IN THE COURT OF APPEALS OF IOWA

No. 2-624 / 11-1124
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS WOOD SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Appanoose County, Annette J. Scieszinski, Judge.

Defendant appeals his convictions for two counts of second-degree sexual abuse and three counts of third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellee.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Richard Scott, County Attorney, and Andrew B. Prosser, Assistant Attorney General, for appellee.

Considered by Potterfield, P.J., Bower, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

Thomas Wood Sr. was charged with two counts of sexual abuse in the second degree, in violation of Iowa Code section 709.3(2) (2009), and three counts of sexual abuse in the third degree, in violation of section 709.4(2). Four of the counts involved his older daughter, T.B., and one count of third-degree sexual abuse involved his younger daughter, C.W. The State alleged Wood had engaged in sex acts with T.B. between 2002 to 2005, and had engaged in a sex act with C.W. sometime between 2009 and 2010.

Prior to trial, the State filed a motion in limine asking the court to exclude evidence of "[a]ny prior sexual activity of either victim, including, but not limited to, prior instances of the victims playing games with each other." The State asserted that if such games occurred and were sexual in nature, evidence of the games was barred by Iowa Rule of Evidence 5.412, Iowa's rape shield law. In the alternative, the State asserted that if the games were not sexual in nature, then evidence of such games was irrelevant, or the relevance was outweighed by potential jury confusion and unfair prejudice. The district court ruled, "this line of evidence is not relevant under the terms of Iowa Rule of Evidence 5.412," but noted the ruling was subject to reconsideration.[1]

The jury trial began on April 26, 2011. That day Wood filed a motion seeking to make an offer of proof. He asserted that during depositions C.W. had claimed T.B. had played with her breasts, while in her deposition T.B. had denied

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[1] Wood also filed a motion in limine prior to trial. His motion was granted in part and denied in part.

this activity. He claimed these inconsistent statements were relevant to show the credibility of the witnesses. In arguments concerning his motion, Wood admitted this activity was not sexual in nature, but was a game the sisters had played while taking baths together. The court agreed Wood could make an offer of proof about the subject outside the presence of the jury.

The following evidence was produced during the offers of proof. T.B., who was then nineteen years old, denied touching or playing with the breasts of C.W. When asked whether she ever gave C.W. "titty-twisters," she stated that maybe that happened when she was younger, and most likely this occurred when C.W. had her shirt on. T.B. stated she and C.W. took baths together until she was about fourteen and C.W. was eight years old. The children's mother testified the girls sometimes took baths together up until T.B. left home when she turned eighteen.[2] She stated she had never seen T.B. playing with C.W.'s breasts, but knew they played a game called "titty-twister," which she described as a playful game that occurred when C.W. had her top on.[3] C.W., who was then thirteen years old, testified that when she was younger she and T.B. played a "funny game" where T.B. would twist her nipple or breast.[4] She stated this happened when she was eight, nine, or ten, or maybe eleven, "something around in there." She testified the last time they played that game was quite a while before T.B.

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[2] T.B. turned eighteen about seventeen months before the trial.

[3] When asked to explain this game, the mother stated, "I guess she'd grab it and twist it. But I don't qualify that as playing with them."

[4] C.W. also stated that T.B. "popped the bumps I had there" and when this occurred she had her clothes on.

moved out. She testified the last time she had a bath with T.B. was when she was eleven or soon after she turned twelve.

The district court determined the proffered evidence was not sexual in nature.[5] The court ruled the evidence presented during the offers of proof would not be presented to the jury, finding:

> The concern here is the relevance of it and, for whatever minor amount of relevance could be argued about it, the Court has concerns that to allow this evidence to be presented risks jury confusion about the importance of it and the context of it and why it's being allowed. And so the Court's going to overrule the offer of that evidence under the authority of Iowa Rule of Evidence 5.403.

The jury found Wood guilty of the five charges against him. The court denied Wood's motion for a new trial and motion in arrest of judgment. Wood was sentenced to a term of imprisonment not to exceed twenty-five years on each charge of second-degree sexual abuse, and a term not to exceed ten years on each charge of third-degree sexual abuse, all to be served consecutively. Additionally, the court imposed a special sentence under section 903B.1 and ordered Wood to register as a sex offender.

Wood appeals his convictions, claiming the court abused its discretion in denying his request to present the evidence elicited during the offers of proof. He claims the evidence was relevant because it reflected on the credibility of T.B. and C.W. Wood also claims the evidence was relevant because it may reveal a motive to lie. Wood additionally asserts that the relevance of the evidence is not outweighed by the danger of unfair prejudice.

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[5] The court noted that if the evidence had been sexual in nature it would have been prohibited by rule 5.412.

II. Standard of Review

We review the district court's ruling on general evidentiary issues for an abuse of discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Richards*, 809 N.W.2d 80, 90 (Iowa 2012) (citation omitted). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). We will reverse the court's decision on admissibility only when there has been a clear abuse of discretion. *State v. Roth*, 403 N.W.2d 762, 765 (Iowa 1987).

III. Admission of Evidence

In general, evidence which is relevant is admissible, while evidence that is not relevant is not admissible. Iowa R. Evid. 5.402. 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 probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401; *State v. Alberts*, 722 N.W.2d 402, 410 (Iowa 2006). "The test to determine if evidence is relevant 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." *Alberts*, 722 N.W.2d at 410 (internal quotation marks and citation omitted).

After expressing its concern as to whether the evidence in question had any relevance, the district court ruled the evidence inadmissible under Iowa Rule

of Evidence 5.403, concluding that "whatever minor amount of relevance could be argued about it," to allow its admission "risks jury confusion about the importance of it and why it's being allowed." Wood claims the evidence was relevant because it reflected on the credibility of T.B. and C.W. as witnesses. Contrary to Wood's expectation, the evidence revealed in the offers of proof shows only minimal differences between the testimony of T.B., C.W., and their mother. The three witnesses primarily agreed that at some time in the past there had been a playful game between T.B. and C.W. where T.B. touched C.W.'s breasts over her clothes. They also all agreed that T.B. and C.W. used to take baths together. The primary difference, if any, was how long ago in the past these events occurred.[6] It does not seem likely a reasonable person would believe the probability of the truth of whether Wood engaged in sex acts with his daughters would be different if the person knew of these discrepancies in testimony as to when these events occurred, and therefore, the evidence is not relevant. *See id.*

Wood also claims the evidence may have revealed a reason for T.B. to lie about what had occurred with her father. He states that if a fact finder found T.B. made untruthful statements about what occurred with C.W. in order to preserve her integrity, she may have been untruthful in her allegations she was sexually

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[6] T.B. testified the game might have occurred when she was younger. She stated she quit taking baths with C.W. about five years previously. The mother testified T.B. and C.W. took baths together until T.B. left home, which was about seventeen months before the trial. She did not testify as to when the game occurred. C.W. testified the last time the game occurred was at least two years in the past, and maybe more. She agreed with her mother that she and T.B. took baths together until about the time T.B. moved out.

assaulted by her father for the same reason. Wood does not explain how untruthful testimony that her father engaged in repeated sex acts with her over a number of years would act to preserve her integrity. We conclude the evidence has no relevance for this purpose.

Even if the evidence was relevant, it may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, ..." *See* Iowa R. Evid. 5.403; *State v. Lesage*, 523 N.W.2d 617, 621 (Iowa Ct. App. 1994). The district court determined the evidence was not admissible under rule 5.403 because the risks of jury confusion outweighed any minor amount of probative value the evidence might have. On appeal, Wood contends the danger of undue prejudice does not outweigh the probative value of the evidence. He asserts the evidence would not have been confusing to the jury, nor cumulative or a waste of time.[7]

In this case, the evidence presented in the offers of proof had such a little amount of relevance, if any, that we have no problem in finding the district court did not abuse its discretion in determining that any probative value was substantially outweighed by the danger of confusion of the issues and misleading the jury. *See* Iowa R. Evid. 5.403. The evidence could have led the jury to base its decision on discrepancies in when past irrelevant events occurred, rather than the central issue of whether Wood had engaged in sex acts with his daughters.

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[7] We read the trial court's decision as not being based on any "probative value [being] substantially outweighed by the danger of unfair prejudice," or the evidence being cumulative or a waste of time, but rather on the evidence's "probative value [being] substantially outweighed by the danger of . . . confusion of the issues, [and] misleading the jury." *See* Iowa R. Evid. 5.403.

See Rodriquez, 636 N.W.2d at 240 (noting evidence is unfairly prejudicial when it "may cause a jury to base its decision on something other than the established propositions in the case"). We conclude the district court did not abuse its discretion in determining the evidence presented in the offers of proof was not admissible.

III. Impeachment by Collateral Evidence

On appeal, the State raises an argument the evidence was also inadmissible because Wood was attempting to impeach T.B. and C.W. through collateral evidence. This issue was not raised before the district court, and was not ruled upon by the court. There is an exception, however, to the error preservation rules when we are addressing a ruling admitting or not admitting evidence. *DeVoss v. State*, 648 N.W.2d 56, 62-63 (Iowa 2002). We will therefore address the State's claim the evidence produced in the offers of proof was inadmissible on this ground. *See State v. Nelson*, 791 N.W.2d 414, 424 (Iowa 2010).

Impeachment evidence is not admissible if it goes only to a collateral issue. *Lesage*, 523 N.W.2d at 621. Impeachment evidence is not collateral if it could have been admitted for some purpose independent of the contradiction. *State v. Hilleshiem*, 305 N.W.2d 710, 713 (Iowa 1981). Impeachment evidence is independently admissible if it (1) is relevant to resolving an issue material to the case, or (2) pertains to the general credibility of the witness. *Belken*, 633 N.W.2d at 794. "Evidence admissible for purposes of establishing or undermining the general credibility of a witness is limited to matters which bear

on bias, peculiar skills, or relevant knowledge or which go to a specific testimonial quality." *State v. Turecek*, 456 N.W.2d 219, 224 (Iowa 1990).

It is clear that the evidence presented in the offers of proof was not relevant to resolving an issue material to the case. The evidence had no bearing on whether the existence of any fact of consequence to the determination of the action was more probable or less probable. *See* Iowa R. Evid. 5.401. Additionally, the evidence was not relevant to establishing or undermining the credibility of the witnesses. As discussed above, any discrepancies in the witnesses' testimony as to when in the past certain irrelevant events occurred was not likely to change jurors' opinions as to the central issue of the case, whether Wood engaged in sex acts with T.B. and C.W. Furthermore, there is no claim the proffered evidence bore on the bias, peculiar skills, or relevant knowledge, or went to a specific testimonial quality of the witnesses. *See Turecek*, 456 N.W.2d at 224. We conclude the evidence was inadmissible for impeachment purposes because it went to a collateral issue.

We affirm Wood's convictions for two counts of sexual abuse in the second-degree and three counts of sexual abuse in the third-degree.

AFFIRMED.