IN THE COURT OF APPEALS OF IOWA

No. 2-490 / 11-0667
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EFRAIN UMANA,
Defendant-Appellant.

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

The defendant appeals his convictions for second-degree sexual abuse, third-degree sexual abuse, and assault with intent to commit sexual abuse. **AFFIRMED IN PART, VACATED AND REMANDED IN PART**.

William F. McGinn of McGinn, McGinn, Springer & Noethe, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Daniel J. McGinn and Shelly Sedlak, Assistant County Attorneys, for appellee.

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

MULLINS, J.

The defendant appeals his convictions for second-degree sexual abuse, third-degree sexual abuse, and assault with the intent to commit sexual abuse against three of his parishioners. The defendant contends the trial court abused its discretion in denying his motion to sever the charges, and the trial information and jury instructions on count I were fatally defective because they contain dates extending beyond the victim's twelfth birthday. The defendant further alleges evidence was insufficient to support guilty verdicts on count I and count IV. For the reasons contained herein, we affirm in part, and vacate and remand in part.

I. Background Facts

The charges against the defendant stem from his time as an unaccredited pastor at a primarily Hispanic church in Council Bluffs, Iowa. The four alleged victims were all members of his church. Their allegations are recounted below.

A. Count I – M.Q.

In 2003, M.Q., an eleven-year-old fifth grader, and her family were members of the church pastored by the defendant. M.Q. and the defendant's daughter were friends. One afternoon in 2003, the defendant and his daughter picked up M.Q. from her home to go to the church to help look for keys the defendant had misplaced. Upon arriving at the church, the defendant allowed his daughter to stay in the car while he and M.Q. searched inside.

Once inside the church, M.Q. and the defendant took separate routes to look for the keys. M.Q. headed to the sound room. The defendant arrived behind her and shut the sound room door. Then, the defendant told M.Q. to take

off her clothes. M.Q. said, "No" repeatedly. The defendant put M.Q. on the floor and pulled down his pants. The defendant pulled up M.Q.'s skirt and removed her underwear. At that point, the defendant had vaginal intercourse with M.Q. and told her that was "what love was."

The defendant finally got off of M.Q. after M.Q. said his daughter was going to come into the room. M.Q. pulled up her underwear and walked out. On the way home, she noticed her underwear was wet.

M.Q. did not say a word to her parents or to defendant's daughter. She testified that it would have been her word against his, so she did not tell anyone. She had trusted the defendant. He was her pastor, her spiritual leader.

M.Q. and her family moved out of the state the following year. She later told two of her close friends about what the defendant had done to her. During a prayer session approximately six years after the abuse, M.Q.'s new pastor in Texas challenged her to tell the truth about what had happened to her. M.Q.'s parents were present at the time. M.Q. began to cry and told her parents about the abuse.

Clinical psychologist Dr. Glenda Cotton assessed M.Q. Dr. Cotton stated M.Q. suffered from anxiety, depression, hypervigilance, anger, difficulty concentrating, exhibited an exaggerated startle response, displayed low self-confidence, and experienced intrusive memories of the incident. According to Dr. Cotton's assessment, M.Q. suffered from post-traumatic stress disorder and these symptoms were consistent with prior sexual abuse.

B. Count II – D.A.

D.A. is married and has four children. Her family also attended the defendant's church in Council Bluffs. The defendant provided marital counseling to D.A. and her husband and would often visit their home.

One day in the summer of 2006, the defendant called D.A. as she was finishing her shift at work. Just as D.A. returned home, the defendant appeared behind her. The defendant's arrival surprised D.A. because she did not see his car parked outside. The defendant then entered her home and asked for a glass of water. D.A. gave the defendant a glass of water and informed him she needed to change her clothes and pick up her children from daycare.

The defendant waited in the living room while D.A. changed clothes. D.A. changed out of her jacket and coveralls but still had pants and a shirt on underneath. When she entered the living room, the defendant stood up and got close to her. He tried to hug her but she kept her distance.

Then, the defendant ordered D.A. to take off her clothes. She said, "No." He told her to "obey" and said, "I like obedient people." D.A. refused. The defendant then hugged D.A. from behind so she could not get away. He unbuttoned her pants and threw her to the floor. Once on the floor, he pulled D.A.'s pants down to her knees. He penetrated her and quickly ejaculated. When he finished, he got up, put on his clothes, and left D.A. crying on the floor.

D.A. did not collect any physical evidence of the incident. The defendant continued to provide D.A. and her husband marital counseling over the next several years. The defendant continued to serve as her pastor and she regularly

attended church. When she attended church, the defendant would sometimes touch her lips with his finger and try to hold her hand. She eventually forgave the defendant for what he had done. Until church leaders approached her, she told no one about the incident.

C. Count III – S.A.

S.A. was another member of the defendant's church. One day, S.A. stayed at church after the service had finished. She and another church member were cooking in the kitchen. After her cooking partner left the room, the defendant entered the kitchen. He gave S.A. a hug, pressed himself against her breasts, and kissed her neck without her consent.

D. Count IV – M.C.

The defendant served as M.C.'s pastor and marital counselor. He would call on M.C. to visit with her over coffee. During one trip to M.C.'s home, he pressed his finger against her lips and told her she had nice lips.

On September 2, 2008, the defendant called M.C. to meet him at the church. He offered to provide her family with free food donated from local businesses. When M.C. arrived, no one else was present. The defendant hugged M.C. and kissed her on the cheek. This did not strike M.C. as an unusual greeting. He then touched her perspiring forehead and asked her if she missed her husband, who was traveling abroad at the time. She said, "Not much because [its] only a few days until he gets home." The defendant smiled and hugged her again.

The defendant carried food into the kitchen while M.C. waited by the door. The lights in the kitchen remained off. At some point, their paths crossed. She stated he looked at her "[l]ike a man when he's wanting to seduce a woman." The defendant hugged M.C. again and this time kissed her on the mouth. M.C. pulled away, turned on the lights, and avoided the defendant until she was able to leave the church.

When her husband arrived home, she told him about what the defendant had done. The two approached leaders in the church and discussed the defendant's actions. The church leaders investigated. The investigation uncovered additional allegations of sexual transgressions relating to M.Q., D.A., and S.A.

II. Proceedings

On July 24, 2009, the State filed a trial information containing four counts. Count I charged the defendant with second degree sexual abuse of M.Q., Count II charged the defendant with third degree sexual abuse of D.A., and Counts III and IV charged the defendant with assault with intent to commit sexual abuse of S.A. and M.C., respectively. The trial, originally scheduled to begin October 13, 2009, was continued seven times.

On August 4, 2010, several weeks before the scheduled trial, the defendant filed a motion to sever. On September 16, 2010, the trial court held a hearing on the motion to sever. The trial court denied the motion in an order filed on September 28, 2010. The trial court found joinder permissible because the

defendant's actions demonstrated a common scheme or plan. The trial court reasoned,

> The defendant was the pastor of Iglesia Monte Horeb church in Council Bluffs, Iowa. All of the alleged victims attended that church when he served as pastor. All of the alleged victims describe instances where the defendant would get them alone in a room of the church when others were not present. All of the alleged victims describe the defendant kissing them in addition to other unwanted touching. Three of the four victims describe an incident that occur[red] in their home. Two of the four victims describe the defendant touching their lips with his finger. . . . The victims in Counts I and II describe brief sexual intercourse with both the defendant's clothing and their own partially removed. The crimes as alleged are more than similar crimes with similar victims. In all instances[,] the defendant is alleged to have used his position within the church as a pretext for being alone with the victims. Additionally, not only is sexual gratification the basis of each offense but also the separate allegations describe the defendant's behavior in similar terms.

A jury trial on all four counts commenced on January 25, 2011. At the conclusion of the trial, the trial court provided a limiting jury instruction. The instructions stated, "If you find the defendant guilty or not guilty on any one of the four (4) counts, you are not to conclude the defendant is guilty or not guilty on the other(s). You must determine whether the defendant is guilty or not guilty separately on each count." The court also provided instructions for lesser included offenses for counts II, III, and IV. On count IV, the judge instructed the judge on the elements of the lesser included offense of assault. The jury found the defendant guilty as charged on counts I, II, and IV. The jury found the defendant not guilty on count III.

The defendant filed a motion in arrest of judgment and a motion for a new trial on February 23, 2011. On April 13, 2011, the trial court held a hearing on

the defendant's motion. The trial court denied both motions. In support of the decision to try the cases together, the trial court found, "[t]he motion to sever was filed out of time, and the defendant failed to show good cause for filing the motion out of time." The trial court also found "the State carried its burden of showing a common scheme or plan in filing the four separate charges in one trial information."

The trial court sentenced the defendant to twenty-five years on count I, ten years on count II, and two years on count IV. The trial court ordered the defendant to serve counts II and IV concurrently, but consecutive to count I. The defendant now appeals the trial court's refusal to sever the charges and argues the evidence was insufficient to support counts I and IV.

III. Standard of Review

This court reviews a trial court's refusal to extend a motion deadline for abuse of discretion. *State v. Christensen*, 323 N.W.2d 219, 222–23 (Iowa 1982). We review a trial court's refusal to sever multiple charges against a single defendant for abuse of discretion. *State v. Geier*, 484 N.W.2d 167, 172 (Iowa 1992). An abuse of discretion will not be found unless "'such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982) (quoting *State v. Buck*, 275 N.W.2d 194, 195 (Iowa 1979)). We review a sufficiency of the evidence appeal for the correction of errors at law. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005).

IV. Motion to Sever

A. Timeliness

The State contends the defendant's motion to sever was untimely. A party must file a motion to sever no later than forty days after arraignment, absent a showing of good cause. Iowa R. Crim. P. 2.11(4); *State v. Wagner*, 410 N.W.2d 207, 212 (Iowa 1987). If the defendant fails to make a timely request, the defendant waives the right to make the request. Iowa R. Crim. P. 2.11(3); *State v. Thornton*, 506 N.W.2d 777, 779 (Iowa 1993). The court may, however, grant relief from such waiver if the defendant can show good cause for the delay. Iowa R. Crim. P. 2.11(3); *Wagner*, 410 N.W.2d at 212 (finding the defendant failed to demonstrate good cause for delay and waived his right to a file a motion to sever).

The State filed the trial information on July 24, 2009. The defendant filed a motion to sever on August 4, 2010. Thus, there is no question the defendant's motion was untimely. *See* Iowa R. Crim. P. 2.11(4); *Wagner*, 410 N.W.2d at 212.

To determine whether there was good cause for the delay, we carefully weigh the defendant's interest in receiving a fair trial against the State's interest in avoiding unnecessary delay and surprise. *State v. Jordan*, 779 N.W.2d 751, 755 (Iowa 2010). We consider factors including "the adequacy of the defendant's reasons for failing to comply with the applicable rules of procedure and whether the State was prejudiced as a result." *Id.*

The defendant failed to state a reason for the delay other than a general preoccupation with a civil trial involving the same factual circumstances. This case had been continued seven times, and the defendant filed his motion just weeks before the scheduled trial date. The defendant had the same attorney throughout the proceedings. We weigh the defendant's failure to state reasons for the delay against the State's interest in avoiding further delay. We find the trial court did not abuse its discretion in finding the defendant waived his right to file a motion to sever.

B. Merits

1. Common Scheme or Plan

In addition to denying the defendant's motion to sever as untimely, the trial court denied the motion on its merits. Although untimeliness is sufficient to uphold the trial court's decision, we will also review the trial court's decision on the merits of the motion.

The defendant contends there was no "common scheme or plan" in the complaint to justify joining multiple offenses against several victims in a single trial. Iowa Rule of Criminal Procedure 2.6(1) allows the State to prosecute contemporaneously two or more offenses which arise from a common scheme or plan.[1] *State v. Lam*, 391 N.W.2d 245, 249 (Iowa 1986). The goal of this rule is to promote judicial economy. *Id.*

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[1] Iowa Rule of Criminal Procedure 2.6(1) provides:

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and

To determine whether a common scheme or plan exists, the essential test is whether all offenses charged are a product of a "single or continuing motive." *Lam*, 391 N.W.2d at 250. The existence of a common scheme or plan requires more than the same person committing two similar offenses. *State v. Wright*, 191 N.W.2d 638, 641 (Iowa 1971). In analyzing whether a common scheme or plan exists, "we have found it helpful to consider factors such as intent, modus operandi, and the temporal and geographic proximity of the crimes." *State v. Elston*, 735 N.W.2d 196, 199 (Iowa 2007) (citing *Lam*, 391 N.W.2d at 249–50).

In *Elston*, the State charged the defendant with indecent contact with a minor, A.E., for transgressions that occurred while babysitting A.E. in her home. 735 N.W.2d at 197. The State also charged the defendant with numerous counts of sexual exploitation for viewing child pornography on a computer in A.E.'s home. *Id.* The offenses occurred over a period spanning more than nineteen months. *Id.* The defendant's modus operandi with A.E. was different than with the other unidentified child victims depicted in the pornography. *Id.* at 199. The Iowa Supreme Court concluded the defendant's crimes were part of a common scheme or plan because all of the crimes "could be found to have been motivated by his desire to satisfy sexual desires through the victimization of children." *Id.* at 199. As a result, the court in *Elston* found no abuse of discretion in the trial court's refusal to sever the charges against the defendant.[2] *Id.*

> prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

[2] For other cases illustrating a common plan or scheme, see *Lam*, 391 N.W.2d 245, and *State v. Dicks*, 473 N.W.2d 210 (Iowa Ct. App. 1991). In *Lam*, the Iowa Supreme Court

The defendant argues the Iowa Supreme Court recently rejected the admissibility of evidence of sexual offenses against multiple victims in sexual abuse cases. *See generally State v. Cox*, 781 N.W.2d 757 (Iowa 2010). As an initial matter, the analysis of the more basic question of whether joinder is permissible for certain offenses is distinct from whether evidence of prior bad acts is admissible under Iowa Code section 701.11 or Iowa Rules of Evidence 5.404(b). *Lam*, 391 N.W.2d at 250. *Cox* specifically allows evidence of similar offenses in sexual abuse cases involving multiple victims "as proof for any legitimate issues for which prior bad acts are relevant and necessary, including those listed in rule 5.404(b) and developed through Iowa case law." *Cox*, 781 N.W.2d at 768. Although evidence of similar offenses is not admissible to show a general lewd disposition, establishing a common scheme or plan and demonstrating intent remain legitimate issues for which prior bad acts may be relevant and necessary. *Id.* at 769–70. Thus, *Cox* does not prevent a finding of a common plan or scheme across multiple victims in a sexual abuse case for the purpose of determining whether joinder is permissible. *Id.*

In this case, the trial court found a common scheme or plan in the defendant's sexual transgressions. The defendant carried out similar acts in

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addressed the issue of whether joinder of two burglaries was proper. 391 N.W.2d at 250. The burglaries were committed "during a period of several hours on the same day in the same general location and using the same means of entry and transportation." *Id.* The court found a common plan or scheme to burglarize apartments during working hours to obtain small portable objects for money and allowed joinder of the offenses. *Id.*

In *State v. Dicks*, the State charged the defendant with committing several acts of sexual abuse with minors in various geographic locations over the course of several years. 473 N.W.2d at 211–12. The court in *Dicks* upheld the trial court's denial of the defendant's motion to sever because the defendant had a "continuing motive to gratify himself and, perhaps, to corrupt the morals of several children." *Id.* at 214.

similar ways. The defendant was a pastor at a primarily Hispanic church in Iowa. In each charged allegation, the defendant used his position of trust and authority within the church to create an opportunity to be alone with the victims. Each allegation tells the story of how the defendant was able to perpetrate these offenses. The defendant had a long standing and continuing motive to abuse his position of trust and authority within the church to allow him to place vulnerable victims in secluded locations in order to gratify himself sexually. Accordingly, we cannot say the trial court abused its discretion in finding a common scheme or plan.

2. Good Cause Determination

A finding of a common scheme or plan does not end our inquiry. The trial court had discretion to sever the charges for "good cause." Iowa R. Crim. P. 2.6(1). In analyzing whether the trial court abused its discretion in refusing to sever the charges, the defendant has the burden to show the unfair prejudice from a joint trial outweighs the State's interest in judicial economy. *State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000); *Geier*, 484 N.W.2d at 173 ("[A] trial on multiple charges must strike the proper balance between the antipodal themes of ensuring [a] defendant a fair trial and preserving judicial efficiency."). While "[w]e hesitate to place undue emphasis on judicial economy where the counterbalancing consideration is the fairness of the trial," we will not reverse where the evidence underlying the offenses "may have been admissible to show defendant's motive, opportunity, intent, preparation, plan, knowledge, and identity." *Dicks*, 473 N.W.2d at 214.

The defendant contends he suffered prejudice resulting from joinder of the sexual abuse and assault with intent to commit sexual abuse charges and the prejudice outweighs the State's interest in judicial economy. The defendant argues the trial court should have tried each individual charge separately and evidence of other charges would not have been admissible in separate trials.

To determine whether prior bad acts would be admissible against the defendant in separate trials, we follow a well-established two-step analysis. *State v. Mitchell*, 633 NW.2d 295, 298 (Iowa 2001). First, we must consider "whether the evidence [was] relevant and material to some legitimate issue other than a general propensity to commit wrongful acts." *State v. Barrett*, 401 N.W.2d 184, 187 (Iowa 1987). Second, under Iowa Rules of Evidence 5.403, we "must . . . decide whether the evidence's probative value was substantially outweighed by the danger of unfair prejudice." *Id.*

Generally, the State may not offer evidence of the defendant's other "crimes, wrongs, or acts" to prove his propensity to behave in a certain manner. *Elston*, 735 N.W.2d at 199 (citing Iowa R. Evid. 5.404(b)). Such evidence is, however, admissible for non-propensity purposes; for example, such evidence is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* If the evidence is relevant and material to some legitimate issue, "the evidence [is] prima facie admissible, even though it illustrates the accused's bad character." *Id.*

In this case, the State offered evidence of prior bad acts to establish the legitimate issue of a common scheme or plan. Evidence and testimony from

other victims made the existence of a common scheme more probable than it would have been without their testimony.

In addition, the State offered evidence of sexual abuse for the purpose of establishing the defendant's specific intent in the assault with intent to commit sexual abuse charges. Evidence of prior sexual offenses is generally admissible for the legitimate purpose of establishing specific intent in assault with intent to commit sexual abuse cases. *Cox*, 781 N.W.2d at 765.[3]

The defendant argues *Cox* precludes the admissibility of evidence of other sexual offenses with different victims and thereby controls the outcome of this case. We disagree. *Cox* held admission of prior bad acts under Iowa Code section 701.11 solely to show a general propensity, rather than a legitimate issue, violates the due process clause of the Iowa Constitution. *Id.* at 768. If offered for a legitimate purpose, however, evidence of the defendant's other similar sexual offenses is prima facie admissible against him even if the evidence also demonstrates the defendant's bad character. *Elston*, 735 N.W.2d at 199. As articulated previously, the State offered evidence of the defendant's other sexual offenses for the legitimate purposes of establishing a common scheme or plan and demonstrating intent.

The crux of the issue on appeal is whether the danger of undue prejudice outweighs the probative value of the evidence of other sexual offenses in view of the availability of other means of proof. Iowa R. Evid. 5.404(b).

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[3] *See also State v. Anderson*, 565 N.W.2d 340 (Iowa 1997); *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992); *State v. Plaster*, 424 N.W.2d 226 (Iowa 1988); and *State v. Howell*, 557 N.W.2d 908 (Iowa Ct. App. 1996).

> Unfair prejudice is an undue tendency to suggest decisions by the fact finder based on an improper basis, often an emotional one. Unfairly prejudicial evidence is evidence which appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that 'unfair prejudice' occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

State v. Most, 578 N.W.2d 250, 253–54 (Iowa Ct. App. 1998).

We are cognizant of the danger of allowing rule 5.404(b) exceptions to swallow the general rule against the admissibility of prior bad acts. *State v. Sullivan*, 679 N.W.2d 19, 26–27 (Iowa 2004); *State v. Williams*, 427 N.W.2d 469, 472 (Iowa 1988). Evidence of sexual offenses, especially those against a child, is by its very nature prejudicial. The defendant must show, however, that evidence of prior bad acts is unfairly prejudicial. *Most*, 578 N.W.2d at 253–54.

The State had limited means of proof to demonstrate the defendant's requisite intent in the assault with intent to commit sexual abuse charges. The defendant's use of authority within the church to isolate the victims precluded the possibility of witnesses to the offenses. The trial court instructed the jury to consider each charge separately. The jury demonstrated its ability to compartmentalize the evidence of each charge, finding the defendant not guilty on one of two counts of assault with intent to commit sexual abuse. We cannot say the trial court clearly abused its discretion in allowing evidence of other charged sexual offenses in this case. As a result, the evidence of each sexual

offense may well have been admissible in separate trials as proof of legitimate issues.

For the foregoing reasons, we find the defendant has not met his burden to show unfair prejudice from a joint trial outweighed the State's interest in judicial economy. Accordingly, we find no abuse of discretion in the trial court refusing to sever the charges.

V. Count I – Second Degree Sexual Abuse

A. Preservation of Error

The defendant contends the trial information and jury instruction for the charge of second degree sexual abuse were fatally defective because they contained dates extending beyond the victim's twelfth birthday. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut III*, 641 N.W.2d 532, 537 (Iowa 2002). This court may not decide an issue raised for the first time on appeal, "even if it is of a constitutional dimension." *Patchette v. State*, 374 N.W.2d 397, 401 (Iowa 1985). A party must normally object to jury instructions to preserve error. *State v. Fountain*, 786 N.W.2d 260, 262–63 (Iowa 2010).

The defendant raises issue with the trial information for the first time on appeal. The defendant did not object to the jury instructions which he now challenges on appeal. We find the defendant did not preserve this issue for appellate review.

B. Sufficiency of Evidence

The defendant asserts the evidence was insufficient to convict him on the charge of second degree sexual abuse. In evaluating the defendant's claim, the test is whether the State presented substantial evidence to support the verdict. *State v. Robinson*, 288 N.W.2d 337, 341 (Iowa 1980). If the evidence could convince a rational fact finder beyond a reasonable doubt, the evidence is substantial. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). To determine whether the State presented substantial evidence, we review the record in a light most favorable to the State. *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006).

M.Q. testified the defendant sexually abused her in the fifth grade before she turned twelve years old. M.Q.'s testimony was full of traumatic, experiential detail. Although M.Q. was not able to determine exactly which month the abuse occurred, she testified the incident was before her twelfth birthday party. In denying the defendant's motion for a new trial, the trial court found M.Q's testimony credible and the defendant's testimony not credible.

M.Q.'s allegation of abuse is consistent with testimony from Dr. Glenda Cotton's assessment. Dr. Cotton testified M.Q. suffered from post-traumatic stress disorder, exhibited hypervigilance, exaggerated startle response, low self-confidence, and experienced intrusive memories of the event. Dr. Cotton testified M.Q.'s symptoms were consistent with sexual abuse.

The defendant argues M.Q.'s testimony was unbelievable, absurd, and contradictory and urges this court to disregard it. *See State v. Smith*, 508

N.W.2d 101, 103 (Iowa Ct. App. 1993). The defendant finds fault with M.Q. for not collecting physical evidence and not telling anyone about the incident until years later. The defendant alleges inconsistency in M.Q.'s testimony and asserts M.Q. did not even know what sex was at age eleven, yet her testimony used the term sex to describe the defendant's acts. Finally, the defendant argues M.Q.'s testimony regarding how her underwear became wet is implausible if, as M.Q. testified, the defendant pulled her underwear down before the abuse.

To uphold a verdict, a sex abuse victim's accusations do not require corroboration. *See* Iowa R. Crim. P. 2.21(3) ("Corroboration of the testimony of the victims shall not be required."); *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998); and *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). It is not surprising an eleven-year-old girl did not collect physical evidence of sexual abuse. Nor is it surprising M.Q. did not tell anyone immediately after the incident because, as she explained, it was her word against a well-respected, trusted, adult pastor. Although M.Q. did not know the meaning of sex when she was eleven, she was eighteen years old when she testified at trial and ostensibly capable of comprehending the concept. Further, M.Q. testified that the defendant put his penis in her vagina. Finally, M.Q.'s testimony about the defendant pulling down her underwear and later noticing her underwear was wet is consistent with a sex act involving ejaculation.

Based on M.Q.'s testimony, a rational jury could find beyond a reasonable doubt the defendant abused M.Q. sexually when she was eleven years old. We

find sufficient evidence to support the jury verdict for second-degree sexual abuse.

VI. Count IV – Assault with Intent to Commit Sexual Abuse

The defendant alleges the evidence was insufficient to convict him on the charge of assault with the intent to commit sexual abuse. As previously indicated, the test is whether the State presented substantial evidence to support the verdict. *Robinson*, 288 N.W.2d at 341. The evidence is substantial if it enables a rational finder of fact to convict beyond a reasonable doubt. *Greene*, 592 N.W.2d at 29. To determine whether the State presented substantial evidence, "we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record." *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

In order to support a verdict of assault with intent to commit sexual abuse, the State must prove beyond a reasonable doubt "(1) the defendant assaulted the alleged victim, (2) with the intent to commit a sex act, (3) by force or against the will of the victim." *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). Assault with the intent to commit sexual abuse is a specific intent crime. *State v. Radeke*, 444 N.W.2d 476, 477 (Iowa 1989). Simple assault is a lesser included offense of assault with intent to commit sexual abuse because "the greater offense cannot be committed without also committing the lesser." *State v. McNitt*, 451 N.W.2d 824, 825 (Iowa 1990). To commit assault under Iowa Code section 708.1, "a defendant must commit an act that he intends to cause pain or

injury to the victim or to result in physical contact that would be insulting or offensive to the victim or to place the victim in fear of physical contact that will be injurious or offensive." *State v. Fountain*, 786 N.W.2d 260, 265 (Iowa 2010). "[A]n actor will ordinarily be viewed as intending the natural and probable consequences that usually follow from his or her voluntary act." *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004).

Here, the defendant held a position of trust over M.C. as her pastor and marital counselor. On September 2, 2008, the defendant called M.C. and asked her to meet him at the church. He knew no one else would be at the church, and he knew her husband was out of town. He hugged her, kissed her on the cheek, pressed his hand against her perspiring forehead, asked her if she missed her husband, and hugged her again. A few minutes later, he looked at her "like a man when he's wanting to seduce a woman," hugged her for the third time, and kissed her on the mouth.

The natural and probable consequence of a person holding the defendant's position of power and trust over a parishioner, who lures the parishioner to the church under a guise of receiving donated food for her family while her husband is out of town, and who kisses the parishioner on her mouth against her will is insulting and offensive contact. *Id.* Thus, we find the State presented substantial evidence the defendant did an act intended to cause insulting or offensive contact and find the defendant assaulted M.C. Iowa Code § 708.1; *Taylor*, 689 N.W.2d at 132.

At issue here is whether the State presented sufficient evidence of the defendant's specific intent to commit a sex act. The defendant argues there was no overt act showing the defendant's desire to engage in sexual activity. Although the defendant need not complete a sex act to commit assault with the intent to commit sexual abuse, the State must show the defendant had the requisite intent through the completion of an overt act beyond mere preparation. *Radeke*, 444 N.W.2d at 478.

To determine whether the defendant had the requisite intent, our supreme court has "pointed to a sexual comment made by the defendant to the victim, touching in a sexual way, the removal or request to remove clothing, or some other act during the commission of the crime that showed a desire to engage in sexual activity." *Casady*, 491 N.W.2d at 787. A defendant "will generally not admit later to having the intention which the crime requires . . . his thoughts must be gathered from his words (if any) and actions in light of surrounding circumstances." *Id.* at 477. The supreme court has also considered other factors relevant, including but not limited to

> the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact.

State v. Pearson, 514 N.W.2d 452, 455 (Iowa 1994).

In addition to the circumstances described above, the State points to the defendant's sexual offense against another parishioner, D.A., to illuminate the defendant's intent with M.C. When a defendant is charged for assault with intent

to commit sex abuse, prior similar crimes are generally admissible to demonstrate the element of sexual intent. *Cox*, 781 N.W.2d at 765 (Iowa 2010). When offered for a legitimate purpose, the danger of unfair prejudice must not substantially outweigh the probative value of evidence of prior sexual offenses. Iowa R. Evid. 5.403; *Elston*, 735 N.W.2d at 199–200.

This is not a case in which the State offered evidence of similar sexual offense solely for propensity purposes. *Cox*, 781 N.W.2d at 760. The evidence of other sexual offenses made the existence of the defendant's specific intent to commit a nonconsensual sex act and the common scheme or plan of perpetrating such act more probable than it would without the evidence. The defendant's use of power and authority within the church to isolate the victims and preclude the possibility of witnesses against him makes evidence of similar sexual offenses more probative in ascertaining the defendant's specific intent. The judge instructed the jury to consider each charge separately. The jury demonstrated the ability to compartmentalize the charges and found the defendant not guilty on one of two counts of assault with intent to commit sexual abuse. Although evidence of sexual offenses is by its very nature prejudicial, we find the danger of such prejudice did not substantially and unfairly outweigh the probative value of such evidence in this case.

Unlike the contact with D.A., however, the defendant's contact with M.C. did not involve sexual comments or requests to remove clothing. M.C.'s belief that he looked at her "[l]ike a man when he's wanting to seduce a woman," is not, by itself sufficient evidence of *his* intent. The undisputed brevity of the contact

with M.C., lack of subsequent physical touching, and defendant's action in stopping after M.C. pulled away, prevent a rational fact finder from concluding the defendant intended to engage M.C. in a nonconsensual sex act. Thus, even with evidence of other sexual offenses and viewing the evidence in a light most favorable to the State, we cannot say the State presented substantial evidence of the defendant's specific intent to commit sexual abuse. For the foregoing reasons, we vacate the defendant's conviction and sentence on count IV and remand with directions to enter judgment on the lesser included offense of assault in violation of Iowa Code section 708.1 and to re-sentence the defendant accordingly.

VII. Conclusion

We affirm the trial court's finding the defendant waived his right to file a motion to sever. Even if the defendant had filed the motion to sever in a timely manner, we find the trial court did not abuse its discretion in overruling the motion. The defendant failed to preserve alleged error in the trial information and jury instructions. The evidence was sufficient to support a guilty verdict on count I, second degree sexual abuse. We find insufficient evidence to support a conviction on count IV, assault with intent to commit sexual abuse. We vacate the defendant's conviction and sentence on count IV and direct the district court to enter judgment against the defendant on the lesser included offense of assault and to re-sentence the defendant accordingly.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.