IN THE COURT OF APPEALS OF IOWA

No. 1-265 / 10-1114
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DUANE THOMAS FLEMING,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge.

A defendant appeals from his convictions of third-degree sexual abuse and assault with intent to commit sexual abuse. **AFFIRMED.**

Alfred E. Willett of Elderkin & Pirnie, P.L.C., and Amy L. Reasner and Corinne R. Butkowski of Lynch Dallas, P.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Jason Besler, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

Following a jury trial, Duane Fleming was convicted of third-degree sexual abuse and assault with intent to commit sexual abuse. He appeals and asserts (1) the district court erred in instructing the jury; (2) evidence of prior bad acts was erroneously admitted; (3) sufficient evidence does not support his conviction; and (4) the district court abused its discretion in imposing his sentence. We affirm.

I. Background Facts and Proceedings.

In March and April 2006, Fleming sexually abused a fourteen-year-old girl, A.J. Fleming was charged with third-degree sexual abuse in violation of Iowa Code section 709.1 and 709.4 (2005) and assault with intent to commit sexual abuse in violation of Iowa Code sections 709.11 and 708.1.

A jury trial was held in January 2010. A.J. testified to three instances of abuse that occurred in March and April 2006—Fleming placed her hand on his penis in March, Fleming inserted his fingers into her vagina in March, and Fleming engaged in sexual intercourse with her in April. She told no one of the first two incidences, but following the April incident, she told her sister and then her parents that Fleming had fondled her breasts. Her parents called the police. The following month she reported the full extent of the abuse.

The State also introduced the test messages A.J. sent from her phone from April 7 to May 31, 2006. After leaving Flemings house the night of April 7, A.J. walked home and sent text messages to a teacher and her older sister, telling them that Fleming had fondled her breasts. They persuaded A.J. to tell her parents what had happened. A.J. continued to text her teacher, who

suspected more had happened than what A.J. had told her. She spoke with A.J. in person and A.J. told her the full extent of the abuse.

The State also introduced two instant message conversations where Fleming contacted A.J. shortly after the April incident. He sent her a message on April 12, making three attempts to get A.J. to respond, stating "can you say hi at least?" A.J. did not respond. He next attempted to contact her on April 13. That conversation began,

> Fleming: hi
> Fleming: not talking to me?
> A.J.: not after what u did
> Fleming: I am so so sorry

The conversation continued with Fleming asking A.J. to "please . . . accept apology," and telling her he "messed up," it would "never happen again," and he "was just confused." He explained that he would apologize in person, but he couldn't talk explicitly about what happened because he was at work and the computer was monitored.

Jamie Trpkosh testified that he was a child abuse investigator with the Iowa Department of Human Services (DHS). He went to Fleming's house and informed Fleming that there had been sexual abuse allegations from a non-family member. Fleming did not appear to be surprised and stated that he "didn't do anything to anybody, and then stated that he knew [A.J.]," although Trpkosh did not tell him A.J. was the person making the allegations.

One of A.J.'s teachers testified that A.J. confided in her about the abuse and after it happened, A.J.'s behavior in school changed—A.J. became very quiet, withdrawn, and her class work changed.

Fleming testified and denied that he sexually abused A.J. He stated that on April 7, 2006, A.J. came over to his house and when she was leaving she gave him a hug, during which his "left hand had hit her right breast." He further explained, "I had apologized to her and told her I didn't mean anything by it, and I said . . . it won't happen again. And she said don't worry about it, it's not a big deal." Finally, he stated that he sent her an instant message on April 12 "to make sure she was okay about what had happened" and he was talking about accidently touching her breast in the April 13 instant message.

The jury found Fleming guilty as charged. The district court sentenced Fleming to terms of imprisonment not to exceed ten years and two years, to be served concurrently. Fleming appeals.

II. Jury Instruction.

Fleming first asserts the district court erred in instructing the jury. We review challenges to jury instructions for correction of errors at law. *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010); *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). "Our review is to determine whether the challenged instruction accurately states the law and is supported by substantial evidence." *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). Error in giving a particular instruction does not merit reversal unless it results in prejudice to the defendant. *Id.*

The jury was instructed,

> Instruction No. 12
>
> You have heard evidence that the defendant allegedly touched A.J.'s breasts prior to the month of March 2006. If you decide defendant touched A.J.'s breasts, you may consider this in determining whether the defendant had a passion or propensity to commit the acts charged in this case.

This instruction was based upon a uniform jury instruction, which provides,

> You have heard evidence that the defendant allegedly committed other acts with (victim) [before] [after] (date of offense charged). If you decide the defendant committed these other acts, you may consider those acts only to determine whether the defendant has a sexual passion or desire for (victim). *You may not consider them as proving that the defendant actually committed the act charged in this case.*

Iowa Crim. Jury Instruction 900.11 (Evidence of Similar Acts) (emphasis added); *see also State v. Munz*, 355 N.W.2d 576, 581 (Iowa 1984) ("One of the exceptions to the general rule of exclusion allows the admission of evidence of prior sexual acts with the victim 'in order to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial.'"). On appeal, Fleming asserts that because instruction number 12 did not contain the last sentence of the model instruction, the use of this prior act evidence was not limited, thus permitting the jury to convict him on a "propensity" rather than the acts charged.

We assume the instruction was flawed and it would have been preferable to give the complete model instruction. Nevertheless, Fleming cannot establish prejudice. In the next instruction, the jury was further instructed,

> Instruction No. 13
>
> Evidence has been received concerning other wrong acts alleged to have been committed by the defendant. The defendant is not on trial for those acts. This evidence must be shown by clear proof, and can only be used to show intent or absence of mistake or accident.
>
> If you find other wrongful acts (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing intent or absence of mistake or accident.

Additionally, instructions number 16 and 22 set forth the specific elements the State was required to prove.

"When a single jury instruction is challenged, it will not be judged in isolation but rather in context with other instructions relating to the criminal charge." *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). The district court does not have to use any particular language in instructing the jury and the same principle Fleming argues was omitted from instruction number 12 was included in instruction number 13. When read as a whole, the instructions provided that the jury could only use the bad acts evidence for a limited purpose and not for proving Fleming committed the acts charged. *See Thavenet v. Davis*, 589 N.W.2d 233, 237 (Iowa 1999) ("[I]f some part was given improperly, the error is cured if the other instructions properly advise the jury as to the legal principles involved."). Therefore, Fleming cannot establish prejudice.

III. Prior Bad Acts—Another Victim.

Fleming next asserts that he should be granted a new trial because prior bad acts evidence relating to another victim was erroneously admitted. "We review a district court's evidentiary rulings regarding the admission of prior bad acts for abuse of discretion." *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010); *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Cox*, 781 N.W.2d at 760.

Fleming argues that he should receive a new trial based upon evidence that referenced another girl and cites to *State v. Cox*, 781 N.W.2d 757 (Iowa

2010).[1] In *Cox*, our supreme court examined a case where two other minor victims testified they were sexually abused by the defendant pursuant to Iowa Code section 701.11. *Cox*, 781 N.W.2d at 760. The supreme court held that evidence of the "defendant's sexual abuse of other victims under Iowa Code section 701.11 based only on its value as general propensity evidence violates the due process clause of the Iowa Constitution." *Id.* at 772. However, such evidence could "be admitted as proof for any legitimate issues for which prior bad acts are relevant and necessary, including those listed in [Iowa Rule of Evidence] 5.404(*b*) and developed through Iowa case law." *Id.* at 768.

The State argues that this issue is not preserved because Fleming did not object to the evidence when admitted at trial, but raised it for the first time in his additional motion for a new trial and motion in arrest of judgment. *See* Iowa R. Evid. 5.103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection . . . ."); *State v. Martin*, 704 N.W.2d 665, 669 (Iowa 2005) ("[G]enerally, when a party makes no objection to the reception of evidence at trial, the matter will not be reviewed on appeal."); *State v. Reese*, 259 N.W.2d 771, 775 (Iowa 1977) ("In order for [there] to be a proper preservation of errors committed by the trial court in the introduction of evidence at trial, objections to evidence must be timely and be raised at the earliest time the error becomes apparent."). A motion for a new trial is generally not sufficient to preserve error where the defendant failed to object to the evidence at trial. *State v. Steltzer*, 288 N.W.2d 557, 559 (Iowa 1980). Fleming replies that

[1] The *Cox* decision was issued after the jury found Fleming guilty.

because *Cox* was filed after his trial concluded, he raised the issue as soon as possible and *Cox* should be applied retroactively.

We need not determine whether Fleming has preserved error, because even if the evidence was erroneously admitted, it was harmless error. *See Cox*, 781 N.W.2d at 771 ("To establish harmless error when a defendant's constitutional rights have been violated, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."). Fleming points to three references at trial that were made to "another student"—(1) The teacher's testimony, "She also told me that there was another student that had this happen, too."; (2) The teacher's email that stated, "there was another girl her age . . . there as well and it happened to her too."; (3) The teacher's police statement that stated, "She said he had grabbed her breasts before in the presence of his young children and also did the same thing to a former [ ] student in front of her." There was no victim testimony of any prior abuse. Each of the references was brief and vague. *Compare id.* (finding it was not harmless error where two other victims gave detailed testimony of a "large number and variety of prior sex abuse," including forced oral sex and anal rape). We find any error in admitting the evidence was harmless.

IV. Sufficiency of the Evidence.

Fleming claims that sufficient evidence does not support his conviction. We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). "If a verdict is supported by substantial evidence, we will uphold a finding of guilt. Substantial evidence is that upon which a rational trier of fact could find the defendant guilty beyond a

reasonable doubt." *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). In conducting our review, we consider all the evidence in the record, that which is favorable as well as unfavorable to the verdict, and view the evidence in the light most favorable to the State. *Id.*

Fleming does not argue that the State failed to introduce evidence to support an element of the crimes, but rather argues that the victim's testimony was not credible. He argues that she initially told her parents Fleming only touched her breasts. He also argues that she made inconsistent accounts of the acts, such as in her deposition she stated she thought she was wearing jeans when the April abuse occurred and in her trial testimony she stated she was wearing athletic pants. The credibility of a witness is for the factfinder to decide except those rare circumstances where the testimony is absurd, impossible, or self-contradictory. *See State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998). The evidence demonstrated that the fourteen-year-old victim was uncomfortable and confused after each incident of abuse occurred. She was hesitant to tell her parents and other adults the extent of the abuse, initially reporting that Fleming had fondled her breasts. Shannon Parrish, an interviewer at the Child Protection Center who interviewed A.J. in May 2006, testified A.J.'s behavior during the interview was typical for a person who experienced something traumatic. Further, that it was common for a child or teenage victim to delay reporting sexual abuse due to fear and that when a victim comes forward to report abuse, it is common for the victim to tell only part of what occurred in order to measure the reaction. A.J.'s deposition testimony, given more than three years after the abuse occurred, and her trial testimony, given nearly four years later, both

relayed the same accounts of abuse, even if slight details varied. Further, her testimony was corroborated by other testimony and evidence of emails and text messages she wrote during the time span when the abuse occurred. The officer who was called to the victim's house the night of the third incident testified that A.J. appeared "to have been crying, . . . she was very quiet, seemed very upset. Would only nod. I remember her looking down a lot and just seemed very quiet." The record demonstrates that A.J.'s testimony was not absurd, impossible, or self-contradictory. The jury was in the best position to evaluate A.J.'s credibility. *See State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("[T]he jury was in the best position to judge whom and what to believe. And it was for the jury to assign the evidence presented whatever weight it deemed proper."). Further, the jury could have found Fleming's testimony not credible because it was directly contracted by other witnesses.

V. Sentence.

Finally, Fleming asserts the district court abused its discretion in imposing his sentence. Our review is for a correction of errors at law. *State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006).

> [T]he decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters.

State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "An abuse of discretion will not be found unless we are able to discern that the decision was exercised on grounds or for reasons that were clearly untenable or unreasonable." *Id.* Where

a sentence is within the statutory limits, legal error will be found if the district court abused its discretion in imposing the sentence. *Id.*

In the present case, there is no dispute that the sentence imposed is within the legal limits. Rather, Fleming simply argues that he should have received a suspended sentence and probation. The district court explained that it considered probation, but did not find it appropriate. Further, the district court considered all the appropriate factors in imposing the sentence, including the presentence investigation report, the arguments of counsel, the nature and circumstances of the offense, the defendant's age and characteristics, and the defendant's opportunity for rehabilitation and the protection of the public. *See* Iowa Code § 901.5 (stating the court shall impose a sentence that, in the court's discretion, provides maximum opportunity for the rehabilitation of the defendant and for the protection of the community from further offenses); *Formaro*, 638 N.W.2d at 725 ("[B]efore deferring judgment or suspending sentence, the court must additionally consider the defendant's prior record of convictions or deferred judgments, employment status, family circumstances, and any other relevant factors, as well as which of the sentencing options would satisfy the societal goals of sentencing."); *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999) ("In applying discretion, the court should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform."). We find the sentence was well within the district court's discretion and Fleming's argument provides no basis for resentencing.

AFFIRMED.