IN THE COURT OF APPEALS OF IOWA

No. 3-499 / 12-0574
Filed October 2, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID ROYCE,
Defendant-Appellant.

Appeal from the Iowa District Court for Greene County, Gary L. McMinimee, Judge.

David Royce appeals his convictions for second-degree sexual abuse. **AFFIRMED.**

James S. Nelsen, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Nicola J. Martino, County Attorney, and Laura Roan, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

David Royce was convicted of three counts of second-degree sexual abuse. The trial court entered a judgment of acquittal on one count, finding no evidence established that the complaining witness was under the age of twelve at the time of the sexual abuse alleged in that count. On appeal, Royce contends the district court abused its discretion in denying his motions for mistrial and new trial based on allegations of juror misconduct and prosecutorial misconduct, and in admitting expert witness testimony concerning delayed reporting of sexual abuse. We find no abuse of discretion in the trial court's overruling the defendant's motions for new trial based on his claims of juror and prosecutorial misconduct. The general subject of the expert's testimony has been found to be proper, and the expert did not testify as to the credibility of the complaining witness. We therefore affirm the convictions.

I. Background Facts and Proceedings.

Twenty-five-year-old R.R. is the daughter of the defendant, David Royce. R.R. was born in 1986. In January 2010, R.R. disclosed that Royce sexually abused her beginning when she was six or seven years old and stopping before she reached puberty when she was twelve or thirteen.

At trial, R.R. testified she kept the sexual abuse a secret because she "was scared of my dad" and "didn't want to hurt my family." She stated her first memory of abuse was when she was six or seven years old. Royce touched her breasts and vagina while she was on the bed in her parents' bedroom in Rippey, Iowa. Royce told her not to tell anyone. She felt "sick and confused and

overwhelmed." R.R. stated she did not tell her mother because she did not want to hurt her—"I was afraid I was going to ruin her life."

The family moved to a farm house outside of Rippey in September 1994, where they lived until February 1995. R.R. testified Royce sexually abused her there. She recalled that while in the "first room" upstairs, Royce once made her fondle his penis. Her mother walked up the stairs and they quickly "sat on the edge of the bed like nothing happened."

On another occasion, Royce and R.R. were in the "second room, the back room" of the house and he made her suck his penis. She felt "dirty and sick and horrible." She testified again that she did not tell her mother because she was scared and did not want to hurt her family.

Royce's family then moved to Grand Junction, Iowa, where the family lived until 2009. R.R. testified Royce committed sex acts upon her at the Grand Junction house.

> I remember us two in the downstairs bathroom, which was very small and there was a little ledge by the sink and he put me on that and he shoved his penis in my butt and my head hit the wall and it hurt and I cried a lot and I felt so sick to my stomach and overwhelmed and traumatized.

R.R. recalled another incident that occurred in the Grand Junction house.

> It was in our living room and my dad and I were on the couch and he was in his underwear and I was too, . . . and he was like on top of me and I remember my—seeing my sister and she saw it and my dad yelled at her to get back upstairs . . . .

R.R. stated that her sister, S.R., who was almost five years younger, was between eight and ten years old when this occurred. The two sisters did not speak of what S.R. had seen until 2010.

R.R. recalled another incident in which they were on her parents' bed in Grand Junction, and Royce penetrated her anally as she cried and begged him to stop. She also remembered Royce once ejaculated on her abdomen. R.R. did not remember the defendant ever forcing her to submit to vaginal intercourse.

R.R. testified that she had a good relationship with her mother, her sister, and her grandmother. She stated she did not want to tell her grandmother "because I always been close to her and I knew she probably would have a heart attack or something." She also testified she sometimes got along with her father when growing up and it did not make sense to her that he could abuse her and yet be nice to her at times.

R.R. stated her father stopped the sexual abuse when she was twelve or thirteen and did not ever speak about the sex acts. She was asked about two telephone voice messages Royce left for her in January 2010 after the investigation of R.R.'s allegations had begun. The transcriptions of those messages were submitted as an exhibit, which read:

> [R.R.], please come home. I love you. Please. I want to talk to you. Please call me back or come home.
>
> [R.R.], I just wanted to tell you that I'm really sorry if I did anything to hurt cha. Can you find it in your heart to forgive me? Please come home. Don't leave like this 'cause we don't want to hurt Mommy and Grandma and everybody. If you want to get a place of your own and get a job, that's fine. Please don't, don't leave like this. Come home, please.

S.R. testified that she recalled an incident when the family was living in Grand Junction when she was eight years old and R.R. was twelve. She and R.R. were playing in their room when R.R. said she was going downstairs to get

a drink of water. S.R. heard Royce call R.R. into the living room. She began to wonder why it was taking her sister so long to come back upstairs to play, so she walked downstairs. S.R. saw R.R. "laying on the floor and my dad laying on top of her and his pants down to his ankles." They were in the living room by a green couch. Royce ordered S.R. to go back upstairs, so she complied. When R.R. came upstairs, S.R. asked R.R. what had happened. R.R. responded, "I don't want to talk about it," and got into the shower. The sisters did not discuss the subject again during their childhood. S.R. was her father's favorite. S.R. did not tell her mother or anyone else because she did not want to "break up the family." S.R. did report her memory to her mother and the police in 2010 after R.R. reported sexual abuse by Royce.

The girls' mother and Royce's former wife also testified at trial. She stated she had no knowledge of the sexual abuse before R.R. disclosed it in 2010. The mother testified that although she used birth control pills and the couple never used condoms after they were married, she once found a condom in her husband's dresser in Grand Junction. She divorced Royce after R.R. disclosed the sexual abuse.

Over Royce's objection, the court allowed the testimony of Lana Herteen, a forensic interviewer and licensed mental health counselor. She did not testify as to the specifics of the case, but discussed the dynamics of delayed disclosure in child sexual abuse cases generally. Herteen explained that most children do not report sexual abuse immediately, citing a number of factors, including the

likelihood he or she will be believed, the effect on the family, the relationship with the perpetrator, and threats or power and control issues.

Royce did not testify at trial, nor call any witnesses on his behalf.

During closing arguments, the prosecutor said:

> Ladies and gentlemen, [R.R] testified, that all told, the Defendant perpetrated sex acts upon her when she was under the age of 12, about 10 times. That's the childhood she had. Now, you can say that there is some other reason that she's alleging these crimes against her father that somehow as a 22-year old or 23-year old woman, daughter, she decided she wanted her parents to get a divorce. So you'll have to decide, based on your common sense, whether she would risk all this and committing perjury on the stand to get her parents to end their marriage and only you can decide whether that makes sense that she is sophisticated enough to have such a scheming and insidious and elaborate motive to come in here and try to convince us he committed these sex acts against her when she was a mere girl. Only you can decide that in this case. She had a secret and that's what the evidence shows. This isn't a made up story. It's not a scam or a scheme. It's not pulling the wool over our eyes. It's not a collusion between her, her sister and her mother and perhaps the defense will tell you because her younger sister [S.R.] fumbled and bumped through parts of her deposition and when she was on the stand about whether she and her mom told [S.R.] and then [S.R.] said, yes, that's right. I saw it too or whether she and [R.R] — [S.R.] and [R.R] talked about it and she told [R.R] she saw it and then they went and told mom. You have to determine, whether that means it didn't happen. Because I'll assert to you that [S.R.] is certainly someone who cannot be coached and certainly wouldn't be a participant in an elaborate scheme because that's the troubling—

The defense objected and moved for a mistrial, contending the prosecutor had improperly vouched for the credibility of R.R. and S.R. The court noted "the language used was a poor choice," but concluded the statements were not "so prejudicial as to warrant a mistrial." The court offered to give a curative instruction. The defense noted that the instructions already given included the caution that arguments of counsel are not to be considered as evidence.

Defense counsel stated further, "I don't want to overemphasize that particular statement. So at this point, I don't know that an additional instruction is necessary if it's already been read to them."

On the morning after the case was submitted to the jury, one of the jurors, R.C., spoke to the court attendant and then submitted a hand-written note to the court, which reads:

> Very sorry about this. [The mother is] listed in the [ ] alumni directory (Class of 1977) was a former student of mine while I taught in the [ ] school system. I did not recognize her at any time during these trial days. I had not seen her since 1977. She was a very quiet person. I did not know this until this morning. If you have any further questions, please feel free to quiz me. AGAIN, very, very sorry.

Along with the note, was a 1994 area alumni directory open to page eleven. There was no picture, but the mother's name appeared with a Rippey address.

The court assembled the lawyers and defendant in chambers to discuss the matter. Royce moved for a mistrial on grounds the juror had done outside research and had tainted the jury with facts not in evidence. The court denied the defendant's request for a mistrial as "it doesn't appear there was any misconduct or wrongdoing or misrepresentations on the part" of the juror. Sometime later, the same juror approached the court attendant and stated, "[W]e are wondering why it's taking so long to hear about the note." Further discussion was had by the court and counsel. The court directed the jury to continue its deliberations.

Royce was convicted of three counts of second-degree sexual abuse. The trial court entered a judgment of acquittal on Count III, finding no evidence

established that R.R. was under the age of twelve at the time of the sexual abuse alleged to have occurred when the family lived in Grand Junction.

Royce now appeals, contending the district court abused its discretion in denying his motions for mistrial based on allegations of juror misconduct and prosecutorial misconduct, and in admitting Herteen's expert testimony.[1]

II. Scope and Standard of Review.

We review rulings on a motion for mistrial based on alleged juror misconduct for an abuse of discretion. *State v*. *Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). An abuse of discretion is found only when the ruling was "clearly unreasonable." *Id*. To the extent the defendant raises a constitutional issue, our review is de novo. *State v*. *Clark*, 814 N.W.2d 551, 560 (Iowa 2012).

Prosecutorial misconduct claims are reviewed for an abuse of the trial court's discretion. *State v*. *Greene*, 592 N.W.2d 24, 30-31 (Iowa 1999).

We review evidentiary rulings for an abuse of discretion. *See State v*. *Richards*, 809 N.W.2d 80, 89 (Iowa 2012). "When a trial court has exercised its discretion to admit expert testimony, we will reverse only if we find an abuse of that discretion and prejudice." *State v*. *Myers*, 382 N.W.2d 91, 93 (Iowa 1986).

III. Discussion.

A. *Juror Misconduct Claim*.

Royce filed a motion for new trial again asserting juror misconduct. Included with the motion was the affidavit of a private investigator who avowed

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[1] Our review has been made more difficult by an all too frequent error in compiling the appendix—failure to place a witness's name at the top of each appendix page where that witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(c).

that he located the juror, R.C., and further that R.C. told the investigator that his wife approached him, contending he had taught the complaining witness's mother. R.C. responded he did not think so, but after his wife talked to him again, R.C.

> looked her up in the alumni book and realized he did in fact have her as a student.
>
> That he saw the victim's grandfather, who he knew, sitting in the court room.
>
> That the family are good people.
>
> That when he did confirm that he knew the victim's mother, he took the alumni book to the Clerk and the Judge to let them know the situation.
>
> That while the jury was waiting for the Judge to decide what to do, he discussed the situation with the jury members and stated he knew the family and that he had had the victim's mother as a student.

The trial court denied the motion for new trial, ruling: "Juror [R.C.]'s misconduct was not calculated to influence the verdict and it is not at all likely that it did. [R.R.]'s mother's testimony was largely tangential to the contested issues in this case."

The defendant vigorously argues that the juror improperly injected evidence that the witness, the mother, was of good character and good credibility. Royce argues that because this case hinges on the credibility of witnesses, the juror's statement, the "family are good people," indicates the juror was more inclined to believe the witness and the witness's daughters. The affidavit of the private investigator suggests the juror told the investigator that "the family are good people," but the affidavit does not state that the juror made such a statement to other jury members. Rather, we observe the affidavit notes only that the juror told the other jury members "he knew the family and that he

had had the victim's mother as a student."[2]

The trial court may grant a motion for mistrial if it concludes three conditions occurred:

> First, the evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct. Second, the acts or statements complained of must exceed tolerable bounds of jury deliberation. Third, and finally, it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

State v. *Wells*, 437 N.W.2d 575, 580 (Iowa 1989) (citing *State v*. *Cullen*, 357 N.W.2d 24, 27 (Iowa 1984));[3] *see also* Iowa R. Crim. P. 2.24(2)(b)(3) (permitting a new trial when the jury has committed misconduct).

In determining whether extraneous material was calculated to, and probably did, influence the verdict, the standard is "whether the material was of a type more likely than not to implant prejudice of an indelible nature upon the mind." *State v*. *Henning*, 545 N.W.2d 322, 324-25 (Iowa 1996). The impact of the information is viewed objectively to determine whether it would prejudice a typical juror. *Id*. at 325. In *Henning*, the defendant was charged with vehicular homicide. *See id*. at 323. During an interruption in the jury trial, several jurors

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[2] Even if the comment "the family are good people" was told to other jurors, Royce himself was not excluded from that description, and it was also fairly consistent with defense counsel's opening statement contending the family was a "completely normal family."

[3] The *Wells* court observed the first prong was revised in *Ryan v*. *Arneson*, 422 N.W.2d 491, 495 (Iowa 1988), "through an interpretation of Iowa Rule of Evidence 606(b)." 437 N.W.2d at 580.

> We determined that under this rule jurors are not competent to testify as to internal deliberations, even if those deliberations could be classified as objective. [*Ryan*, 422 N.W.2d at 495.] Jurors are, of course, still competent to testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Iowa R. Evid. 606(b).

Wells, 437 N.W.2d at 580.

learned that the defendant had three prior convictions for operating while intoxicated. *See id*. at 324. On appeal, the court found this information required retrial, writing:

> We are convinced that the nature of the improper information to which the jury was subjected in the present case was sufficiently prejudicial to deny defendant a fair trial. This information went beyond merely advising the jurors that defendant had been guilty of bad acts other than the one alleged in the present case. It demonstrated that he was a habitual operator of a motor vehicle while under the influence of intoxicants. The question of whether defendant was operating his motor vehicle while under the influence at the time of the events leading to the present charge was a paramount issue in the case. Within this context, we find that it was very likely the evidence of defendant's prior convictions would prejudice the views of a typical juror concerning whether defendant was also under the influence on this occasion.

Id. at 325.

Here, the juror properly reported to the court what had transpired as he was admonished to do throughout the trial, and the trial court found no basis to grant the motion for new trial. The juror informed the court that he belatedly discovered he had taught one of the witnesses many years ago. Defense counsel objected to the suggestion that the court make a further inquiry with the juror beyond the contents of the hand-written note. The court's reasoning, that the mother's testimony was "largely tangential to the contested issues in this case," is not clearly unreasonable. Though the outside communication was improper, the information that the juror taught a witness years ago does not appear to be of the type "calculated to, and with reasonable probability did, influence the verdict." We reach the same conclusion relative to the use of the alumni directory. We find no abuse of the trial court's discretion.

B. Prosecutorial Misconduct.

Royce next complains that the court erred in denying his motions for mistrial and new trial based on his claim of prosecutorial misconduct. "The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct." *State v*. *Graves*, 668 N.W.2d 860, 869 (Iowa 2003). The second element "is proof the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial." *Id*.

> In determining prejudice the court looks at several factors "within the context of the entire trial." We consider (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct.

Id. (citations omitted).

In closing arguments a prosecutor is entitled to some latitude in analyzing the evidence admitted at trial. *Id.* at 874. A prosecutor "may argue the reasonable inferences and conclusions to be drawn from the evidence." *Id*. However, a prosecutor may not express his or her personal beliefs. *Id*. The prosecutor is "precluded from using argument to vouch personally as to a . . . witness's credibility." *Id*. (citation and internal quotation marks omitted).

Royce contends the prosecutor improperly vouched for a witness's credibility by stating in closing argument, "You have to determine whether that means it didn't happen. Because I'll assert to you that [S.R.] is certainly someone who cannot be coached and certainly wouldn't be a participant in an elaborate scheme." The trial court denied Royce's mistrial motion, ruling

although "the language used was a poor choice," it was not "so prejudicial as to warrant a mistrial." Defense counsel declined the trial court's offer to provide a curative instruction, relying upon the instruction already given that arguments of counsel are not to be considered evidence.

The trial court has "broad discretion" in determining whether prejudice results from asserted misconduct. *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa Ct. App. 1997). "As a firsthand observer to both the claimed misconduct and any reaction by the jury, the trial court is better equipped than an appellate court to determine the presence of prejudice." *Id*. The trial court found that "[c]onsidering the prosecutor's final argument as a whole, the prosecutor did not personally vouch for the credibility of any witness."

The defense's cross-examination of the complaining witness and her sister centered upon their possible motives for wanting their mother to divorce their father. There were also several questions to S.R. related to her pretrial discussions with her sister and her mother, and if she recalled the events she testified to, or was simply told a story by her sister or mother. After asking S.R. about such pretrial discussions, defense counsel specifically asked S.R.:

> Q. You guys sit around and talk about different things about the case; is that fair to say? A. Yes.
> Q. And do you discuss memories that you've maybe come up with? A. Yes.

While the prosecutor's statement might be interpreted as vouching for the sister's credibility, it was in context with the evidence and can be viewed as a comment on the evidence.

When argument resumed after the objection, the prosecutor reiterated that

"only you can decide that these three women have created this scheme in order to get away from David Lee Royce" and "you are the sole judges of the truth." Defense counsel rejected additional cautionary instructions because as counsel noted, the instructions already stated that arguments of counsel were not evidence. We cannot say that there is a reasonable probability the prosecutor's single comment "prejudiced, inflamed, or misled the jurors so as to prompt them to convict the defendant for reasons other than the evidence introduced at trial and the law as contained in the court's instructions." *See Graves*, 668 N.W.2d at 877. We find no abuse of discretion.

C. Expert Witness Testimony.

Royce finally argues the court erred in allowing the testimony of Lana Herteen. Iowa Rule of Evidence 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

> We take a liberal approach to the admissibility of expert testimony, giving considerable deference to the trial court's exercise of its discretion. *Mensink v. Am. Grain*, 564 N.W.2d 376, 380 (Iowa 1997). Expert testimony directly expressing an opinion on the credibility of a witness is not admissible. *State v. Pansegrau*, 524 N.W.2d 207, 210 (Iowa Ct. App. 1994). However, expert witnesses may express opinions on matters explaining the pertinent mental and physical symptoms of the victims of abuse. *Id*. "There is a fine but essential line between testimony that is helpful to the jury and an opinion that merely conveys a conclusion concerning the defendant's guilt." *Id*. at 210–11.

State v. Allen, 565 N.W.2d 333, 338 (Iowa 1997).

In *State v. Meyers*, 799 N.W.2d 132, 146 (Iowa 2011), our supreme court

summarized cases addressing expert testimony in cases analogous to the case before us:

> Expert testimony may be used to assist a fact finder in determining a victim's state of mind as long as the expert does not testify to the ultimate fact of the defendant's guilt or innocence. *See State v*. *Griffin*, 564 N.W.2d 370, 374–75 (Iowa 1997) (recognizing evidence of battered women's syndrome from expert is admissible to show psychological reason for victim's recanting of accusation and refusal to testify against defendant); *see also Allen*, 565 N.W.2d at 338 (holding expert witnesses "may express opinions on matters explaining the pertinent mental and physical symptoms of the victims of abuse" if expert testified about the effects of the victim's mental condition on her ability to tell the truth); *State v*. *Gettier*, 438 N.W.2d 1, 6 (Iowa 1989) (approving expert testimony linked to an explanation of PTSD and the typical reaction of a rape victim); *State v*. *Chancy*, 391 N.W.2d 231, 234 (Iowa 1986) (noting in third-degree sex abuse trial that "there seems to be no question about the potential of psychological evidence in the present case to assist the trier of fact[, and] [t]he victim's lack of mental capacity is . . . key element in the crime charged").

In *Myers*, 382 N.W.2d at 97, the court observed "it seems experts will be allowed to express opinions on matters that explain relevant mental and psychological symptoms present in sexually abused children," but such experts will not be allowed to opine on matters "that either directly or indirectly renders an opinion on the credibility or truthfulness of a witness."

In *State v*. *Payton*, 481 N.W.2d 325, 327 (Iowa 1992), the Iowa Supreme Court found that the general subject of an expert witness's testimony explaining why child sex abuse victims often delay reporting it "is proper for expert testimony." And in *Pansegrau*, 524 N.W.2d at 210–11, we explained that "[i]n several cases involving children, there has been limited approval of allowing testimony that explains normal behavior following abuse." For example, in *State*

v. *Seevanhsa*, 495 N.W.2d 354, 357 (Iowa Ct. App. 1992), we allowed expert testimony regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). This court stated,

> In the case before us, the expert limited her discussion of CSAAS to generalities. She did not testify she believed the complainant was credible nor did she testify that she believed the complainant had been sexually abused. She limited her discussion to an explanation of the symptoms common to children who have been sexually abused.

Seevanhsa, 495 N.W.2d at 357.

In *State v*. *Tonn*, 441 N.W.2d 403, 404–05 (Iowa Ct. App. 1989), the issue of expert witness testimony was raised by the defendant contending his counsel was ineffective in not objecting to the following evidence:

> The challenged testimony was given by a clinical psychologist of the Des Moines Child Guidance Center who testified as a witness for the State. She testified often child victims repeatedly expose themselves to abuse out of a lack of knowledge that the relationship is illegal or abusive. Occasionally, victims derive pleasure from the relationship. She said in this specific case the children she interviewed did enjoy some aspects of their relationship with the person they have alleged abused them, and in the beginning did not really have the sense that what was going on was wrong; and as time went on became more aware of that.

We determined that the opinion evidence "could help the jury in understanding the evidence because it explained the delayed reporting symptom that existed in children who were sexually abused" and was not "necessarily inadmissible." *Tonn*, 441 N.W.2d at 405.

In *Gettier*, 438 N.W.2d at 6, the Iowa court found no abuse of discretion when the trial court allowed testimony of a psychologist "as to what she considered typical symptoms exhibited by a person after being traumatized and no more." The *Gettier* court noted:

> Our review of the case law indicates that the majority of jurisdictions find no abuse of discretion in the admission of expert testimony limited to an explanation of the effects of PTSD and the typical reaction of a rape victim. This is an almost unanimous uniform rule when the expert neither uses the term "rape trauma syndrome" nor offers an opinion on whether the victim had been raped.

438 N.W.2d at 5-6. We said in *Pansegrau*, 524 N.W.2d at 211, "A careful review of *Gettier* instructs that the Iowa court has carefully limited the admission of similar testimony and set guide rules for the credentials of the expert as well as limiting the testimony only to the reaction to trauma."

Here, Herteen testified generally as to the mental state of child sex abuse victims and why they may delay reporting sex abuse. She did not interview the complaining witness and offered no testimony as to the truthfulness of R.R.'s testimony or whether sexual abuse did or did not occur. She also did not testify if allegations of child sex abuse are generally true or not true. The defense vigorously cross-examined Ms. Herteen. The evidence was helpful and relevant to the jury in making their decision upon the right reasons—the evidence presented—and not based upon a common misconception or myth that delayed reporting necessarily means the claim is false. The jury was still required to determine if the complaining witness was credible and if there was proof beyond a reasonable doubt that Royce committed the alleged offenses. We find the trial court did not abuse its discretion in allowing the testimony.

AFFIRMED.