IN THE COURT OF APPEALS OF IOWA

No. 2-096 / 11-0848
Filed April 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH EDWARD CARVER,
Defendant-Appellant.

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

The defendant appeals from the judgment and sentence entered following verdicts finding him guilty of second-degree sexual abuse and two counts of lascivious acts with a child. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant Appellate Defender, and Christina I. Thompson, student intern, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger and Susan Krisko, Assistant Attorneys General, and Eric Hansen, County Attorney, for appellee.

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

BOWER, J.

Kenneth Edward Carver appeals from the judgment and sentence entered following verdicts finding him guilty of second-degree sexual abuse and two counts of lascivious acts with a child. At trial, he sought to elicit testimony from the two victims regarding the number of times they had met with a counselor and whether they had told their counselor of the alleged sexual abuse perpetrated by Carver. The district court ruled the testimony was inadmissible under our supreme court's holding in *State v. Cashen*, 789 N.W.2d 400, 408-10 (Iowa 2010).

On appeal, Carver argues the court erroneously interpreted *Cashen* and seeks a reversal of his conviction and a new trial. Because he is unable to show he was prejudiced by the district court's evidentiary ruling, we affirm.

I. Background Facts and Proceedings.

In March of 2010, the State filed a trial information charging Carver with several crimes stemming from his alleged sexual abuse of two victims. The charges were later amended to second-degree sexual abuse and two counts of lascivious acts with a child. The remaining counts were dismissed.

At the beginning of the March 2011 jury trial, the district court ruled Carver was not permitted to ask either victim about their experiences in counseling as it would violate their right to confidentiality. The court also noted Carver failed to make a timely application for the counseling records. During cross-examination of one of the victims, the court reaffirmed its ruling.

Carver was found guilty of all three charges. He filed a motion in arrest of judgment, asserting that the district court had erred in restricting his ability to call witnesses and examine them about the counseling sessions. Following a hearing, the court overruled the motions for the reasons previously stated on the record.

Carver was sentenced to twenty-five years imprisonment on the second-degree sexual abuse conviction and five years imprisonment on each of the lascivious acts convictions. The sentences were ordered to run concurrently. The special lifetime parole requirement of Iowa Code section 903B.1 (2009) was also ordered, and Carver was also ordered to pay fines, costs, attorney fees, a civil penalty, and restitution.

II. Scope and Standard of Review.

As a general rule, evidentiary rulings are reviewed for an abuse of discretion. *State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011). An abuse of discretion occurs when the court exercises its discretion based on an erroneous application of the law or when it is not supported by substantial evidence. *State v. Harrington*, 800 N.W.2d 46, 48 (Iowa 2011).

A trial court's ruling on the admissibility of evidence will only be reversed on appeal if "a substantial right of the party is affected." *State v. Redmond*, 803 N.W.2d 112, 127 (Iowa 2011). An erroneous evidentiary ruling is harmless if it does not cause prejudice. *Id.* Where the error is not constitutional in nature, prejudice occurs when the party has been "injuriously affected by the error" or has "suffered a miscarriage of justice." *Id.*

III. Analysis.

Carver contends the district court abused its discretion in limiting his cross-examination of the victims and in limiting the evidence he could present while testifying. Specifically, Carver sought to introduce evidence of the following: the victims had attended counseling; the number of counseling sessions they had attended; neither victim had told their counselor about the abuse; and Carver had called one of the victim's a name, which the victim reported to the counselor. Carver had initially sought to introduce this evidence though testimony by the victims' counselor, but later sought to question the victims about their counseling experiences instead. He argued the evidence was relevant to the victims' credibility.

The district court denied Carver's attempt to cross-examine the victims regarding their counseling experiences or to testify regarding his knowledge of their counseling experiences, finding there were two compelling and competing interests at stake: the defendant's right to a fair trial and to confront and cross-examine witnesses balanced against the victims' right to be able to talk with a therapist or counselor and to know it would be kept confidential. The court noted it had not been able to conduct a *Cashen*-style review of the counseling records, which it felt inhibited its ability to determine the issues. It stated:

> I don't see how we—how you get to some type of compelling interest that your client has to have in the record. I think you certainly have a right to make argument that [the victims] didn't tell anyone, including counselor, teacher, minister, aunts, anyone. That's a given. The question is, do I take this [victim]'s right to confidentiality and put it in the public domain that [the victim] has been counseling for fifteen times.

> And I'm saying no for two reasons. Number one is I look at pre-*Cashen*. I don't see a compelling interest at this point when I think you can argue [the victim] didn't tell anyone. And that's what we're looking at. We're not looking at any direct evidence of some character trait or something else. We're looking at the fact that something was not said. And two, after *Cashen*, I think it would have been helpful for the Court to have gone through that process for the sole purpose of I would have known what was in the—in the session notes, how close do they come to the negative, whether the [victims] allowed them to talk to Mom and Dad, those types of things.

In *Cashen*, our supreme court reiterated the right to privacy regarding mental health records exists because

> [p]sychotherapy probes the core of the patient's personality. The patient's most intimate thoughts and emotions are exposed during the course of the treatment. The psychiatric patient confides [in his therapist] more utterly than anyone else in the world. . . . [H]e lays bare his entire self, his dreams, his fantasies, his sin, and his shame. The patient's innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone . . . can deter persons from seeking needed treatment and destroy treatment in progress.

789 N.W.2d at 407 (citations omitted). The court further noted a defendant's right to produce exculpatory evidence is an important public interest that must also be considered. *Id.* With those principles in mind, the court adopted "a protocol that balances a patient's right to privacy in his or her mental health records against a defendant's right to present evidence to a jury that might influence the jury's determination of guilt." *Id.* at 403.[1]

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[1] Before a defendant may subpoena a victim's privileged records, the defendant has to "make a showing to the court that the defendant has a reasonable basis to believe the records are likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt." *Cashen*, 789 N.W.2d at 408. Next, the county attorney

As Carver points out, *Cashen* did not address any limitation on a defendant's ability to examine a witness regarding their mental health history or treatment. Nor does the case at bar involve any request for the production of medical records. As a result we find that a *Cashen* inquiry was not necessary as confidential records were not in dispute. Carver argues that in order to question the victims regarding their counseling experiences, he merely had to show the evidence was relevant.

In determining whether challenged evidence is admissible, the court must engage in a two-step analysis. *State v. Buchanan*, 800 N.W.2d 743, 753 (Iowa 2011). First, the court must decide whether the evidence is relevant. *Id.* If it is, the court must then decide whether its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would without the

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must notify the victim of the request for the privileged records, and, after conferring with the victim, the county attorney must provide an affidavit signed by the victim stating the victim either consents or opposes the disclosure. *Id.* If the victim opposes, a hearing must be held to determine "if a reasonable probability exists that the records contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt." *Id.* If a reasonable probability exists that the records contain such evidence, the court shall issue a subpoena for the records to be produced under seal to the court. *Id.* The court must then enter a protective order containing stringent nondisclosure provisions, which prohibit any attorney, county attorney, or third party who is allowed to inspect or review the records from copying, disclosing, or disseminating the information contained therein. *Id.* at 408-09. If the records are produced, the defendant's attorney has the right to inspect the records at the courthouse. *Id.* at 409. After identifying any records he or she believes contain exculpatory evidence, the attorney shall notify the county attorney and the court of the specific records the defendant desires and request a hearing. *Id.* The county attorney may then inspect the records. *Id.* Finally, at the closed hearing, the court is to determine if the designated records contain exculpatory evidence and, if so, copies of the records are to be provided to the defense attorney and county attorney after all non-exculpatory matters are redacted. *Id*. These provisions have now been enacted by amending Iowa Code section 622.10(3A).

evidence." *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). The test is "whether a reasonable person might believe the probability of the truth of the consequential fact to be different if such person knew of the proffered evidence." *Id.* Evidence that is relevant to establish a legitimate issue in the case is presumptively admissible. *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997).

The evidence sought to be introduced went to the victim's credibility. As such, it was relevant. *See State v. Alberts*, 722 N.W.2d 402, 411 (Iowa 2006) (finding evidence was relevant where it reflected on the credibility of a witness). However, it is not enough for Carver to show the court's ruling prohibiting him from cross-examining the victims regarding their counseling experiences was in error. Carver must show he was prejudiced by the court's ruling.

The victims, who were fifteen and eleven at the time of trial, testified Carver would provide them with alcohol and cigarettes. They testified he would play stripping games with them and their friends, or other games that required them to remove their clothes. These activities did not occur when other adults were around. The State's expert testified engaging in these types of activities is "grooming" behavior, in which the adult attempts to test boundaries and "desensitize" the victim to inappropriate behavior.

The victims testified to specific incidents of abuse perpetrated by Carver. They were able to describe both the acts that transpired and their location. The details of the abuse were similar for both victims. One victim testified that Carver bought flavored condoms to use during oral sex because the victim told him performing oral sex was "really gross." There was also testimony that Carver did

not wear underwear, which was corroborated by the jailer who booked Carver into the jail.

Carver was permitted to cross-examine the victims regarding whether they told anyone about the abuse being perpetrated on them. Both victims testified they were afraid to tell because Carver had a temper, and they feared he would harm anyone who confronted him. They were also afraid of what other people would think. The State's expert testified regarding "delayed disclosure" by victims of abuse and why it occurs:

> When kids are abused by family members or loved ones, people that they're closer with, it really makes it more difficult for them to tell. They trust that person. They love that person. They don't want to disappoint anyone. So a lot of times, kids delay their disclosures and are afraid to tell. They feel it might be their fault. They don't want to get in trouble or get that other person in trouble.

When viewing the evidence as a whole, we are unable to find Carver was prejudiced by the omission of the evidence regarding the number of times the victims attended counseling and their failure to report this abuse to a counselor, even though one victim felt comfortable enough to report being called a name by Carver. The victims presented credibly with detailed accounts of Carver's grooming behaviors and details regarding their abuse. The evidence the victims failed to report the abuse was credibly explained by each victim, and their explanation conformed with the explanation given by the State's expert as to why children do not report abuse.

Because Carver failed to show he was prejudiced by the court's evidentiary ruling, we affirm.

AFFIRMED.