**IN THE COURT OF APPEALS OF IOWA**

No. 3-097 / 12-0022
Filed July 10, 2013

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**RICKY LEE PUTMAN,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Fayette County, John J. Bauercamper, Judge.

A defendant appeals his judgment and sentence for first-degree sexual abuse, contending (1) there is insufficient evidence to support the jury's verdict, (2) the district court abused its discretion in making certain evidentiary rulings. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, W. Wayne Saur, County Attorney, and Denise Timmins, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

**VAITHESWARAN, P.J.**

Ricky Putman appeals his judgment and sentence for first-degree sexual abuse. He contends (1) the record contains insufficient evidence to support the jury's finding of guilt, (2) the district court abused its discretion in admitting evidence of child pornography found in his home, and (3) the district court abused its discretion in excluding laboratory reports prepared by the Iowa Division of Criminal Investigation.

### *I. Sufficiency of the Evidence*

The jury was instructed that the State would have to prove the following elements of first-degree sexual abuse:

> 1. On or about May 23, 2010, the defendant, Ricky Lee Putman, performed a sex act with [the child].
> 2. The defendant did so while [the child] was under the age of 14 years.
> 3. During the commission of sexual abuse, the defendant caused [the child] a serious injury.

*See also* Iowa Code §§ 709.1, .2 (2009).

Putman argues there is "no direct evidence inculpating" him in the matter. While he is correct that DNA evidence did not tie him to the crime, the record contains substantial circumstantial evidence to support the jury's finding of guilt. *See State v*. *Bass*, 349 N.W.2d 498, 500 (Iowa 1984) (setting forth the standard of review); *State v*. *Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981) ("Direct and circumstantial evidence are equally probative.").

A reasonable juror could have found the following facts. Putman spent the night at the home of the child's parents, sleeping in their bedroom adjacent to their two-year-old daughter's room. Early in the morning, the child's father

checked on his daughter and found her asleep in her room. He went downstairs and nodded off in the living room. His wife had been home the previous evening but spent the night elsewhere.

At around 8:00 a.m., the child came downstairs without the dress and diaper she had worn to bed. The father noticed "a little bit of blood in between her thighs" and thought "she might have scratched herself." When he went upstairs to get the child's bottle, he saw that Putman was awake and noticed "he had blood on his stomach and his hand." Putman came downstairs. When the child saw him, she ran to her father. Putman left.

The child's mother returned home to find her husband "visibly upset and shaking." He left and returned approximately fifteen minutes later with another relative. According to the mother, the child's "face was bruised," "she appeared to have bite marks on her ear," and "she had a little bit of smeared blood on her chest and also on her legs, like in her thigh area."

The child was taken to the hospital, where an emergency room physician confirmed bruising on her head and behind her ears. A pediatric trauma physician similarly confirmed bruising "around the back of her ears, behind her ears, as well as on her head and her face" and "some bruising on her arms and legs" and "on her inner thighs." She testified a two-year-old who fell generally did not experience "symmetric" bruising "on both sides of the head, especially behind the ears" or bruising on the thighs. She examined the child's vaginal area and found "a tear . . . in the middle of her vagina." The doctor noted that everything "from the back of her vagina all the way down to her rectum" was torn.

"Numerous" stiches were needed to "put together the muscle and the skin, and the mucosa."

A deputy sheriff went to Putman's house and interviewed him. He noticed signs that "some laundry . . . had just been done." Citing the "piles of dirty clothes" in the home, the deputy testified that it appeared "the laundry that was done was very little." When he approached the bedroom, he saw an "[e]xtremely damp" shirt hanging on the bedroom door. The shirt matched a description of the shirt Putman wore the previous night.

Putman acknowledges the trial evidence "was tragic" but suggests it fails to establish that he, rather than the child's father, was the perpetrator. A reasonable juror could have found otherwise. The child's mother testified that the child was crying for her father in the hospital examining room. Later, she saw no issues between father and child; their daughter "wanted to be in his lap the whole time," even though she was scared of any other man that came around her.

A reasonable juror also could have found that child pornography discovered on Putman's computer and on a flash drive pointed to him as the perpetrator. Putman challenges the admission of this evidence, but we are obligated to consider it in assessing the sufficiency of the evidence supporting the jury's finding of guilt even if we ultimately conclude the evidence is inadmissible. *See State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003). As will be discussed, we are convinced the evidence was properly admitted.

Based on this record, we conclude sufficient evidence supported the jury's finding of guilt.

### *II. Admission of Child Pornography Evidence*

After Putman's arrest, Putman asked his friend to care for his cat while he was away. The friend examined the contents of Putman's computer and found child pornography on it. He took the computer to his parents' garage, putatively as repayment of a debt Putman owed him. He then called the sheriff's department, which had it picked up. Later, a flash drive obtained from the home and also containing child pornography was turned over to the sheriff.

A computer forensic examiner with the Iowa Division of Criminal Investigation examined the computer and its drives. Two file names of videos contained references to a "two-year-old getting raped." The examiner testified that the content of the videos matched the titles.

Before trial, Putman filed a motion in limine to exclude the evidence. The State responded with a request for a ruling on the admissibility of the evidence. The court ruled the evidence was "relevant to the issue of identity, motive and related issues, due to the fact the defense theory of the case that another person committed the crime." The court denied Putman's motion to exclude the evidence and ruled the evidence was admissible. Putman moved to reconsider the ruling. Following an evidentiary hearing at which the court accepted detailed testimony about the computer and its contents, the court denied the motion. The court stated it remained "convinced that the limited evidence to be presented by the State is relevant, necessary, and not unduly prejudicial."

On appeal, Putman contends the district court should have excluded the evidence of child pornography. He asserts the evidence "served only the

purpose of proving action in conformity with character and, therefore, unnecessarily inflamed the passions of the jury."

Iowa Rule of Evidence 5.404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The principles governing admission of this type of evidence are well-established: "(1) the evidence must be relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts, and (2) there must be clear proof the individual against whom the evidence is offered committed the bad act or crime." *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). If these criteria are satisfied, the evidence is prima facie admissible. *Id.* The "court must then decide if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *Id.*

On the first question, relevancy, the State argues the computer-related evidence was "directly relevant to Putman's motive and to his identity as the man who raped [the child]." *See State v. Cox*, 781 N.W.2d 757, 769 (Iowa 2010) (holding a statute that permitted the admission of prior sexual conduct with a person other than the victim was unconstitutional as applied, but stating "the prosecution may introduce evidence of prior relevant sexual abuse against a different victim where the evidence is used to demonstrate a legitimate issue"). We will focus on identity.

When prior bad acts evidence is used to prove identity, the test of relevancy is whether the act is "strikingly similar" or of a "unique nature" such that involvement in that crime makes it more likely the defendant committed the charged crime. *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994). The titles of the videos on Putman's computer meet this test. *See State v. Ripperger*, 514 N.W.2d 740, 748 (Iowa Ct. App. 1994) (finding similarities between prior sexual abuse incident and the present incident which were "sufficiently distinctive to support the admission of the evidence").

Turning to the "clear proof" requirement, that standard simply requires sufficient proof to "prevent the jury from engaging in speculation or drawing inferences based on mere suspicion." *See State v. Newell*, 710 N.W.2d 6, 23 (Iowa 2006) (quotation marks and citation omitted). The State made a detailed pretrial record on this question, eliciting testimony from Putman's friend, deputy sheriffs, and the forensic examiner. This testimony essentially refuted Putman's assertion that the images could have belonged to someone else or could have been placed on the computer by someone else.

We are left with the district court's balancing of the probative value of the evidence against its prejudicial effect. *See* Iowa R. Evid. 5.403 ("Although relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). At trial, the State introduced very little of the pretrial evidence it elicited to establish clear proof. *See State v. Rodriguez*, 636 N.W.2d 234, 243 (Iowa 2001) ("The State did not elicit great

detail about the prior assaults and spent a relatively small amount of time on this line of questioning."). The videos whose titles the DCI agent referenced were not admitted at trial and a written summary of the videos was also not admitted. The State narrowed the testimony precisely to minimize its conceded prejudicial effect. In addition, the court instructed the jury that "the defendant [was] not on trial for those acts." Finally, the computer-related testimony paled in comparison to the graphic testimony about the charged crime and the injuries the child sustained. *See State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) (noting potential prejudicial effect was "neutralized by the equally reprehensible nature of the charged crime"). For these reasons, we conclude the probative value of the evidence was not substantially outweighed by its prejudicial effect and the district court did not abuse its discretion in admitting the child pornography evidence.

### *III. Exclusion of Laboratory Reports*

An Iowa Division of Criminal Investigation criminalist testified about DNA evidence. At trial, the defense sought to admit her essentially exculpatory reports. The district court excluded them, stating they appeared to be confusing and contained irrelevant items. The court also noted that defense counsel had "other alternatives to present information referred to in that report through cross-examination." The court did not cite a rule to support the ruling, but the parties agree the court must have relied on Iowa Rule of Evidence 5.403, quoted above.

We conclude the court did not abuse its discretion in excluding the reports. *See State v. Martin*, 704 N.W.2d 665, 671 (Iowa 2005) (setting forth the standard of review). The criminalist testified to the key exculpatory evidence contained in

the report: the fact that no DNA profile matching Putman's was found. She also acknowledged that the comforter on which Putman slept contained DNA profiles matching those of the child's parents. The reports did little to strengthen these statements in favor of Putman and were cumulative of those statements. Accordingly, the exclusion of the reports did not amount to reversible error.

### *IV. Disposition*

We affirm Putman's judgment and sentence for first-degree sexual abuse.

**AFFIRMED.**