IN THE COURT OF APPEALS OF IOWA

No. 1-626 / 10-1511
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES RAY PARKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Benton County, Douglas S. Russell, Judge.

Defendant appeals his convictions for sexually abusing a child. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and David C. Thompson, County Attorney for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

EISENHAUER, P.J.

Charles Ray Parker appeals his convictions for second-degree sexual abuse, dissemination or exhibition of obscene materials to a minor, and lascivious acts with a child. The charges stemmed from allegations Parker molested A.B. during a camping trip in the summer of 2005.

Parker appeals arguing: (1) the court abused its discretion by admitting the testimony of S.M. (A.B.'s sister); (2) the court abused its discretion by denying his request to admit three Facebook photographs; and (3) his trial counsel was ineffective. We affirm Parker's convictions and preserve his ineffective-assistance-of-counsel claims for possible postconviction relief proceedings.

I. Background Facts and Proceedings.

At all times relevant to this case, A.B. lived with her mother. Her older sister, S.M., lived in Cedar Rapids and visited her mother on weekends and during the summer.

In 2003, eight-year-old A.B. and her mother moved into Parker's house in Charles City. Parker was married to A.B.'s grandmother and was considered to be A.B.'s grandfather.[1] A.B. testified to an incident of sexual activity in Charles City involving both A.B. and eleven-year-old S.M. that started with their grandfather forcing them to watch sexually-explicit adult movies. S.M. also

[1] A.B.'s mother eventually learned Parker is not her biological father. However, for many years Parker was thought to be the grandfather of A.B. and S.M. We will refer to him as the grandfather as the parties have done so throughout the trial and in the briefs.

testified to the viewing of adult movies and sexual activity with Parker and A.B. in Charles City.

In May 2004, A.B. and her mother moved to a farmhouse outside Marengo. A.B.'s mother's boyfriend (eventual husband) also lived in the farmhouse. Parker lived with the family in Marengo in the summer months and spent the winter months in Texas. Parker parked a tow-behind trailer with living quarters on the Marengo acreage.

A.B. and S.M. testified Parker would show them sexually-explicit movies and involve them jointly in sexual behavior in both the Marengo house and in his trailer. A.B. stated Parker only abused her in Charles City/Marengo when her sister was visiting. A.B. testified these sexual activities occurred forty to fifty times. S.M. testified the sexual activities occurred over forty times. Afterward, Parker would buy A.B. presents. Parker told the sisters to keep the sexual activities secret and told them they were good granddaughters. A.B. was afraid to tell her mother what Parker was doing and did not want to "get him in trouble."

In the summer of 2005, when A.B. was ten/eleven (A.B. has a summer birthday), Parker took A.B. camping. In the evening, when A.B. was done swimming, Parker and A.B. watched a movie. Parker then switched to watching an adult-content movie with A.B. and he engaged A.B. in sexual behavior. After two and one-half hours, A.B. told Parker she had to go to the bathroom, dressed, and went outside. A.B. avoided Parker by sleeping on a picnic table. In the morning, Parker told A.B. "remember, this is our secret."

Parker's concurrent sexual abuse of S.M. and A.B. continued. A.B. testified to the sexual activities initiated by Parker: (1) "Parker started touching

himself and then he tried getting me and my sister to touch each other;" and (2) "[Parker] tried to make me and my sister hold [the fake penises] against each other or put them inside of each other."

In the summer of 2006, A.B. and S.M. developed a plan to stop the sexual activities during S.M.'s visits by writing a note to Parker. While S.M. was in Cedar Rapids, A.B. wrote the note and taped it to Parker's motorcycle. In the note A.B. told Parker if he did not stop molesting them and leave the Marengo home, A.B. and S.M. would tell their parents and notify the police. A.B. testified Parker packed up and moved out the next day. Parker did not speak to either of the sisters or their mother again.

In late 2006, fifteen-year-old S.M. was seeing a counselor. S.M. told the counselor Parker was the reason for her depression and anxiety issues. The counselor contacted the authorities. In early 2007, twelve and one-half-year-old A.B. was interviewed. Parker was subsequently charged with three crimes for the 2005 camping trip's sexual activities with A.B.

At trial, A.B. and S.M. each described the acts and sexual devices with specificity. Parker's brother also testified at trial:

> Q. When you helped move [Parker] to your house at Charles City, Iowa, how long did he stay with you? A. Well . . . it would be four to six weeks.
>
> . . . .
>
> Q. . . . During that four-to-six week period that he lived up with you . . . did he tell you about a letter or a note that he received from one of his granddaughters? A. Yes, he did . . . .
>
> . . . .
>
> Q. What did your brother . . . tell you about a letter or a note that he received from one of his granddaughters? A. . . . He just told me it was taped on . . . his motorcycle and that was the reason he came to my house . . . .

Parker did not testify in his own defense. Parker called A.B.'s cousin, who stated A.B. told her "all they did was watch porn." A.B. denied this conversation on rebuttal.

Parker also called a niece who testified she saw sexual devices in the Marengo home before Parker moved in and she believed A.B. and S.M. had untruthful reputations.

In closing argument, Parker's attorney told the jury:

> And here is what [the niece] said. [Their mother] treated [A.B.] and [S.M.] like they were sisters. It was a peer relationship. Their mother bought them things and let them do what they wanted to do.
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> Charles Parker argued with [A.B./S.M.'s mother] about her parenting style. [A.B.] and [S.M.] disobeyed and talked back to [their mother], and she did nothing.
>
> And you can't tell me that [S.M.] and [A.B.] did not have motivation to try and kick out my client from the house. Because he was trying to give them the structure that they needed. Mom allowed [S.M.] and [A.B.] to live a self-directed and undisciplined childhood. Charles Parker did not. Charles Parker objected to that kind of parenting. He wasn't given the opportunity to be a grandfather because he was placed in the role of trying to figure out how to be a father and a mother to them.

Parker appeals his jury convictions to the three charges detailed above.

II. Prior Bad Acts—Different Victim.

Parker requests a new trial arguing prior bad acts evidence regarding a different victim, S.M., was erroneously admitted. Our rules of evidence provide:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. Evid. 5.404(*b*). The goal of the rule is "to exclude evidence that serves no purpose except to show the defendant is a bad person, from which the jury is

likely to infer he or she committed the crime in question." *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001).

"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). "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.'" *Id*. (quoting *Rodriquez*, 636 N.W.2d at 239). "Recognizing that '[w]ise judges may come to differing conclusions in similar situations,' we give 'much leeway [to] trial judges who must fairly weigh probative value against probable dangers.'" *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004) (quoting *Rodriquez*, 636 N.W.2d at 240).

> Before admitting prior bad acts evidence a district court must find:
>
> (1) the evidence is "relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts," and (2) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant.

Cox, 781 N.W.2d at 761 (quoting *State v. Reynolds*, 765 N.W.2d 283, 289 (Iowa 2009)).

The district court ruled S.M. would be permitted to testify, but only as to acts she witnessed or participated in with A.B. The court found there was no admissible purpose for allowing S.M. to testify to any abuse she suffered when A.B. was not present and, even assuming an admissible purpose, such evidence would be unduly prejudicial. The court explained:

> The distinction in my mind here . . . alleged prior acts with S.M., just S.M., and then prior alleged bad acts that were basically concurrent S.M. and A.B.
>
> . . . .

> Any acts that took place with A.B. and S.M. at the same time, I find that those come in under 404(*b*). . . . [T]hey go to show intent, potentially lack of mistake . . . knowledge, those things that are allowed under 404(*b*), but do not come in for propensity. . . . I don't see the probative value of S.M.'s testimony is substantially outweighed by the danger of unfair prejudice.
>
> So I've done the 403 balance, I've done the 404(*b*), and find that alleged acts of S.M. contemporaneously with acts against A.B. in the same time frame, I'm not even saying it has to be on the date that this incident was charged.
>
> . . . .
>
> [S.M.'s] testimony is going to be limited to the purposes under 404(*b*) . . . and only incidences that allegedly occurred at the same time. So . . . when A.B. and S.M. are . . . in the same room or [in the] presence of each other.
>
> If it's a different room or anything like that where S.M. is not a witness to what's happening to A.B., that . . . falls outside . . . that's the line.
>
> . . . .
>
> [T]he eyewitness part of that would be if S.M. is in the room when this . . . happened and Mr. Parker is in the room when this happened, that would be the stuff that she'd be an eyewitness to.

Parker argues S.M.'s testimony "was inadmissible as propensity evidence pursuant to" *Cox*, 781 N.W.2d at 769. Second, Parker recognizes "[e]vidence of other acts of sexual abuse with the same victim [A.B.] is admissible to show the nature of the relationship between" Parker and A.B. *See* Iowa Code § 701.11 (2005); *State v. Reyes*, 744 N.W.2d 95, 102 (Iowa 2008) (finding no due process violation in "admission of prior sexual misconduct involving the same victim"). Because the State had A.B.'s "testimony about Parker's abuse of her in Marengo and Charles City to demonstrate specific intent," Parker argues S.M.'s testimony is unnecessary to show intent.

The State argues S.M.'s testimony, as limited, is not propensity evidence but is relevant to the legitimate issue of Parker's specific intent and motive. *See Cox*, 781 N.W.2d at 771. It argues Parker's "relevant intent and accompanying

modus operandi . . . were best demonstrated by the fact [Parker] engaged in a systemic and long-standing plan to groom his granddaughters for sexual activity." The State notes A.B. testified, with the exception of the camping trip giving rise to the crimes charged, Parker only engaged her in sexual activities when S.M. came to visit.

We start our analysis with the *Cox* court's discussion of the admissibility of prior bad acts evidence showing the defendant's sexual abuse of different victims. *See id*. at 759 (discussing "evidence of Cox's prior sexual abuse of two other cousins"). The court ruled prior bad acts of sexual abuse against "an individual other than the victim in the case" are *not* admissible "to demonstrate general propensity." *Id*. at 769. However, the court recognized "the prosecution may introduce evidence of prior relevant sexual abuse against a different victim where the evidence is used to demonstrate a legitimate issue" other than propensity. *Id*. Additionally, "[t]here are numerous ways in which prior sexual abuse of one other than the victim may become relevant to motive or intent." *Id*. at 771. The court identified the specific intent crime Parker was charged with, lascivious acts with a child, as an example. *Id*.

Further, the *Cox* court discussed the connectivity of events:

> Prior crimes against the same victim are relevant to a legitimate issue because the later crimes "do not occur single and independent—isolated from all others—but each is connected with some antecedent fact, "whereas acts against a different victim are "not part of the principal transaction."

Id. at 768 (quoting *People v. Jones*, 335 N.W.2d 465, 466–67 (Mich. 1983)).

We conclude the challenged evidence (S.M.'s eyewitness testimony of Parker's bad acts occurring concurrently with S.M. and A.B. in Charles

City/Marengo) was relevant to establish Parker's specific intent during his camping trip with A.B. S.M.'s eyewitness testimony is also relevant to explain the "antecedent facts" as "part of the principal transaction." *See id*.

Having concluded the evidence is relevant; we now consider whether the district court abused its discretion in deciding the probative value outweighed its inherently prejudicial effect. *See* Iowa R. Evid. 5.403. Relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Taylor*, 689 N.W.2d at 124. The factors to be considered in the balancing process are "the need for the evidence in light of the issues and other evidence available," whether there is clear proof, "the strength or weakness of the evidence on the relevant issue," and the degree to which the jury "will be prompted to decide the case on an improper basis." *Id*.

After evaluating these factors, we find no abuse of discretion. Parker asserted "A.B. and S.M. evicted Parker by threatening him with abuse allegations because he tried to exert discipline over them when their mother would not." Therefore, the need for this evidence was substantial. *See Rodriquez*, 636 N.W.2d at 242 (noting "he said/she said" nature of case made the need substantial). Without the context of the concurrent assaults, as well as S.M.'s confirmation of the concurrent assaults, there was no explanation for Parker's conduct during the camping trip and the jury would have been presented with an artificially-sanitized version of the facts.

Second, the prior bad acts directly supported a main issue at trial: Parker's intent as he committed lascivious acts with A.B. *See State v. Haines*, 259 N.W.2d 806, 811 (Iowa 1977) (ruling specific intent is an element of

lascivious acts with a child). Parker's argument that the evidence was unnecessary ignores the fact Parker himself forced A.B. and S.M. to participate in the concurrent sexual activities constituting "prior bad acts." Accordingly, the concurrent crimes against the different victim are unequivocally related to the "antecedent facts" and necessary to prove intent.

Third, though this evidence could tend to raise the passion of the jury, the specific prior bad acts were not more prejudicial than the evidence concerning the actual crime charged. *See State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) (finding challenged evidence "did not involve conduct any more sensational or disturbing" than acts charged). In cases of child sexual abuse, most of the evidence, by its nature, will be shocking and at least somewhat prejudicial.

Finally, despite the incriminating nature of S.M.'s testimony, we also find it is unlikely the jury based its decision on an improper ground. The trial court's limiting instruction cautioned the jury:

> Evidence has been received concerning other wrongful acts alleged to have been committed by the defendant against S.M. The defendant is not on trial for those acts.
>
> If you find by clear proof these 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.

Based on the specific circumstances of this case, we conclude the district court did not abuse its discretion in applying the balancing test and ruling S.M.'s testimony, as limited, should be allowed.[2]

III. Excluded Evidence—Facebook Photographs.

Parker argues the court erred in refusing to admit into evidence three Facebook photographs of A.B. and her mother. We review "standard claims of error in admission of evidence for an abuse of discretion." *State v. Stone*, 764 N.W.2d 545, 548 (Iowa 2009).

At the start of the trial, defense counsel notified the court it intended to introduce three, 2010-postings of photographs on Facebook. The photographs are not available for general viewing but were available for viewing by A.B.'s and her mother's Facebook friends. A.B. and her mother are Facebook friends. The photographs showed: (1) A.B. holding several condoms and her mother standing behind her; (2) A.B. inflating a condom like a balloon; and (3) A.B.'s mother making a gesture with her hand/face that could be interpreted as a sexual gesture.

Parker argues the photographs are "not Rape Shield protected. None of this is prior sexual conduct. It's not sexual conduct at all."

Iowa Rule of Evidence 5.412 is "the rape shield law" and it "prohibits introduction of reputation or opinion evidence of [a victim's] 'past sexual behavior'

[2] Alternatively, Parker argues S.M.'s testimony is not admissible under the "inextricably intertwined" doctrine. In *State v. Nelson*, 791 N.W.2d 414, 420 (Iowa 2010), the court ruled the "inextricably intertwined" doctrine permits admission of other crimes evidence "based on a special relationship between this evidence and the charged crime, regardless of the strictures of rule 5.404(*b*)." Because we have concluded the district court did not abuse its discretion in allowing S.M.'s testimony, as limited, under rule 5.404(*b*), we need not address this argument.

and substantially limits admissibility of evidence of specific instances of a complainant's past sexual behavior." *State v. Alberts*, 722 N.W.2d 402, 408 (Iowa 2006). The rule's purpose "is to protect the victim's privacy, encourage the reporting and prosecution of sex offenses, and prevent parties from delving into distractive, irrelevant matters." *Id*. at 409.

Additionally, Parker argues the photographs were necessary to show the relationship A.B. has with her mother and to impeach A.B.'s claim she was ashamed to talk with her mother about the abuse. Parker contends the photographs demonstrate the open relationship between A.B. and her mother.

The district court ruled the photographs involved "past sexual behavior" in violation of Iowa Rule of Evidence 5.412, and that counsel failed to give the required notice. Alternatively, the court ruled the photographs are not relevant and any probative value was substantially outweighed by a danger of unfair prejudice. *See* Iowa R. Evid. 5.403.

We do not address the rule 5.412 evidentiary issue because we agree with the district court's relevancy/probative value/unfair prejudice analysis under rule 5.403. The district court explained:

> The question to the witness [A.B.] was something about her being ashamed to tell her mom, either at the time this happened or the time it was reported. This allegedly happened nearly five years ago. It's currently May 18, 2010. The allegations are for conduct around the summer of 2005. And from what I can glean from the evidence at this point, the report was sometime in late '06 or early '07. That's . . . three years ago.
>
> The court finds specifically that whatever the relationship [A.B.] and her mom have today is not relevant to what their relationship might have been in the past. These photos are not relevant to whether or not this girl, when she was eleven—ten, eleven, twelve years old, was ashamed to talk to her mom. [These photos], at best, [are] three years down the road from that.

> So these pictures are not going to come in. . . . [U]nder a 403 balance I find that the probative value of this evidence, if any—and, quite frankly, I don't find it probative of anything at all given the time length that I've just summarized—is substantially outweighed by the danger of unfair prejudice.

We find no abuse of discretion. The 2010 Facebook photographs shed no light on whether A.B. had been ashamed to tell her mother about the sexual abuse she suffered as a young child, and the photographs were properly excluded.

IV. Ineffective Assistance of Counsel.

Parker also argues his counsel was ineffective by failing to demonstrate a reasonable basis to believe S.M.'s mental health records likely contained exculpatory evidence. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). This is not the "rare case" which allows us to decide ineffective assistance on direct appeal without an evidentiary hearing. *See State v. Straw*, 709, N.W.2d 128, 138 (Iowa 2006). We preserve Parker's claims of ineffective assistance of counsel for possible postconviction relief proceedings.

We have also considered Parker's other arguments for ineffective assistance of counsel set forth in his pro se brief. These arguments essentially claim his counsel was ineffective in not "allowing the C.D. video of" S.M. into evidence. We likewise preserve this claim for possible postconviction relief proceedings.

AFFIRMED.

Doyle, J., concurs; Mullins, J., concurs specially.

MULLINS, J. (concurring specially)

Although I agree with the result decided by the majority, I respectfully assert that I would affirm under a different analytical approach. I believe the trial court's reasoning for allowing the limited testimony of S.M. aligns closely with "the inextricably intertwined doctrine . . . as a narrow and limited exception to rule 5.404(*b*)" as explained in *State v. Nelson*, 791 N.W.2d 414, 423-24 (Iowa 2010). The testimony of S.M. was admissible as "evidence to complete the story of what happened when the other crimes, wrongs, or acts evidence [were] so closely related in time and place and so intimately connected to the crime charged that it form[ed] a continuous transaction." *Id.* at 423. Her testimony was necessary to complete the story of the crimes against A.B. as the court could not "sever this evidence from the narrative of the charged crime without leaving the narrative unintelligible, incomprehensible, confusing, or misleading." *Id.*