IN THE COURT OF APPEALS OF IOWA

No. 3-636 / 12-1256
Filed August 21, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES DEAN WHITE,
Defendant-Appellant.

Appeal from the Iowa District Court for Page County, Richard H. Davidson, Judge.

Defendant appeals his convictions arguing counsel rendered ineffective assistance and the court erred in admitting challenged evidence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Teresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich and Becky Goettsch, Assistant Attorneys General, and Jeremy Peterson, County Attorney, for appellee

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

A Page County jury convicted Charles Dean White of three counts of second-degree sexual abuse and one count of lascivious acts with a child for offenses committed against his seven-year-old granddaughter, R.A. White now questions the effectiveness of his legal representation, alleging counsel should have challenged the undifferentiated charges and identical marshalling instructions for the three sexual abuse counts. White also argues his lawyer was remiss in not objecting to the prosecutor's reference to "free molests" during closing argument. Finally, White asserts he was prejudiced by the admission of testimony from his grandson who saw him masturbating.

I. Background Facts and Proceedings

While Colleen Z. worked long days as a care coordinator at a medical clinic her sixty-five-year-old father, Charlie, babysat for her six children: thirteen-year-old S.A.; twelve-year-old T.A.; ten-year-old J.A.; seven-year-old twins, H.A. and R.A.; and six-year-old K.A. The children noticed their grandfather paid more attention to R.A. than to her siblings.

When R.A. was in first grade, she watched a video at school encouraging children to "speak up" about inappropriate touching. Armed with that information, R.A. approached her mother when she returned home from work the evening of March 23, 2011. The little girl followed her mother around the kitchen, saying: she needed to tell her "something that was bad and inappropriate." Colleen asked her: "What do you mean inappropriate?" The girl pointed at her grandfather, who was standing in an adjoining room. Colleen asked her father:

"Do you know what she's talking about?" White responded by running out the back door.

After her grandfather left, R.A. told her mother "she didn't want to be Grandpa's girlfriend anymore and she didn't like sexing her grandpa boyfriend." Colleen called a therapist friend, who came over to talk to R.A. Later that night, the women called a local child welfare agency and the police. Colleen also took R.A. for a physical examination. A pediatric assault nurse examiner found an abrasion on R.A.'s right vestibular wall and a linear area of hypopigmentation in the posterior fourchette region, which is anterior to the hymen. The nurse said the girl's vaginal injuries were consistent with blunt force penetrating trauma. R.A. confided in the nurse that "Grandpa Charlie, he put it in the back and in the front."

The State charged White with three counts of sexual abuse in the second degree, class "B" felonies, in violation of Iowa Code sections 709.1 and 709.3(2) (2009), and one count of lascivious acts with a child, a class "C" felony, in violation of section 709.8.

White's trial commenced on April 10, 2012. On the witness stand, R.A. recalled her grandfather coming into her bed where she would try to "scooch away" but could not. R.A. said her grandfather would rub his "front stuff" (her word for penis) against her "back cushions" (her term for buttocks). R.A. also recounted incidents of abuse which occurred in her mother's bedroom, when her grandfather "would flop me over so my tummy was on the bed, . . . and then usually he would rub his front stuff against my back cushions." She said it felt

"weird" but she could not tell him to stop because she "couldn't exactly breathe" or speak.

R.A. told the jury her grandfather also laid on top of her on the bathroom floor and "then usually would rub his front stuff against [her] front." The girl also remembered incidents on the couch when White "would flip [her] on [her] back, and rub his front stuff against her front stuff." R.A. said during these times, her grandfather "would try to tongue kiss," but she would keep her mouth closed. She further recalled her grandfather rubbing his front part against her front part on the kitchen floor. Sometimes when she sat on the kitchen counter, her grandfather would stand between her open legs and "do this weird breathing" in her ear—"like if you just run a hundred meter dash and breathe really hard."

Her grandfather also molested her on the living room couch, according to R.A.'s testimony. She said while they were under a blanket he would "stick" his finger in her "vajayjay" (her word for vagina), which was painful. R.A. also testified her grandfather would rub her "front part" when he was helping her take a bath, which was also painful.

R.A. then told the jury about sexual contact with White in the laundry room: "[T]his is the part where my pants came off." She recalled her grandfather closing the lid on the washer, where she would sit with her legs open and knees bent "and he would start sucking on my front part. . . . He would take off my underwear, but then he would leave, like part of my clothes dangling on one leg." R.A. remembered this happening in the laundry room more than once.

One time, R.A's twin sister, H.A., walked into the laundry room and saw their grandfather engaging in oral sex with R.A. on the washer. R.A. ran after H.A. and made her promise not to tell anyone "because if she did, something bad would happen and people would make fun of us. They wouldn't believe us." H.A. confirmed on the witness stand that she had seen "[R.A.] and Grandpa doing the most gross thing" while R.A. was sitting on the washer. She also said she witnessed other encounters between her sister and grandfather where they would lay in the bed or on the floor and "hold each other and just lay there."

R.A. testified she never saw her grandfather's penis, but once when she went to the bathroom after he had been rubbing against her bare skin she wiped "gooey white stuff" from her buttocks. She also remembers it being painful to have a bowel movement after he had rubbed his penis against her buttocks.

A criminalist testified a crime scene team found no trace of White's seminal fluid in Colleen's house. White took the stand and denied engaging in sex acts with R.A.

The jury returned guilty verdicts on all three counts of sexual abuse in the second degree, as well as the single count of lascivious acts. The court sentenced White to concurrent terms on the sexual abuse offenses to run consecutively to the lascivious acts offense, for an indeterminate term of thirty-five years. White now appeals.

II. Analysis

A. Ineffective assistance of counsel

White claims his trial attorney was ineffective in two ways: (1) failing to object to the undifferentiated sexual abuse counts in the trial information and marshalling instructions and (2) failing to object to a reference to "free molests" in the prosecutor's closing argument. Our review is de novo. *State v. See*, 805 N.W.2d 605, 606 (Iowa Ct. App. 2011). While it is our general practice to preserve ineffective-assistance claims for possible postconviction relief proceedings, we will decide these claims on direct appeal if the record shows as a matter of law the defendant cannot prevail. *Id*. In this case, the record allows us to reject White's claims.

The familiar test for gauging the effectiveness of counsel comes from *Strickland v. Washington*, 466 U.S. 668 (1984). White bears the burden to show (1) counsel breached an essential duty and (2) prejudice resulted. *See Strickland*, 466 U.S. at 687. On the breach of duty prong, White must demonstrate his trial attorney performed below the standard demanded of a "reasonably competent attorney." *See id.* at 687; *Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012) (measuring counsel's performance by prevailing professional norms). To meet the prejudice prong, White must show his counsel's errors deprived him of a fair trial. *See Strickland,* 466 U.S. at 687. Counsel's omissions must have impacted the judgment; therefore, White must show "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *See Lamasters*, 821 N.W.2d at 866.

1. Undifferentiated counts

White argues effective trial counsel would have objected to the identical charges and marshalling instructions for all three counts of sexual abuse in the second degree. White acknowledges the minutes of evidence alleged several different sex acts but asserts "the trial information itself is unclear as to which acts the State was relying upon for each count." All three of the sex abuse counts included the same language:

> The said Charles Dean White from on or about or between January 1, 2009 and March 23, 2011, in Essex, Page County, Iowa, did perform a sex act, separate and distinct from the actions in [the other three counts] on a seven year old child, R.A. in violation of Sections 709.1 and 709.3(2) of the Iowa Criminal Code.

White also argues the marshalling instructions provided the jurors "no guidance as to the specific act alleged, the location alleged, or the date alleged within the applicable time span."

Our court recently addressed a very similar complaint from a defendant convicted of three counts of sexual abuse in the second degree. *State v. See*, 805 N.W.2d at 605.[1] We said:

> To avoid a violation of a criminal defendant's right to due process of law, an indictment or trial information and its accompanying minutes of evidence that charges a defendant with multiple counts of the same crime should in some manner differentiate among the charges. *See Valentine v. Konteh,* 395 F.3d 626, 630–31 (6th Cir. 2005). Instructions to the jury should similarly differentiate among the charges. *See id.* at 628, 631

[1] We recognize the trial in this case occurred in June 2011, predating our September 8, 2011 decision in *See*.

> (finding a violation of "Valentine's rights to notice and his right to be protected from double jeopardy" where the prosecution did not distinguish the underlying "factual bases of these charges in the indictment, in the bill of particulars, or even at trial").

Id. at 607.

As we emphasized in *See*, the better practice is to differentiate the acts constituting the separate offenses charged in both the trial information and the marshalling instructions. *Id*. Specificity by differentiation gives the defendant notice of what he must defend against, reduces the defendant's exposure to double jeopardy, and avoids confounding the jury. *Id*.

But our bottom line here is the same as the result in *See*. Assuming, without deciding, counsel breached a material duty in failing to object to the undifferentiated charges and instructions, White is unable to establish *Strickland* prejudice. *See id*. at 607.

The minutes of evidence detailed R.A.'s many allegations of sex acts committed by White—supporting at least three counts of sexual abuse in the second degree. If counsel had sought and the State had provided a bill of particulars, White's defense strategy would not have changed. He did not raise an alibi defense. Rather, White outright denied inappropriately touching R.A. in his interview with authorities and again denied doing so in his trial testimony. White cannot show a reasonable probability of a different outcome had his counsel urged more precision in the charging instrument.

Likewise, White cannot show a reasonable probability the jury would have reached different verdicts if the marshalling instructions had described distinct acts for each count. *See State v. Delap*, 466 N.W.2d 264, 266 (Iowa Ct. App.

1990) (finding counsel's failure to object to assault instructions did not substantially disadvantage Delap's defense when evidence at trial delineated several confrontations). The jury heard clear testimony from R.A. describing how her grandfather had sexual contact with her in many rooms of her house. Her twin sister testified to seeing "gross" interactions between White and R.A. Other siblings confirmed White was "very hands on" with R.A. Physical injuries discovered by the nurse examiner also corroborated R.A.'s reports. In her closing argument the prosecutor explained how more than three of the incidents described by R.A. met the statutory definition of sex act. The court instructed the jury to decide White's guilt or innocence separately on each count. On this record, White cannot show counsel's inaction caused him prejudice.

2. Prosecutor's closing argument

In closing argument, the prosecutor discussed the definition of sex act. She reminded the jury "penetration is not required"—and acknowledged "there was some discussion about, you know, how far did it go or was it all the way in."

The prosecutor then argued:

> Thank goodness, we don't have to talk about that. If there's contact between genital and anus or genital and genital or mouth to the genitals, good enough. That counts as a sex act. And we've only charged three counts, so it's a little bit of your choice as to how you plug all of these sex acts that [R.A.] described for you into these guilty verdicts.
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> . . . There's multiple acts. You heard her describe many different acts in many different rooms. We only charge three because we're only asking that you convict him of those things that are very clear and very consistent, because we know that seven-year-olds who have been molested over a long period of time are going to have difficulties recalling every single act, exactly how it went down and where.

> *So does that mean that the defendant got some free molests here? Yes, he did*. We're only asking for three, and there's multiple ones to pick from.

(Emphasis added.)

White contends his trial counsel had a material duty to object to the prosecutor's remark about "free molests"—arguing the jurors were likely to assume defendant was "getting off easy" because he could have been charged with additional counts. He cites *State v. Castaneda*, 621 N.W.2d 435, 441–42 (Iowa 2001), to highlight the risk a jury will return a verdict based on uncharged misconduct. But *Castaneda* is somewhat off point. The question there was whether the trial court wrongly allowed testimony concerning Castaneda's prior sexual acts with someone other than the victim. *Constaneda*, 621 N.W.2d at 439–41. In contrast, we are not concerned here with the admissibility of R.A.'s allegations of repeated molestations by her grandfather. R.A.'s testimony is not other bad acts evidence but rather evidence of "continual sexual activity" properly proffered to prove sexual abuse occurred on three separate occasions. *See State v. Bowers*, 656 N.W.2d 349, 354 (Iowa 2002); *see also State v. Nelson*, 791 N.W.2d 414, 423 (Iowa 2010) (recognizing a narrow exception to other-bad-acts evidence for acts inextricably intertwined with charged conduct). White did not object to such evidence at trial and is not doing so on appeal.

The question White raises on appeal is whether the prosecutor erred in commenting on the fact that R.A. accused her grandfather of committing more sex acts than are reflected in the charged offenses. Under *Bowers*, the closing argument challenged by White did not constitute reversible error. In *Bowers*, a

young boy testified he was sexually abused by his mother and stepfather one to three times per week for one year. 656 N.W.2d at 351. The prosecutor in *Bowers* argued in closing: "We charged four counts. They are probably undercharged. We could have charged 50 counts, but certainly the pretty much conclusive evidence would be that at a very minimum there has to be at least four counts on each." *Id*. at 355. The *Bowers* court concluded: "Because we have found this evidence was properly admitted, it was not improper for the prosecutor to comment on it. Defendant's counsel was not ineffective in failing to challenge these statements of the prosecutor." *Id*.

By saying White "got some free molests," the prosecutor was telling the jury the case was "probably undercharged." While the prosecutor's phraseology may have been too flippant, this single isolated comment did not taint the proceedings. Prosecutors should not use arguments calculated to inflame the passions of the jury. *State v. Blanks*, 479 N.W.2d 601, 604 (Iowa Ct. App. 1991). But at the same time, they do not need to check their personalities at the courtroom door. *See State v. Hickman*, 193 N.W. 21, 28 (Iowa 1923) ("Usually the attorneys upon either side are quite evenly matched, and it would be unfair to permit defense attorneys to soar and hold the state's attorneys too close to the earth."). White's attorney could accurately assess the comparative advantages and disadvantages of calling attention to the prosecutor's "free molests" reference. *See State v. Graves*, 668 N.W.2d 860, 882 (Iowa 2003) (recognizing it could be a sound trial tactic to let prosecutor's isolated comment go without

objection). Finding no breach of duty, we reject this claim of ineffective assistant of counsel.

B. Admission of masturbation evidence

R.A. testified after her grandfather was done touching her, he usually would go in the bathroom and shut the door. The seven-year-old assumed he was "go[ing] to the toilet" because that was what people usually do in the bathroom. R.A. testified her grandfather did not always retreat to the bathroom after engaging in sex acts with her, but sometimes he touched his penis to her buttocks "really fast so he could go to the bathroom."

R.A.'s older brother, T.A., testified one day he inadvertently walked in on his grandfather masturbating in the bathroom when his grandfather was at their house to babysit. Older sister S.A. remembers T.A. telling her about seeing their grandfather masturbating.

White sought to exclude the masturbation evidence by filing a pretrial motion in limine. The district court denied the motion, finding T.A.'s testimony relevant and not unduly prejudicial.[2] The court reasoned the testimony was "consistent with the State's theory the defendant did not always ejaculate during the alleged abuse and also the State's theory the defendant would then retreat to the bathroom."

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[2] The State questions whether the district court's limine ruling constituted a final determination of the admissibility of the masturbation evidence because the judge said it was his "intent" to allow the boy's testimony. When read in context, we believe the court's ruling settled the admissibility question and could be relied upon to preserve error without further objection. *See State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa Ct. App. 1997).

On appeal, White argues the evidence of masturbation was "irrelevant to the charges, likely to shock the jury, and highly prejudicial." White contends the district court should have excluded the evidence under Iowa Rules of Evidence 5.401,[3] 5.402,[4] 5.403,[5] and 5.404(b).[6]

The State counters:

> [T]his testimony was relevant because it tended to establish the State's theory of the case—that White would become sexually aroused while babysitting his young granddaughter and would molest her, but would not always "complete" the sex act in her presence. Evidence that he was discovered masturbating in the bathroom of the victim's home, in conjunction with the testimony that White's DNA was not found in the house and the testimony that he would sometimes rush to the bathroom immediately after sexually abusing [R.A.], was relevant to establish the particulars of the crime.

We agree with the State that, under these circumstances, the evidence of T.A. seeing his grandfather masturbating fits the narrow exception for evidence inextricably intertwined with the crimes charged, so it forms a "continuous transaction." *See Nelson*, 791 N.W.2d at 420. If the jury chose to believe R.A., White frequently engaged in conduct to satisfy his sexual desires while

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[3] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401.

[4] "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States or the state of Iowa, by statute, by these rules, or by other rules of the Iowa Supreme Court. Evidence which is not relevant is not admissible." Iowa R. Evid. 5.402.

[5] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Iowa R. Evid. 5.403.

[6] "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).

babysitting his grandchildren. The observed incident of masturbation fit his ongoing pattern.

We also disagree with White's contention testimony revealing his act of masturbation while alone in the bathroom ranked as the kind of highly prejudicial evidence likely to shock jurors. Compared to the heinous behavior alleged by R.A.—repeatedly engaging in sex acts with his seven-year-old granddaughter—masturbation seems mild. *See State v. Rodriquez,* 636 N.W.2d 234, 243 (Iowa 2001) (noting the prejudicial impact of other act may be neutralized by the reprehensible nature of the charged conduct).

But even if the district court should have excluded the evidence of White's masturbation, we find any error in admission was harmless. *See id.* ("Reversal is not required for the erroneous admission of evidence unless prejudice results."). The State offered solid testimony from R.A. Her report of abuse was corroborated by White's actions in bolting from the house when questioned by R.A.'s mother, his daughter. Medical evidence also supported R.A.'s recollections. As did the testimony of H.A., who witnessed what she recognized as unnatural contact between her twin sister and her grandfather. Accordingly, we find no ground for reversal.

AFFIRMED.