IN THE COURT OF APPEALS OF IOWA

No. 3-357 / 12-1082
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VINCENT MUMMAU,
Defendant-Appellant.

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

Vincent Mummau appeals from his conviction and sentence for third-degree sexual abuse. **AFFIRMED.**

John W. Hofmeyer III, Oelwein, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Alan Heavens, County Attorney, and Natalia Blaskovich, Assistant County Attorney, for appellee.

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

POTTERFIELD, J.

Vincent Mummau appeals from his conviction and sentence for third-degree sexual abuse. He contends the district court erred in two pretrial rulings: finding the sexual abuse statute, Iowa Code chapter 709, is constitutional; and denying his application for a court-ordered psychiatric evaluation of the victim. He appeals three evidentiary rulings, alleging the court erred: in not allowing his proposed character witnesses, in restricting his cross-examination of the alleged victim, and in admitting the recording of a telephone conversation he had while in jail. Mummau also claims the district court erred in denying his proposed jury instructions, motion for judgment of acquittal, and motion for a new trial. Finally, he argues his sentence is cruel and unusual punishment. We affirm.

I. Facts and Proceedings

A review of the evidence reveals a reasonable jury could have found the facts as follows. *See State v. Smith*, 739 N.W.2d 289, 290 (Iowa 2007). On July 7, 2011, B.K. arrived at the home of Vincent Mummau to fix his television and pick up eggs. After working on one television in the lower level of the home, Mummau suggested she also see the one upstairs and offered her a tour of his home. The two walked upstairs to the second level of the home. Mummau asked whether she "need[ed] some loving" to which she responded "not today." The tour continued to Mummau's bedroom, where B.K. declined his advances again.[1] At some point, Mummau forced B.K. onto the bed, landing on top of her. Mummau then instructed her to remove her clothes. B.K. stood and complied.

[1] Mummau contends she only declined once, B.K. states she did so at least four times.

Mummau performed various sex acts on B.K. and left the room. B.K. reported the incident to police several days later.

Mummau was charged August 2, 2011, with sexual abuse in the third degree. While in jail he called a friend, requesting the friend attempt to have B.K. drop the charges against him. This call was recorded by jail staff.

Before trial, Mummau filed a motion to challenge the constitutionality of the sexual abuse statute claiming it violated his due process rights, and filed a motion to compel psychiatric testing of B.K. These motions were denied. He then filed a series of motions in limine, seeking to exclude evidence of his past wrongs, the recorded phone call from the jail, opinions of police officers as to his credibility, and his interview with a detective. The court denied all but the motion regarding evidence of his past wrongs. The State also filed motions in limine, seeking to exclude any evidence of prior sexual abuse experienced by B.K., evidence of past sexual history of any witness, Mummau's video reenactment of the encounter, and any reference to Mummau's religious beliefs or opinions. The court granted these motions.

Mummau disclosed the statements of several witnesses who would testify as to his good character. In response, the State filed a motion to strike all of them, citing Iowa Rule of Evidence 5.404(a). At a hearing on the motion, the State also raised Mummau's failure to establish the proper foundation for admitting reputation and opinion testimony. The court granted the motion to strike on rule 5.404(a) grounds.

At trial, Mummau made timely objections to the evidence on the same grounds as the motion in limine. He also attempted to impeach B.K.'s testimony

through her deposition testimony. The court denied the use of the transcript for impeachment purposes, finding its use violated our rape shield statute. Mummau requested certain jury instructions, which were denied. The jury found Mummau guilty of third-degree sexual abuse. Mummau made motions for judgment of acquittal and for new trial. These also were denied.

The court imposed the mandatory sentence of a term of imprisonment not to exceed ten years and ordered Mummau to pay a fine of $1000. He appeals from these proceedings.

II. Analysis

A. Due process and Iowa Code section 709.4 (2011).

Mummau argues Iowa Code section 709.4, which defines sexual abuse, is unconstitutional for two reasons—it does not provide adequate notice of prohibited conduct, and lacks a mens rea provision. We review this argument de novo. *State v*. *Seering*, 701 N.W.2d 655, 661 (Iowa 2005). In this review, we remember statutes are "cloaked with a presumption of constitutionality." *State v*. *Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002); *accord Seering*, 701 N.W.2d at 661.

> The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. Moreover, the challenger must refute every reasonable basis upon which the statute could be found to be constitutional. Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction.

Seering, 701 N.W.2d at 661 (internal citations and quotations omitted).

1. Notice of prohibited conduct.

We agree with the district court that Iowa Code section709.4 is not unconstitutionally vague. A statute must: (1) give a person of ordinary intelligence fair notice of what is prohibited, and (2) provide an explicit standard for those who apply it. *State v*. *Whetstine*, 315 N.W.2d 758, 764 (Iowa 1982) (holding sexual abuse statute 709.4, construed with section 702.17 sufficiently notified defendant of what constitutes a "sex act"). Mummau argues that, because Iowa Code section709.4(1) defines sexual abuse as "against the will of another," a person has to know clairvoyantly what is in the mind of another and the statute does not provide fair notice of what is prohibited. We find a person of ordinary intelligence is notified by section 709.4(1) that committing a sex act when the other person has not consented to the act—here, by stating "no" or "not today"—that person commits a sex act against the will of another. *See State v*. *Meyers*, 799 N.W.2d 132, 43 (Iowa 2011). Second, we find the statute is clear in its standard for those who apply it. *See id.* at 142–143 (explaining the legislative intent of the "against the will" language of section 709.4 is to "broadly protect persons from nonconsensual sex acts"); *Whetstine*, 315 N.W.2d at 764.

2. Mens rea.

Mummau next argues the sexual abuse statute is unconstitutional as it does not contain a *mens rea* provision. He argues sexual abuse can no longer be a general intent crime because our supreme court has found sexual abuse requires conduct that is sexual in the mind of the defendant. *See State v*. *Monk*, 514 N.W.2d 448 (Iowa 1994). He contends the *Monk* opinion is contrary to prior precedent of our supreme court defining sexual abuse as a general intent crime

to which a mistake of fact as to consent is no defense, citing *State v. Bauer*, 324 N.W.2d 320 (Iowa 1982). Our supreme court recently reaffirmed *Bauer* in stating "the mental state of the victim is a proper circumstance to consider in determining if a sex act is nonconsensual." *Meyers*, 799 N.W.2d at 144.

Further, in our reading of *Monk* and its sister case *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994), we find no requirement for sexual intent in the mind of the defendant. To the contrary, "sexual motivation is not required in order to establish an offense of sexual abuse." *Monk*, 514 N.W.2d at 452 (Ternus, J. concurring specially) (citing *Pearson*, 514 N.W.2d at 456).

> Whether certain conduct constitutes "sexual contact" is a fact question. As in any fact-finding process, judges and juries must exercise common sense in their deliberations and be reasonable in their judgments. Common sense and reasonableness, together with the standards set forth above, will protect the innocent person from an arbitrary perversion of the sexual abuse laws.

Pearson, 514 N.W.2d at 456. We find Mummau's *mens rea* argument is without merit.

B. Denial of psychiatric evaluation.

Mummau argues the district court erred in denying his request for a psychiatric evaluation of the victim. He argues we should overrule our supreme court precedent in *State v. Gabrielson*, which held that trial courts "have no authority to order sexual abuse victims to undergo psychiatric examinations." 464 N.W.2d 434, 438 (Iowa 1990). He argues his position is in line with the more recent precedent of *State v. Cashen*, which allowed discovery of a victim's mental health records under very limited circumstances. 789 N.W.2d 400, 408 (Iowa 2010). We do not find *Cashen* goes so far as to overrule the clear holding

of *Gabrielson*. We are bound by our precedent and find the district court properly declined Mummau's request to order the victim to undergo a psychiatric evaluation. *Gabrielson*, 464 N.W.2d at 438.

C. Disallowance of character witnesses.

Mummau first argues the court erred in not allowing testimony from seven character witnesses. Mummau argues our review of this point should be de novo, as the "exclusion of his character evidence is of Constitutional proportions, and involves [his due process rights]." The State disagrees, asserting our review is for abuse of discretion and that to accept Mummau's standard would be to eviscerate discretionary review of trial court evidentiary rulings. We agree with the State. Our review of a district court's evidentiary ruling regarding the admissibility of witness testimony is for abuse of discretion. *See State v*. *Huston*, 825 N.W.2d 531, 536 (Iowa 2013); *State v*. *Allen*, 565 N.W.2d 333, 339 (Iowa 1997).

Mummau sought to introduce seven witnesses who would testify to his good character for "peacefulness, respect for women, kindness, caring, honest, physical aggressiveness, mild manneredness, integrity, citizenship, and violence." The district court did not allow testimony from the character witnesses, finding the statements admitted as an offer of proof were not admissible under Iowa Rule of Evidence 5.404(a). This rule reads, in relevant part:

> a. *Character evidence generally*. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

> (1) *Character of accused*. Evidence of a *pertinent trait* of the person's character offered by an accused, or by the prosecution to rebut the same.

Iowa R. Evid. 5.404(a) (emphasis added). A criminal defendant may put his or her character in issue "by producing evidence as to his good character as bearing on the probability or nonprobability of his guilt of the crime charged. This principle is based upon the philosophy that a man of good character would not be likely to commit the crime of which he is accused." *State v*. *Hobbs*, 172 N.W.2d 268, 271 (Iowa 1969).

Our supreme court has found traits to be pertinent to the elements of the crime with which a defendant is charged in several cases. For example, "[i]n a charge of robbery or larceny the traits involved are honesty, integrity, and good citizenship." *Id.* In *State v*. *Martinez*, 679 N.W.2d 620, 625 (Iowa 2004), the court ruled traits of honesty, trustworthiness, and dependability were not "strongly related to the criminal behavior at issue"—in that case, delivery of methamphetamine and failure to affix a drug tax stamp. In *State v*. *Kramer*, 231 N.W.2d 874, 877 (Iowa 1975), the court ruled testimony of Kramer's good reputation in the community was properly excluded because the testimony did not relate to the particular character traits involved in the crime charged of breaking and entering.

The initial disclosure of the character witnesses to the court and the post trial offer of proof containing deposition testimony of the proposed witnesses show the offered testimony included generalized descriptions of Mummau's good character, respect for women, kindness, caring, honesty, mild manners, integrity, and citizenship. These traits are not strongly related to the crime of sexual abuse

and were properly excluded. *See Martinez*, 679 N.W.2d at 625. There are several statements indicating Mummau's lack of aggression.[2] Rape is a crime of aggression, and Mummau's character for lack of aggression is pertinent to the charge of sexual abuse. *See State v*. *Hickman*, 337 N.W.2d 512, 516 (Iowa 1983) (allowing expert testimony as to accused's characteristics in common with "aggressive, antisocial, or sociopathic" rapists). However, in order to offer testimony from a witness regarding such evidence, certain foundation must be laid. This foundation must include:

> (1) The background, occupation, residence, etc., of the character witness, (2) His familiarity and ability to identify the party whose general reputation was the subject of comment, (3) Whether there have in fact been comments concerning the party's reputation for a given trait, (4) The exact place of these comments, (5) The generality of these comments, many or few in number, (6) Whether from a limited group or class as opposed to a general cross-section of the community, (7) When and how long a period of time the comments have been made.

Hobbs, 172 N.W.2d at 272. Upon our review of the posttrial depositions comprising his offer of proof, we find the offered testimony would not have fulfilled the foundational requirements of *Hobbs*. These depositions show the witnesses' personal, general impression of Mummau. They do not claim familiarity with his reputation for aggression in the community, comments in the community about whether he is or is not aggressive, nor do they show where such comments were made, much less how long a period of time during which these comments have been made. *See id.* Though the district court based its ruling on rule 5.404(a), the State presented the argument of lack of foundation to

[2] These comments include: "when something goes wrong, I've never seen him have a temper or anything. No, I haven't seen him being aggressive"; "I couldn't imagine him hurting anybody"; and a description that he is "gentle."

the court, and we may affirm on any ground urged below. *DeVoss v. State*, 648 N.W.2d 56, 60–61 (Iowa 2002).

D. Impeachment ruling.

Mummau next challenges the district court's ruling that the transcript of B.K.'s pretrial deposition was not admissible to impeach her testimony. Once again, our review is for abuse of discretion. *State v. Berry*, 549 N.W.2d 316, 319 (Iowa Ct. App. 1996). A trial court abuses its discretion and a reversal is warranted "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, 89 (Iowa 2012); *State v. Alberts*, 722 N.W.2d 402, 408 (Iowa 2006). This occurs when a court's ruling "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) (citation omitted).

At trial, on direct examination B.K. testified Mummau told her to take off her clothes. On cross-examination, Mummau sought to introduce the following deposition testimony of the victim to impeach her trial testimony:

> Q: Have you ever taken your clothes off for anybody else— A: No.
> Q: —other than your husband? A: No.
> Q: But you took your clothes off for Vincent? A: Because he had asked.

She goes on in the deposition to explain that removing her clothes was an unwilling act—that she thought, given the circumstances, "[she]'d better cooperate, or God only knows what, you know." This deposition testimony arose after a series of questions regarding sexual abuse experienced by the victim during her childhood. At trial, the court determined allowing this testimony would

violate the rape shield statute—Iowa Rule Evidence 5.412. This rule disallows evidence of the past sexual behavior of a victim in a criminal sexual assault case absent very limited circumstances, which do not apply here. The deposition testimony arose after inquiry into undressing before other men, and the entire context shows a very limited impeachment impact. We find the trial court did not abuse its discretion in disallowing the use of this portion of the deposition transcript for impeachment purposes.

E. Admission of phone conversation.

Mummau argues the district court should not have admitted the recording of a phone conversation between himself and a friend while in jail. He filed a motion to suppress based on the wiretap statute—Iowa Code section 808B.[3] However, "as explained in *State v*. *Fox*, 493 N.W.2d 829, 831 (Iowa 1992), it is clear that Iowa law permits [jail] officials acting in the ordinary course of their duties to monitor communications of [jail] inmates." *See State v*. *Washburne*, 574 N.W.2d 261, 268 (Iowa 1997) (applying *Fox* to statements of an accused recorded while in county jail) (*overruled on other grounds by State v*. *Palmer*, 791 N.W.2d 840 (Iowa 2010). The district court did not commit error in admitting this evidence.

[3] Mummau also argues the recording of the conversation should not be admitted on authentication grounds. However, it is clear from the record that this ground was not urged before the trial court, and we do not consider it for the first time on appeal. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008). He also argues the admission of the recording resulted in unfair prejudice which outweighed any probative value; however, he cites no authority to support that proposition. We therefore decline to consider this argument. See Iowa R. App. P. 6.903(2)(g)(3).

F. Sufficiency of evidence.

Mummau next argues the district court improperly denied his motion for judgment of acquittal because insufficient evidence exists that he used enough force to overcome the victim's will.

> We review challenges to the sufficiency of the evidence for correction of errors at law. *State v*. *Webb*, 648 N.W.2d 72, 75 (Iowa 2002). "If a verdict is supported by substantial evidence, we will uphold a finding of guilt. Substantial evidence is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *State v*. *Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). "The State must prove every fact necessary to constitute the crime with which the defendant is charged. The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Webb*, 648 N.W.2d at 76. In conducting our review, we consider all the evidence in the record, that which is favorable as well as unfavorable to the verdict, and view the evidence in the light most favorable to the State. *Henderson*, 696 N.W.2d at 7.

State v. *Neitzel*, 801 N.W.2d 612, 614 (Iowa Ct. App. 2011). The jury received testimony from the officer who responded to B.K.'s complaint and said B.K. reported being thrown on the bed and blocked from exiting the bedroom. The jury also heard testimony from the nurse practitioner who testified to B.K.'s limited mobility and health issues, as well as B.K.'s report of being very afraid and pushed on the bed by Mummau. Further, the jury heard B.K.'s own testimony about being forced onto the bed and being afraid of trying to leave. Viewed in the light most favorable to the State, we find there was sufficient evidence for the jury to conclude Mummau committed the sex act by force or against B.K.'s will.

G. Jury instruction.

We review a claim that the district court should have given a jury instruction for an abuse of discretion. *State v*. *Marin*, 788 N.W.2d 833, 836 (Iowa 2010). To warrant reversal, Mummau must be prejudiced by the failure of the court to give his instruction. *Id.* "Under Iowa law, a court must give a requested instruction when it states a correct rule of law applicable to the facts of the case and is not embodied in other instructions." *Smith v*. *Koslow*, 757 N.W.2d 677, 683 (Iowa 2008). Mummau argues his proposed instructions on specific intent and mistake of fact should have been given. One of these instructions encompasses Mummau's argument on intent, which we have rejected. Regarding the remaining instructions, Mummau points to no Iowa case law supporting his instructions. We cannot find the district court abused its discretion in failing to provide the jury with instructions unsupported by Iowa case law. *See id.*

H. Denial of motion for new trial.

Mummau argues the court erred in failing to grant his motion for a new trial, based on the issues we addressed earlier. "The district court has broad discretion in ruling on a motion for new trial, and thus our review in such cases is for abuse of discretion." *State v*. *Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006) (internal citations and quotation marks omitted). Because we rejected each of these claims, we find no abuse of discretion in the trial court's rejection of his motion for new trial. *See id*.

I. Cruel and unusual punishment.

Finally, Mummau argues his sentence constituted cruel and unusual punishment. We review this constitutional challenge de novo. *State v*. *Oliver*, 812 N.W.2d 636, 639 (Iowa 2012). A challenge to the constitutionality of a sentence may be raised for the first time on appeal. *Id.*; *State v*. *Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009). In challenging his particular sentence, Mummau must show his sentence is grossly disproportionate to the crime committed. *Oliver,* N.W.2d at 650. This review is not toothless, but we defer substantially to the legislature. *Id.* Mummau was sentenced to imprisonment not to exceed ten years, fined $1000, ordered to submit a DNA specimen, and register on the sex offender registry. We do not find this punishment grossly disproportionate to the forcible felony crime the jury found he committed. *See id.*

Mummau also makes a categorical challenge to his sentence. *Id.* at 641. The threshold inquiry of this challenge is whether there is a "national consensus against the use of this penalty for this crime." *Id.* Mummau has not provided us with any support that would call into question his sentence to imprisonment "not to exceed ten years." We therefore reject his claim. *See id.*

AFFIRMED.