IN THE COURT OF APPEALS OF IOWA

No. 7-828 / 06-1496
Filed December 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS RAY DAVIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Thomas Ray Davis appeals his conviction and sentence for third-degree sexual abuse. **AFFIRMED**.

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

This is an appeal by defendant Thomas Ray Davis (Davis) from the judgment and sentence imposed upon his conviction of four counts of sexual abuse in the third degree, in violation of Iowa Code sections 709.1 and 709.4(2)(c)(4) (2005), with sentence enhancement under Iowa Code section 901A.2(3). We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Davis, the stepfather of A.D, sexually abused her when she was nine years old. The offense involved sexual touching, however, he did not have sexual intercourse with her. Davis pled guilty to lascivious acts with a child and enrolled in the Intra-Family Sexual Abuse Program. Davis was later allowed to have supervised visitation with A.D., which eventually became unsupervised. The abuse at issue here occurred when A.D. was fourteen and included sexual intercourse. It was discovered when A.D., afraid she might become pregnant, talked to her mother about birth control.

The State filed a motion to determine the admissibility of the prior sexual abuse of A.D. by Davis and Davis filed a motion in limine to exclude the evidence. In ruling on the motions, the district court noted: "Iowa has long recognized the rule allowing evidence of prior acts of sexual abuse involving the same victim." The court concluded the evidence was admissible under both the Iowa Rules of Evidence and the newly-enacted Iowa Code section involving prior sexual abuse. *See* Iowa Code § 701.11. Next, the court applied a balancing test and concluded the probative value of the evidence outweighed the danger of unfair prejudice, but limited the type of evidence the state could utilize.

> The court believes that the balancing test to be applied . . . allows for the victim to testify regarding the prior acts committed against her by the defendant, as well as the admissions of the defendant's own statements regarding those acts. This evidence would not include the fact that the defendant was eventually charged, pled guilty and was convicted of a crime associated with these actions. The state may offer the defendant's own prior statements regarding these acts through the transcript of his confession and guilty plea, and through testimony of [the investigator.] . . . To the degree the state wishes to offer other evidence regarding the defendant's prior bad acts, the defendant's motion in limine is granted.

At trial, A.D. and Davis both testified. Davis testified he was heartbroken when he learned A.D. claimed he had abused her again and he strongly suspected she was angry because he had refused to buy her a new Mustang GT after his promotion at work:

> The car was the last argument. She didn't get her car. She got the junky one her mom gave her, is her words. . . . I told her . . . I simply couldn't afford it. She was – that was our last visit.

Davis was convicted on all counts and on appeal argues: (1) evidence concerning his prior sexual abuse of A.D. should have been excluded at trial; and (2) the court erred in giving a jury instruction limiting the jury's consideration of his prior sexual abuse.

II. SCOPE AND STANDARDS OF REVIEW.

The court's ruling on the admissibility of prior bad acts evidence will be reversed only where there is an abuse of discretion. *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). "[W]hether evidence of prior crimes should be admitted is a judgment call on the part of the trial court." *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). "Recognizing that 'wise 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.'" *Taylor*, 689 N.W.2d at 124 (quoting *Rodriquez*, 636 N.W.2d at 240).

The standard of review for issues regarding jury instructions is for errors at law. *State v. Anderson*, 636 N.W.2d 26, 30 (Iowa 2001).

III. MERITS.

A. Prior Acts Evidence.

Davis argues evidence concerning his prior sexual abuse of A.D. should not have been allowed at trial because such evidence is not relevant and is highly prejudicial.

In general, for evidence of other acts to be admissible, the evidence must be probative of a disputed fact or issue other than a defendant's criminal disposition, and the probative value cannot be substantially outweighed by the danger of unfair prejudice. *Taylor*, 689 N.W.2d at 123-24. *See* Iowa R. Evid. 5.403, 5.404(*b*). Iowa courts have long recognized a special exception in sexual abuse cases which permits use of prior acts "to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial." *State v. Spaulding*, 313 N.W.2d 878, 880 (Iowa 1981). "Sex-abuse cases warrant a special rule" and evidence of prior sexual acts with the victim is "admissible if it is probative on the matter of defendant's sexual desires." *State v. Tharp*, 372 N.W.2d 280, 281-82 (Iowa Ct. App. 1985).

In addition to the special exception developed in Iowa case law, in 2003, a new statute specifically authorized the use of evidence of prior sexual abuse.

> In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This

> evidence, though relevant, may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. . . . This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

Iowa Code § 701.11(1).

Both the statute and the case law require clear proof of the prior act. *See* Iowa Code § 701.11(1); *Rodriquez*, 636 N.W.2d at 240. The clear proof requirement is unquestionably met here because Davis admitted the prior abuse of A.D. in a taped interview and also pled guilty to the prior abuse. Additionally, the details concerning the prior abuse were relevant to legitimate issues in dispute. Davis completely denied the charged sexual abuse and physical evidence was inconclusive concerning whether or not the abuse occurred. Davis claimed A.D. fabricated the story because she was upset he would not buy her a new car. Thus, evidence showing Davis had a "passion or propensity" for A.D. and was therefore motivated to engage in the charged sexual acts with her is made more or less probable by the details of the earlier sexual abuse. *See also Taylor*, 689 N.W.2d at 125 ("defendant's prior conduct . . . reveals the emotional relationship between the defendant and the victim and is highly probative of the defendant's probable motivation").

Therefore, pursuant to section 701.11(1) and Iowa precedent, Davis's prior abuse of A.D., which was shown by clear proof, was relevant and admissible[1] unless the evidence's probative value was substantially outweighed

[1] Davis argues *State v. Sullivan*, 679 N.W.2d 19 (Iowa 2004) requires a different result. We disagree. The *Sullivan* court analyzed evidence of the defendant's prior drug dealing and cautioned against the unlimited use of unconnected but similar prior bad acts. *See Sullivan*, 679 N.W.2d at 26-27. Unlike the prior bad acts evidence utilized in *Sullivan*, the evidence here was not wholly unconnected to the crime charged, but

by the danger of unfair prejudice. Because the prejudice language in section 701.11 identically tracks the language in Iowa Rule of Evidence 5.403, we conclude the same balancing analysis should apply. The factors to be considered in balancing whether unfair prejudice outweighs probative value are the need for the evidence; whether there is clear proof; the strength or weakness of the evidence in supporting an issue; and the degree to which the jury will be prompted to decide the case on an improper basis. *Taylor*, 689 N.W.2d at 124.

Davis completely denied the charged sexual abuse of A.D., which directly contradicted A.D.'s description of the abuse. The physical evidence was inconclusive. We note the need for evidence of prior bad acts, especially acts involving the same victim, is particularly high in sexual abuse cases where there is often little evidence of the crime. Therefore, the need for other evidence was substantial. *See Rodriquez*, 636 N.W.2d at 242 (noting need substantial in light of "he said/she said" nature of case). Second, we have already determined the clear proof requirement is met. Third, the prior bad acts directly supported the main issue at trial: whether Davis sexually abused A.D. The evidence addressed Davis's motivation and "passion or propensity" concerning A.D. Fourth, though the nature of Davis's prior bad acts 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

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involved the same victim. Our conclusion is supported by the court's later decision involving domestic abuse, *State v. Taylor*, which discussed *Sullivan* while allowing prior acts evidence. *Taylor*, 689 N.W.2d at 129 n.6. (prior abuse of spouse admissible to prove the nature of their relationship and relevant to the general intent crime charged). Just as the prior bad acts evidence in *Taylor* was admissible to establish the abusive nature of the Taylors' relationship, the evidence of prior sexual abuse of A.D. by Davis is admissible to establish his "passion or propensity" for illicit sexual relations with A.D.

803, 808 (Iowa Ct. App. 1993) (finding prior act "did not involve conduct any more sensational or disturbing" than acts charged).

We conclude "this is not a case where the prior acts evidence would rouse the jury to 'overmastering hostility.'" *See Rodriquez*, 636 N.W.2d at 243. Therefore, the district court did not abuse its discretion in applying the balancing test and concluding the prior abuse evidence should be allowed.

B. Jury Instruction.

Davis challenges jury instruction fifteen, arguing he was prejudiced because the instruction is confusing and directs the jury to convict because of bad character. The instruction states:

> You have heard evidence that the defendant committed other acts with [A.D.] before the dates of the offenses with which he is 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 [A.D.]. You may not consider them as proving that the defendant actually committed the acts charged in this case.

This instruction utilizes the language of Iowa Uniform Jury Instruction 900.11. Appellate courts are reluctant to disapprove of uniform instructions. *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). We find no error. The instruction is not confusing and is a limiting instruction favorable to Davis rather than prejudicial. It restricts the purpose for which the jurors can consider the prior sex crimes evidence and is consistent with Iowa's "passion or propensity" cases and with Iowa Code section 701.11.

AFFIRMED.