IN THE COURT OF APPEALS OF IOWA

No. 2-794 / 11-1605
Filed October 17, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES ROBERT McCURDY,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Kurt J. Stoebe, Judge.

The defendant appeals his convictions for five counts of second-degree sexual abuse and one count of third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Phil Van Liew, Legal Intern, Stephen Holmes, County Attorney, and Timothy Meals, Assistant County Attorney, for appellee.

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

DOYLE, J.

James McCurdy was convicted of five counts of second-degree sexual abuse and one count of third-degree sexual abuse. His long-time friend, who is a pastor, was allowed to testify about statements McCurdy made to him about the abuse. McCurdy claims this violated the priest-penitent privilege of Iowa Code section 622.10(1) (2009). He additionally claims the district court erred in allowing the State to admit into evidence a photograph of sexually explicit toys that were found in McCurdy's bedroom. We affirm.

I. Background Facts and Proceedings.

In February 2010, a fourteen-year-old boy told his school counselor that he was being sexually abused by a family friend—James McCurdy. In the months leading up to the allegation, the child was drinking heavily and smoking marijuana. He ran away from his father's home in December 2009. About a week later, he was hospitalized for alcohol poisoning. McCurdy picked the child up from the hospital and took the child to his home. The next thing the child remembers is waking up naked in McCurdy's bed. McCurdy was touching the child's penis.

The child stated McCurdy began abusing him when he was six years old. McCurdy frequently babysat the child while his father attended night classes at a university. One night when the child was spending the night at McCurdy's apartment, McCurdy told the child he could help him fall asleep by touching the child's penis. From then on, whenever the child spent the night at McCurdy's apartment, he would sleep with McCurdy in his bed. The child stated that as he

grew older, the abuse progressed from touching each other's penises to oral sex and attempted anal sex.

About one month after the child's allegations came to light, McCurdy called his friend of twenty-five years, Keith Acker. McCurdy told Acker that he was being investigated for sexually abusing a child. He explained the child

> had come over to his home one evening. He had been high on some drugs, and he had gone in to Jim's bedroom and passed out on his bed. A few hours later Jim had gone to bed as well, laid down next to [the child]. And then a few hours later, Jim had awoken because he was having a painful erection. . . .
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> And so as he awoke with this painful erection, he found [the child] to be giving him oral sex. And so he told [the child] to stop and to go out on to the couch to sleep.

When Acker asked why the child would think it was okay to do that, McCurdy told Acker "the only thing he could think of was that [the child] was in love with him and that he [the child] . . . felt like he had scorned his [the child's] love and, therefore, he [the child] . . . made these allegations to . . . try to ruin his life."

At the end of their four-hour conversation, Acker, a pastor for the Seventh Day Adventist Church, urged McCurdy "to seek God and to give his life and heart over to God and ask for God's help with this matter." McCurdy agreed to do so, and the two ended their phone call "with a prayer and with [McCurdy] committing his life to God." Acker later traveled to Iowa from his home in Delaware to baptize McCurdy.

After his arrest for second and third-degree sexual abuse, McCurdy filed a motion in limine seeking to exclude Acker's testimony under the priest-penitent privilege in Iowa Code section 622.10(1). The State resisted and filed a motion to adjudicate law points requesting a pretrial ruling on the issue. Following a

hearing, the district court entered an order finding "the statements made by the defendant were made to Acker as a result of their friendship and not as a result of Acker's professional capacity" and thus not privileged. Acker was accordingly allowed to testify about his conversation with McCurdy at the jury trial on the sexual abuse charges.

The jury was also presented with a photograph of key chains with masturbating teddy bear figurines that were found by the police during a search of McCurdy's bedroom. The child testified he had seen the key chains on a shelf in McCurdy's room. McCurdy objected to this evidence, arguing it was not relevant. The State disagreed, asserting "this was Mr. McCurdy's attempt to normalize the behavior" by "using basically children's toys, bears to depict sex acts." The district court ruled in favor of the State.

The jury found McCurdy guilty of five counts of second-degree sexual abuse and one count of third-degree sexual abuse. This appeal followed.

II. Scope and Standards of Review.

"Because evidentiary privilege in Iowa is based on statute, our review is on error." *State v. Richmond*, 590 N.W.2d 33, 34 (Iowa 1999). A trial court's determination on whether or not the privilege attaches is nevertheless discretionary. *Id.* We also review the court's admission of the challenged exhibit for an abuse of discretion. *See State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011).

III. Discussion.

A. Priest-Penitent Privilege.

Our supreme court last discussed the priest-penitent privilege of section 622.10(1) in *Richmond*. In that case, the court stated

> that in order to determine whether a communication to a member of the clergy falls within the purview of section 622.10, the communication must be: (1) confidential; (2) entrusted to a person in his or her professional capacity; and (3) necessary and proper for the discharge of the function of the person's office.

Richmond, 590 N.W.2d at 35. The State does not challenge the first element, but asserts the remaining two were not met. *See State v. Alspach*, 524 N.W.2d 665, 668 (Iowa 1994) (stating it is the defendant's burden to establish all three requirements in order for the privilege to apply). We agree.

At the pretrial hearing on the issue, Acker testified he had been friends with McCurdy since he was twelve years old. McCurdy dated Acker's sister and often dined with the family. He visited Acker at school and occasionally took him on trips. The two maintained their friendship over the years, typically speaking by phone two or three times each week. Acker considered McCurdy to be his "worldly friend," stating:

> He was not a member of my church. He wasn't a fellow pastor. We had been friends through all of my growing up years and my mistaken years so I felt very comfortable to talk with him about a variety of personal things, my struggles and temptations that I was going through, my marriage problems, my parenting challenges, my frustrations with the church and pastoring.

Acker continued,

> [O]ne of my things that I really appreciate about my friendship with Jim is that I could just be Keith and so I told Jim all sorts of things that I would never tell my parishioners or people that I was trying to minister to, very many personal things. And he the same with me.

McCurdy argues that while his relationship with Acker "may have been rooted in friendship, that did not remove the fact that Acker was a minister of the church and spiritual adviser—even to McCurdy." He asserts that when he called Acker during the sexual abuse investigation, he was "seeking something more than friendship," as evidenced by his acceptance, at Acker's urging, of "Christ as his savior" at the end of their conversation.

On this point, Acker testified, "[F]rom my perspective, my feeling on the matter has always been this is my friend and he was in trouble and I was sharing with him the solution that I'd found to the trouble that I caused in my life, which was God." He explained:

> I am a pastor, but I'm also a spiritual man, a man who loves God dearly. And so . . . as I'm talking to my sister or to my other friends, . . . my parents even, I regularly offer spiritual guidance and advice. So to say that because I was offering him some spiritual advice that I was doing that in my ministerial capacity, I would definitely have to say no.

Though McCurdy testified he viewed Acker as his "spiritual advisor," the court found Acker's testimony on this point more credible. McCurdy acknowledged at the hearing that when he first wrote Acker letters from jail, he addressed him as "Keith." In later letters, he began referring to him as "Pastor Keith." Acker testified he was surprised by this, stating:

> I knew that it would be very hard for Jim to . . . know that I had told someone what he had shared with me as a friend, but I did not have any idea that perhaps . . . he might make an effort to throw my testimony out because of a career path that I chose ten years after we met. It was very surprising to me.

We think it is clear from Acker's testimony that McCurdy did not talk to Acker in a pastoral capacity, though we repeat the warning of the court in

Richmond that it "is highly risky for prosecutors to bolster a case by resorting to evidence that is subject to such a claim." 590 N.W.2d at 35.

B. Sexually Explicit Toys.

McCurdy next claims the district court erred in allowing the State to admit into evidence a photograph of key chains with masturbating teddy bear figurines that were found by the police during a search of McCurdy's bedroom. While we question the relevancy of this evidence,[1] we find its admission was harmless. *See State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (recognizing not all evidentiary errors require reversal); *see also* Iowa R. Evid. 5.103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .").

The harmless-error analysis under Iowa Rule of Evidence 5.103(a) "accepts that error has seeped into the trial, but does not allow the error to serve as grounds for reversal of the conviction or other relief if the overall circumstances affirmatively establish the error did not affect the substantive

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[1] The State argued the key chains were relevant to show McCurdy's attempt to normalize the behavior between him and the child. However, in the State's offer of proof, the child testified he only briefly discussed the key chains with McCurdy, who told him "they were just toys." And the extent of the child's testimony about the exhibit at trial was as follows:

> Q. Okay. And then State's Exhibit 15, I'm going to ask you if you recognize those. A. Yes.
>
> Q. And what are those? A. Key chains of bears masturbating.
>
> Q. Okay. Have you seen those before? A. Yes.
>
> . . . .
>
> Q. . . . [W]here did you see State's Exhibit 15? A. In Jim's bedroom.
>
> Q. Okay. Where were they located? A. On top of his movie shelf.

This testimony does not provide a link to the State's theory of relevance for the key chains. *Cf. State v. Elston*, 735 N.W.2d 196, 200 (Iowa 2007) (finding pornographic photographs of young girls were admissible to prove indecent contact charge where defendant claimed touching was accidental).

rights of the defendant." *State v*. *Parker*, 747 N.W.2d 196, 209 (Iowa 2008). The photograph of the teddy bear key chains was a relatively small piece of the case against McCurdy and was outweighed by other, similar evidence that McCurdy did not object to. *See State v*. *Shanahan*, 712 N.W.2d 121, 138 (Iowa 2006) (finding admission of questionably relevant evidence non-prejudicial because the "evidence was not much different in character from the other-acts evidence we concluded was admissible").

Before the State admitted the picture of the teddy bear key chains, the child was asked to identify two books that were also found in McCurdy's bedroom. One was titled, "The Complete Manual of Sexual Positions," and the other was titled, "The Good Sex Bible." The child testified McCurdy told him to look at one of the books to see "if there was anything else that we wanted to try new that we haven't before." McCurdy did not object to either of these exhibits which, when taken with the child's above testimony, were significantly more prejudicial than the picture of the key chains. *See, e*.*g*., *Elston*, 735 N.W.2d at 200 (finding other evidence, such as the victim's testimony that defendant was present in the bedroom when pornographic photos were taken of her, "was considerably more prejudicial than the pornographic photographs of unknown female children"). We accordingly conclude McCurdy has failed to establish he suffered a miscarriage of justice by the admission of the challenged exhibit. *See Parker*, 747 N.W.2d at 209.

For these reasons, the judgment of the district court is affirmed.

AFFIRMED.