in excluding the BDSM-related evidence because the texts showed the “particular nature” of Gerle and the victim’s relationship and thus were relevant to consent and lack of intent. *Id.* at ¶ 38 (quoting *People v. Garcia*, 179 P.3d 250, 258 (Colo. App. 2007)). The division reversed and remanded the case for a new trial. *Id.* at ¶ 47.

¶6 We now reverse the division’s judgment. We conclude that the trial court did not abuse its discretion in excluding the BDSM-related evidence as irrelevant. *See* CRE 401. While a prior act may be relevant to charged conduct, the prior act here involved a BDSM encounter that was explicitly sexual in nature. No evidence indicated that Gerle and the victim planned or were otherwise engaged in a consensual sexual BDSM encounter during the charged incident. Therefore, this

evidence was inadmissible to suggest that the victim consented to Gerle confining her or to suggest that Gerle did not intend to confine the victim against her will or to assault her, but rather acted recklessly.<sup>1</sup> That is, the text messages do not make it more probable that the victim consented to being confined or less probable that Gerle intended to confine and assault the victim.

¶7 We need not address the division’s decision as to the rape shield statute because the People concede the trial court’s error.

### **I. Facts and Procedural History**

¶8 Gerle and the victim began arguing on Thursday, November 11, 2021, when the victim, in response to a question from Gerle, said she could not remember the name of her ex-boyfriend. Gerle did not believe the victim, and what began as a verbal argument escalated into physical abuse, which intensified over the course of the next three days. On Thursday, Gerle broke the victim’s laptop and printer. On Friday, when the argument about the ex-boyfriend resumed, Gerle used a camera tripod like a bat and hit the victim with it until the tripod’s legs bent.

¶9 After the argument resumed on Saturday evening, Gerle confined the victim to a walk-in closet for roughly fourteen hours (into the early morning hours on

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<sup>1</sup> We do not understand Gerle to argue that the victim consented to the physical activity that caused serious bodily injury. Consent is not a defense to assault that causes serious bodily injury as a matter of law. § 18-1-505(2), C.R.S. (2025).

Sunday) and beat her with his hands and various objects including hangers, a belt buckle, and steel-toe boots. Gerle insisted, while he had the victim confined, that she write down the name of her ex-boyfriend. While in the closet, the victim lost consciousness.

¶10 When the victim regained consciousness and was eventually able to get up, she drove herself to the hospital. There, she was treated for two black eyes, a collapsed lung, a puncture wound on her ankle, two broken ribs, and bruises all over her body, including behind her ears. Gerle was charged with assault in the first degree, assault in the second degree, and false imprisonment.

¶11 At trial, Gerle's opening statement suggested that the charged conduct was part of Gerle and the victim's "ongoing and regular sexual fantasy role-playing." The People objected, noting that the defense had not provided notice of their intent to offer evidence of the victim's past sexual conduct, as required under the rape shield statute. *See* § 18-3-407(2)(a). The trial court sustained the objection under the rape shield statute and barred defense counsel from mentioning the sexual BDSM role-playing during opening statement.

¶12 Gerle later sought to admit texts that he and the victim exchanged on November 8. He argued that they were relevant to disprove the consent element of the false imprisonment charge, and the intent element of all the charges. The texts included a screenshot of an erotic novel the victim had read, Gerle's and the

victim's discussion of the novel, and descriptions of a variety of their sexual fantasies. These fantasies included a sexual BDSM role-playing scenario the two appeared to have planned for that evening, which included Gerle using a soft whip on the victim's back. The texts included the following relevant exchanges:

Gerle: You still need to b[e] whipped on the back [sixteen] times for your Disobedience – SIR[.]

Victim: Thank you SIR[,] PET deserves whatever SIR delivers[.]

....

Gerle: Those [three] rules will b[e] in our SUB / DOM contract. W[ith] a list of punishments for rule breaking[.]

Victim: Yes, SIR[.]

....

Gerle: B[e] home in [ten] min[utes]. . . . [Yo]u still have some lashes coming.

Victim: I am looking forward to them SIR[.]

....

Victim: PET gets hot with anticipation of what's coming. PET just realized she likes the soft whip[.]

....

Gerle: Nothing turns me on more than hearing [you] talk about real or imagined sex stories[.]

¶13 The People objected to the admission of these texts based on the rape shield statute and on the ground that they were not relevant. The court deferred ruling, as Gerle's counsel indicated that they would file a brief regarding the admissibility

of the text messages that evening. Counsel did so, arguing that the rape shield statute did not apply, that the messages were relevant, and that the court's limitation on Gerle's opening statement warranted a mistrial. The trial court denied the motion.

¶14 The court ruled that Gerle could not use the text messages unless defense counsel could connect the texts "to the timeframe that's relevant to these charges," in which case it would be "fair game to ask about it." If, however, the victim denied any such connection, then Gerle would be "stuck with that answer." The court additionally allowed Gerle's counsel to cross-examine the victim about whether the conduct on the charged dates was consensual.

¶15 On cross-examination, the victim answered that she had not consented to being whipped—"not like he did to me"—on the dates of the incident. She explained that she had previously consented to Gerle gently using a soft "cat [o'] nine tails thing." But she emphasized that "we weren't engaged in that during [those four] days." The trial court did not allow any follow-up questions and sustained the People's objection to the admission of the text messages.

¶16 The jury found Gerle guilty on all counts, and the trial court sentenced him to twenty-two years in prison. Gerle appealed, arguing that the court abused its discretion by (1) applying the rape shield statute to limit his opening statement, (2) denying his request for a mistrial, and (3) improperly excluding the

BDSM-related texts. He further asserted that the cumulative effect of the errors warranted reversal.

¶17 A division of the court of appeals agreed. It concluded that the trial court abused its discretion both by applying the rape shield statute and by otherwise excluding the texts as irrelevant. *Gerle*, ¶¶ 22–23, 27. First, the division held that the rape shield statute was inapplicable, as there was no allegation that the victim had been sexually assaulted, and section 18-3-407(2)(a) limits the statute’s application to cases in which a witness is a sexual assault victim or the crime charged is a sexual offense. *Gerle*, ¶ 25.

¶18 Second, the division determined that the trial court erred in declining to admit the BDSM-related texts under general relevance principles. *Id.* at ¶ 29. It noted that in *Garcia*, 179 P.3d at 255 – a case that it viewed as comparable – another division of the court of appeals had concluded that a victim’s past sexual fantasies were relevant to issues of consent. *Gerle*, ¶ 31. Therefore, the division reasoned, the victim’s BDSM fantasies were similarly relevant to Gerle’s false imprisonment and assault charges. *Id.* at ¶ 32. The victim’s “potential consent to being locked in a bedroom closet to engage in BDSM activities,” the division explained, spoke to the “lack of consent” element of false imprisonment. *Id.* at ¶¶ 30–33, 36 (citing *Garcia*, 179 P.3d at 254–58).

¶19 The division further determined that “if the incident began as a consensual BDSM encounter,” then Gerle may have lacked the intent to confine the victim against her will and may have injured the victim recklessly rather than with intent. *Id.* at ¶¶ 33–35. The division noted that evidence that the two had “previously participated in BDSM role-playing encounters and had just planned another such encounter makes it more probable that the victim consented to at least some of the conduct and makes it less likely that Gerle had the requisite intent for the three charged crimes.” *Id.* at ¶ 35 (citing *Garcia*, 179 P.3d at 256).

¶20 The division then concluded that the BDSM-related texts were not unfairly prejudicial under Rule 403. *Gerle*, ¶ 38. Leaning again on *Garcia*, the division determined that the probative value of showing “the particular nature . . . of the relationship” far outweighed any prejudice. *Id.* (alteration in original) (quoting *Garcia*, 179 P.3d at 258). Having decided that the trial court should have admitted the texts, the division ultimately concluded that these cumulative errors may have affected the fairness of the trial and influenced the verdict. *Id.* at ¶ 47. Accordingly, the division reversed and remanded the case to the trial court for a new trial. *Id.*

¶21 The People petitioned for certiorari, and we granted their petition.<sup>2</sup>

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<sup>2</sup> We granted certiorari to review the following issue:

## II. Analysis

¶22 We begin by setting forth the applicable standard of review and relevant case law. Next, we briefly cover the requirements of the rape shield statute, § 18-3-407. Then, we discuss Rule 401 and 402. Finally, we consider the facts of this case and assess whether the texts are relevant to the issues of consent and intent. Ultimately, we reverse the division’s conclusion as to the relevance of the BDSM-related texts and leave undisturbed its conclusion that the rape shield statute did not apply here.

### A. Standard of Review

¶23 We review a trial court’s evidentiary ruling for an abuse of discretion. *People v. Elmarr*, 2015 CO 53, ¶ 20, 351 P.3d 431, 437-38. “A trial court abuses its discretion when its decision is ‘manifestly arbitrary, unreasonable, or unfair,’ or based on a misapplication of the law.” *People v. West*, 2025 CO 61, ¶ 13, 578 P.3d 832, 835 (quoting *People v. Kent*, 2020 CO 85, ¶ 28, 476 P.3d 762, 768).

### B. The Trial Court Abused Its Discretion by Improperly Applying the Rape Shield Statute

¶24 In cases involving sexual assault, evidence of a victim’s or a witness’s prior sexual history is generally presumed irrelevant outside of specifically enumerated

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Whether evidence of prior consensual sexual activity between a victim and defendant is relevant to prove the victim’s consent and the defendant’s lack of intent for purposes of false imprisonment and assault charges.

exceptions. *See* § 18-3-407. The rape shield statute was designed to protect victims and witnesses from “humiliating ‘public “fishing expeditions” into their past sexual conduct.’” *People v. Gulyas*, 2022 COA 34, ¶ 41, 512 P.3d 1049, 1057 (quoting *People v. MacLeod*, 176 P.3d 75, 79 (Colo. 2008)).

¶25 Here, the People concede that the procedure and notice requirements in section 18-3-407 do not apply. The crimes charged – false imprisonment and first and second degree assault – are not sexual offenses, and there is no allegation that the victim had been sexually assaulted. Accordingly, we do not disturb the division’s conclusion that the trial court’s rape shield ruling was erroneous as a matter of law. *Gerle*, ¶ 25.

### **C. The Trial Court Did Not Abuse Its Discretion by Excluding the BDSM-Related Texts**

¶26 That leaves the question of relevance. The People contend that the trial court did not abuse its discretion in excluding the BDSM-related text messages because the messages were not relevant to the charged conduct. We agree.

¶27 Generally, evidence is relevant and presumptively admissible when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” CRE 401; *see also* CRE 402 (“Evidence which is not relevant is not admissible.”). In criminal cases, evidence that “makes it more or less probable that a criminal act occurred” is relevant. *People v. Clark*, 2015 COA 44, ¶ 17, 370 P.3d 197, 204.

¶28 Conversely, evidence that is irrelevant is inadmissible at trial. CRE 401; CRE 402. Evidence that is too remote in logical relation to a matter in dispute should not be admitted. *Fletcher v. People*, 179 P.3d 969, 974 (Colo. 2007); *see also People v. Botham*, 629 P.2d 589, 602 (Colo. 1981) (“[F]acts bearing so remotely upon or collateral to the issue, that they afford only conjectural inference, should not be admitted in evidence.”).

¶29 Importantly here, Gerle is not charged with sexual assault; he is charged with false imprisonment and first and second degree assault. As we have explained, he sought to admit evidence regarding the text messages during the victim’s cross-examination to contest the consent element of the false imprisonment charge and the intent element of all three charges. But the conduct described in the November 8 texts bears no similarity to the charged conduct which began *three days later* and took place over the span of *four days*.

¶30 Most significantly, the texts, unlike the charged conduct, are overtly sexual in nature. True, Gerle mentions whipping the victim “on the back [sixteen] times for [her] [d]isobedience” and still “hav[ing] some lashes coming.” And the texts also identify “a list of punishments” for breaking certain role-playing rules. But these messages are part of Gerle’s and the victim’s sexually charged conversation.

¶31 Here, context matters. The subject of whipping first arose when Gerle directed the victim to provide details about an erotic novel she had read. Later,

Gerle and the victim described a variety of their sexual fantasies. Notably, Gerle repeatedly stated how aroused he was. Throughout the texts, the two used graphic language, discussing a range of sexual topics from what makes the victim “hot,” to sex toys, to a specific sex act that the victim said she liked engaging in with Gerle.

¶32 To the extent that the text messages revealed a plan for a sexual encounter, the encounter described was imminent, not something planned to begin days later. When Gerle told the victim that she had “some lashes coming,” he also told her that he would be home soon and that he was sexually aroused from their earlier texts. The victim replied that she was “looking forward to [it]” and that she would be waiting for him. The texts did not suggest that they were planning a consensual BDSM sexual encounter three to seven days later.

¶33 What transpired during those four days was altogether different. The charged conduct began as an argument about the victim’s ex-boyfriend. The victim claimed she did not remember the ex’s name, but Gerle did not believe her and insisted that she did. Their argument continued as Gerle’s physical assaults intensified, including during the fourteen hours during which Gerle confined the victim in their bedroom closet. It was there, in the midst of beating the victim, that he forced her to write down her ex-boyfriend’s name.

¶34 Nothing suggests that this conduct which began on Thursday and escalated on Friday and Saturday and into the early morning hours on Sunday had anything to do with sex. The stark differences between the impending sexual encounter with a soft whip described in the texts and Gerle's later confinement and physical assault of the victim renders the evidence regarding the text messages irrelevant and thus inadmissible. In short, because there is no resemblance between the two instances of conduct, the texts would improperly invite the jury to speculate about consent and intent. And while Gerle might have argued that this evidence was conditionally relevant, *see* CRE 104(b),<sup>3</sup> the text messages did not connect to any theory that Gerle and the victim planned to engage in or had engaged in any sexual acts during the charged incident. What's more, Gerle does not point to any evidence that would support this missing condition.

¶35 But what about the division's conclusion, based on *Garcia*, that the texts were relevant? *Gerle*, ¶¶ 34-35, 48. To answer this question, we turn to consider *Garcia*. There, a division of the court of appeals considered the admissibility of evidence in a sexual assault prosecution regarding (1) the victim's rape fantasy and (2) prior consensual sex between the defendant and the victim. *Garcia*,

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<sup>3</sup> Conditionally relevant evidence is evidence whose relevance depends on the introduction of subsequent evidence establishing its probative value. *See People v. Dunham*, 2016 COA 73, ¶ 33, 381 P.3d 415, 422.

179 P.3d at 255–57. The trial court in *Garcia* excluded the defendant’s testimony that the victim fantasized about being tied up with a rope and raped; that he and the victim had acted her fantasy out several times; and that before having sexual intercourse with the defendant on the date charged, the victim said, “[I]f we could do it the way I like to do it, my favorite fantasy.” *Id.* at 256.

¶36 The *Garcia* division determined that the trial court erred in barring the defendant’s testimony under the rape shield statute. *Id.* at 255. It concluded that the victim’s alleged rape fantasy and prior acting out of the fantasy were relevant to consent. *Id.* It reasoned that the defendant’s testimony in this regard could make his admission that he tied her up and had sex with her at knifepoint reconcilable with consent, rather than inherently nonconsensual. *Id.* at 256.

¶37 In this case, the division’s reliance on *Garcia* is misplaced. In *Garcia*, the victim’s fantasy and the couple’s acting out of the fantasy as described by the defendant were almost identical to the sexual assault with which the defendant was charged. *Id.* at 257.

¶38 But as we have already explained, the conduct with which Gerle was charged is not at all similar to the encounter described in the texts. That conduct arose out of the argument between Gerle and the victim regarding her ex-boyfriend. It had nothing to do with sex. Thus, the division below erred by extending the logic of *Garcia* to infer a connection between the BDSM-related texts

and the charged conduct here without considering the very different circumstances of the facts before it. Because the conduct with which Gerle is charged had nothing to do with sex, evidence regarding Gerle's and the victim's past consensual sexual BDSM encounter is not relevant. *See* CRE 401. The texts cannot support an inference of reckless escalation of an otherwise consensual sexual BDSM encounter.

¶39 Put differently, the evidence regarding Gerle's and the victim's sexual BDSM encounter does not make it more probable that the victim consented to being confined in the closet or make it less probable that Gerle intended to confine and assault the victim. *See* CRE 401. For these reasons, the trial court did not abuse its discretion in excluding the BDSM-related text messages and limiting Gerle's opening statement and cross-examination of the victim regarding the texts.

### **III. Conclusion**

¶40 We reverse the judgment of the court of appeals.