IN THE COURT OF APPEALS OF IOWA

No. 3-503 / 12-0983
Filed July 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VERNON LEE MCENDREE,
Defendant-Appellant.

Appeal from the Iowa District Court for Adams County, David L. Christensen, Judge.

Vernon McEndree appeals from convictions of eight counts of third-degree sexual abuse. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Susan R. Krisko, Assistant Attorney General, and Duane Golden, County Attorney, for appellee.

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

POTTERFIELD, J.

Vernon McEndree appeals from convictions of eight counts of third-degree sexual abuse arising from allegations made by his granddaughter, born in 1986, that he committed several sex acts with her between Thanksgiving of 2000 and the summer of 2002. On appeal, McEndree asserts the district court abused its discretion in allowing the testimony of the State's expert witness forensic interviewer, April Anderson, and in excluding the testimony of the defense's expert witness, psychologist Craig Rympa. McEndree also contends his trial counsel was ineffective (1) in allowing the State to elicit testimony from the complaining witness about prior instances the defendant touched her improperly, which occurred out-of-state, and (2) failing to seek a limiting instruction with regard to Anderson's testimony. Finally, the defendant claims his motions for judgment of acquittal on counts IV and V should have been granted. For the reasons that follow, we affirm.

I. Background Facts and Proceedings.

The defendant was charged in eight counts[1] alleging he committed sex acts with B.V., a person fourteen or fifteen years of age,[2] at various times and places: Count I alleges a sex act occurring "[i]n the month of November, 2000" "in B.V.'s home"; Count Number II, "[d]uring the of summer of 2001 . . . in a motor home parked outside B.V.'s home"; Count III, "[o]n or between April 2001 and October 30, 2001, on a date different than count II . . . in B.V.'s home"; Count IV,

[1] The counts are set out as alleged in the third amended trial information filed on March 7, 2012, and granted on the State's reoffer during trial.

[2] B.V. was born October 1986. Counts I through III allegedly occurred when B.V. was fourteen, counts IV through VIII allegedly occurred when B.V. was fifteen.

"[o]n or about the month of December 2001 . . . in B.V.'s house . . . in her living room"; Count V, "[o]n or about the month of December 2001, and on a different day then alleged in Count IV . . . in B.V.'s house . . . in her living room"; Count VI, "[d]uring the summer of 2002 . . . in a vehicle parked in front of homes"; Count VII, [d]uring the summer of 2002 . . . in a vehicle while parked on a gravel road"; and Count VIII, "[d]uring the summer of 2002 . . . in a corn field."

Prior to trial, the district court granted the State's motion in limine, excluding the testimony of the defense's proffered expert witness, psychologist Craig Rypma, as his proposed testimony went to the credibility of the complaining witness.

The defendant moved to exclude any testimony by the State's expert, April Anderson, arguing that it was being offered to bolster the complaining witness's credibility. The court ruled it was admissible to explain delayed disclosure of child sexual abuse.

At trial, B.V. testified that her grandfather, McEndree, started touching her "inappropriately" at age eight when she lived with her family in Colorado: "it was just my breasts and kissing me around. And eventually when I got older, like 11-ish, he would start going further, and he would put his hands down my pants and touch me down there." She clarified that by "down there" she meant "[m]y vagina." She said she did not tell anyone because "at first, I don't know, it was scary."

B.V. and her family moved from Colorado to Iowa in September 2000. McEndree lived in Colorado still. B.V. stated she was "[r]elieved. . . . I thought it was done. I really did." She testified she had planned to keep her grandfather's

conduct a secret. "I didn't want to hurt anybody or make anybody go through what we're going through now. It's just—you know, it hurts and that—I don't want to see anybody hurt."

B.V.'s grandparents came to Iowa in their motor home to visit for Thanksgiving in 2000. B.V. testified that McEndree came into the bathroom where she was and "put his hand in my pants, put his finger in my vagina, and he whispered, 'I missed this.'"

B.V. and her family moved from Creston to Corning in March 2001. Her grandparents came to visit in the summer of 2001 when B.V. was fourteen. She stated that one day no one else was home, and McEndree asked her to come into his motor home. She testified this was the "first time he actually took my pants off and—licked my vagina." She testified she agreed to go into the motor home because she "didn't want him to do it to my sisters, and so maybe if he would do it to me, then he wouldn't touch them."

B.V. testified that McEndree sexually abused her "quite often" but one particular memory was "I think it was in December" 2001.

> The reason why I think it's around December is because we—he used a blanket. And we were on the couch and he put a blanket over me and sat down while we were watching a movie and again stuck his finger into my vagina.
>
> Q. At—what age were you at the time? A. Fifteen.
>
> Q. And why does this time stick out in your mind? A. Well, because my sister was in the room.
>
> Q. And he had a blanket over you and him? A. Yes.
>
> Q. Were there any other times? A. Yes.
>
> Q. What's the next time that sticks out in your mind? A. There was another time when I was laying on the couch, and he came down, and he knelt down next to me on his knees, and he again put his finger into my vagina.
>
> Q. Can you help us understand the time frame of this? Was this before or after the time on the couch when your sister was in

> the room? A. I—I'm not sure really. I think—I'm—I'm not really sure.
>
> Q. Do you remember anything else, about whether or not there was a blanket involved? A. Yeah. So I'm guessing that it was wintertime.
>
> Q. Do you think that it was a year before or a year after or the same year? A. I'm pretty sure it was around the same year.

On cross-examination, B.V. was asked about the incidents alleged to have occurred in December 2001. She testified two sex acts occurred "around that time" and it was "wintertime."

B.V. testified to two more specific incidents in the summer of 2002 when she was fifteen and learning to drive. Both times McEndree was supervising her driving practice and had her pull the car over, at which time he reclined the car seat and inserted his finger into her vagina. B.V. said one time they were on a gravel road approaching her friend's house; another time they were on a gravel road by cornfields, which "I think it was the last time he did it to me was towards that time."

B.V. testified she told a friend when she was sixteen but otherwise did not disclose the abuse until she told her sister in 2010 after B.V. moved back to Iowa. Her sister then told their mother. B.V. and her mother talked. "Eventually we[3] went to Vern [McEndree] and [grandmother] Nellie's house and confronted them about it." B.V. testified she asked McEndree if he ever touched her because she "wanted him to admit it." McEndree first said, "Maybe." But later said, "Yes, I did."

B.V.'s mother testified that McEndree admitted the abuse to B.V. and also said, "You're going to ruin my life over this." B.V.s mother said she told

[3] B.V., her sister, and her mother went to confront McEndree in March 2011.

McEndree "that if I could call the police, I would, that the statute of limitations had passed."

Though she did not believe she could file criminal charges due to the lapse in time, B.V. reported McEndree's abuse to law enforcement. She learned she could file charges and chose to do so. When Officer Robert Lillie went to arrest McEndree on May 19, 2011, McEndree asked, "Well, what for?" Lillie testified:

> And I explained to him he was under arrest for sexual abuse of his granddaughters, and so—and he goes, "they can't do that," and at the point I started to explain to him the statute. I said, "They have ten years," and he goes, "Well, it's been too long. They can't do that."

April Anderson testified she was a forensic interview specialist. She stated she was not speaking specifically about the instant case, had never met B.V., and was not "making a judgment call one way or the other." She testified she was there to testify as to child abuse dynamics, which was grounded on research and studies and her more than 3500 interviews. She testified that while "a lot of people think that if a child is abused, that they would tell right away," "[m]ost kids that are sexually abused do not tell right away."

> One of the major reasons is fear; fear of whoever might be doing something inappropriate to them, fear of getting in trouble themselves or getting that person in trouble. A lot of times kids love and trust the person that is abusing them, so if they're a little older, they may know and understand the consequences that might happen as far as that person might go to jail or the family might break up or they might lose money, whatever it might be. They worry about those consequences.
>
> It's—Kids are less likely to tell if it's a family member that has abused them. They often feel ashamed, embarrassed. They feel like it's their fault, that they did something wrong. Those are just a handful of the reasons why.

Anderson also testified that many people believe that sexual abuse "happens more with a stranger; but, in fact, it is more likely to happen within the family."

On cross-examination, Anderson stated that her interviews were mostly with children, acknowledging her "expertise is not in adults." She was asked, "And would you agree with me that individuals make false allegations about sexual abuse?" She responded, "A small percentage of individuals have made, yes." When defense counsel asked about "what's your opinion as to the percentage," the prosecution objected citing its motion in limine. The district court sustained the objection. Defense counsel asked Anderson, "[Y]ou're not an expert in delayed disclosure are you?" Anderson responded, "I'm an expert in sexual abuse which includes understanding delayed disclosure."

The defense was allowed to make an offer of proof concerning the proposed testimony of Craig Rypma, a psychologist who had been retained to "talk about delayed disclosure and false allegations." Rypma was prepared to testify that some people make false allegations of sexual abuse and that the reasons for false allegations include "financial motivation, mental illness, and revenge or retribution." Rypma testified that studies showed that false allegations of sexual abuse are made in two to thirty-five percent of cases and the "more empirically-sound studies seem to fall in the range of about 10 percent." He testified that any discussion about delayed disclosure without discussing false allegations would be "incomplete." The district court rejected the testimony, citing *State v*. *Schott*, an unpublished opinion of this court.

Nellie testified that McEndree was a stationary operating engineer for Kaiser-Hill, a nuclear facility, who retired December 31, 2001. She testified she

and McEndree came in their motor home to visit B.V.'s family for Thanksgiving 2000. They came again in their motor home in April 2001 en route to Ohio—McEndree's mother was very ill and the couple picked up B.V.'s mother to accompany them to Ohio. She said they did not stay in Iowa for any length of time on that occasion. Nellie and McEndree returned to Iowa in their motor home in August 2001 and stayed for a "couple days." She said they were not in Iowa again until January 13 or 14, 2002. Nellie had a stroke on January 18 and was hospitalized until January 21. She and McEndree stayed in the motor home parked outside B.V.'s house until they left the state on February 19. Nellie denied that McEndree admitting sexually assaulting B.V. at any time during the confrontation in March 2011. She acknowledged McEndree helped B.V. learn to drive.

McEndree testified and repeatedly denied sexually assaulting B.V. He stated he was not in Iowa in December 2001—he was working except for the "first four or five days . . . of December" when he was elk hunting in Colorado. He admitted being in Iowa in January 2002.

The jury returned guilty verdicts on all eight counts, and McEndree now appeals.

McEndree asserts the district court abused its discretion in allowing Anderson to testify and in excluding Rympa's testimony. McEndree also contends his trial counsel was ineffective (1) in allowing the State to elicit B.V.'s testimony about prior instances that occurred out-of-state, and (2) in failing to seek a limiting instruction with regard to Anderson's testimony. Finally, the

defendant asserts the court erred in overruling his motions for judgment of acquittal as to counts IV and V.

II. Scope and Standards of review.

We review evidentiary rulings for an abuse of discretion. *See State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982). "When a trial court has exercised its discretion to admit expert testimony, we will reverse only if we find an abuse of that discretion and prejudice." *State v. Myers*, 382 N.W.2d 91, 93 (Iowa 1986).

Claims of ineffective assistance of counsel raise constitutional issues, which we review de novo. *State v. Shanahan*, 712 N.W.2d 121, 131 (Iowa 2006).

We review challenges to the sufficiency of evidence for correction of errors at law. *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011).

III. Discussion.

A. Expert witness testimony. Iowa Rule of Evidence 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

> We take a liberal approach to the admissibility of expert testimony, giving considerable deference to the trial court's exercise of its discretion. *Mensink v. American Grain*, 564 N.W.2d 376, 380 (Iowa 1997). Expert testimony directly expressing an opinion on the credibility of a witness is not admissible. *State v. Pansegrau*, 524 N.W.2d 207, 210 (Iowa Ct. App. 1994). However, expert witnesses may express opinions on matters explaining the pertinent mental and physical symptoms of the victims of abuse. *Id*. "There is a fine but essential line between testimony that is helpful to the jury and an opinion that merely conveys a conclusion concerning the defendant's guilt." *Id*. at 210–11.

State v. *Allen*, 565 N.W.2d 333, 338 (Iowa 1997).

In *Meyers*, 799 N.W.2d at 146, our supreme court summarized cases addressing expert testimony in cases analogous to the case before us:

> Expert testimony may be used to assist a fact finder in determining a victim's state of mind as long as the expert does not testify to the ultimate fact of the defendant's guilt or innocence. *See State v*. *Griffin*, 564 N.W.2d 370, 374–75 (Iowa 1997) (recognizing evidence of battered women's syndrome from expert is admissible to show psychological reason for victim's recanting of accusation and refusal to testify against defendant); *see also State v*. *Allen*, 565 N.W.2d 333, 338 (Iowa 1997) (holding expert witnesses "may express opinions on matters explaining the pertinent mental and physical symptoms of the victims of abuse" if expert testified about the effects of the victim's mental condition on her ability to tell the truth); *State v*. *Gettier*, 438 N.W.2d 1, 6 (Iowa 1989) (approving expert testimony linked to an explanation of PTSD and the typical reaction of a rape victim); *State v*. *Chancy*, 391 N.W.2d 231, 234 (Iowa 1986) (noting in third-degree sex abuse trial that "there seems to be no question about the potential of psychological evidence in the present case to assist the trier of fact[, and] [t]he victim's lack of mental capacity is . . . key element in the crime charged").

In *Myers*, 382 N.W.2d at 97, the court observed "it seems experts will be allowed to express opinions on matters that explain relevant mental and psychological symptoms present in sexually abused children," but such experts will not be allowed to opine on matters "that either directly or indirectly renders an opinion on the credibility or truthfulness of a witness."

In *State v*. *Brotherton*, 384 N.W.2d 375, 378-79 (Iowa 1986), the court found it was error that a child social worker was allowed to opine at trial that a child would not be able to fantasize or report sexual abuse in detail without some experience because it was an implied opinion that the victim told the truth. The court noted it had inferred such a ruling in *Myers* in citing *State v*. *Taylor*, 663 S.W.2d 235 (Mo. 1984), in support of that ruling. *Brotherton*, 384 N.W.2d at 378

("In *Taylor* the Missouri Supreme Court held inadmissible a psychiatrist's statement that the victim did not fantasize the rape because the statement was an implied opinion that the victim told the truth.").

We also note that in *Pansegrau*, 524 N.W.2d at 210-11, we explained that "[i]n several cases involving children, there has been limited approval of allowing testimony that explains normal behavior following abuse." For example, in *State v. Seevanhsa*, 495 N.W.2d 354, 357 (Iowa Ct. App. 1992), the court allowed expert testimony regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). The court stated,

> In the case before us, the expert limited her discussion of CSAAS to generalities. She did not testify she believed the complainant was credible nor did she testify that she believed the complainant had been sexually abused. She limited her discussion to an explanation of the symptoms common to children who have been sexually abused.

Seevanhsa, 495 N.W.2d at 357.

In *State v. Tonn*, 441 N.W.2d 403, 404-05 (Iowa Ct. App. 1989), the issue was addressed on the defendant's ineffective-assistance-of-counsel claim, asserting trial attorney should have objected to the following evidence:

> The challenged testimony was given by a clinical psychologist of the Des Moines Child Guidance Center who testified as a witness for the State. She testified often child victims repeatedly expose themselves to abuse out of a lack of knowledge that the relationship is illegal or abusive. Occasionally, victims derive pleasure from the relationship. She said in this specific case the children she interviewed did enjoy some aspects of their relationship with the person they have alleged abused them, and in the beginning did not really have the sense that what was going on was wrong; and as time went on became more aware of that.

The court determined that the opinion evidence "could help the jury in understanding the evidence because it explained the delayed reporting symptom

that existed in children who were sexually abused" and was not "necessarily inadmissible." *Tonn*, 441 N.W.2d at 405.

And in *Gettier*, 438 N.W.2d at 6, the Iowa court found no abuse of discretion when the trial court allowed testimony of a psychologist, "as to what she considered typical symptoms exhibited by a person after being traumatized and no more." We said in *Pansegrau*, 524 N.W.2d at 211, "A careful review of *Gettier* instructs that the Iowa court has carefully limited the admission of similar testimony and set guide rules for the credentials of the expert as well as limiting the testimony only to the reaction to trauma."

Applying these principles, we find the trial court did not abuse its discretion in ruling that Anderson's testimony was admissible to explain generally delayed reporting in children who were sexually abused. *See Gettier*, 438 N.W.2d at 5-6 (allowing testimony that "showed only the typical symptoms exhibited by a person after being traumatized"); *see also State v*. *Payton*, 481 N.W.2d 325, 327 (Iowa 1992) (finding no abuse of discretion in allowing testimony about delayed reporting syndrome).

Nor do we find an abuse of discretion in the court's exclusion of Rypma's proposed testimony. First, Rypma testified that any discussion of delayed reporting would be incomplete without a discussion of false allegations. Anderson's testimony included the statement that a "small percentage" of sexual abuse allegations are false. Rypma's proposed testimony—that in the "more empirically-sound studies [false allegations] seem to fall in the range of about 10 percent"—adds little to the discussion.

Moreover, we find the district court did not abuse its broad discretion in disallowing the proposed testimony of Rypma. In citing this court's opinion in *State v*. *Schott*, No. 10-0158, 2011 WL 2071725 (Iowa Ct. App. May 25, 2011), the district court impliedly found that the testimony indirectly rendered an opinion on the credibility or truthfulness of a witness.[4]

On appeal, McEndree contends his confrontation rights were violated by the court's limitation of cross-examination of Anderson as to what percentage of cases involved false allegations of sexual abuse. However, this claim was not raised at the trial court level and "[w]e may not consider an issue that is raised for the first time on appeal, 'even if it is of constitutional dimension.'"[5] *State v*. *Webb*, 516 N.W.2d 824, 828 (Iowa 1994) (citation omitted).

As for his contention that the district court erred in basing its decision on an unpublished case of this court, we observe only that the case cited by the district court applied the relevant principles of published opinions noted above. We find no error.

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[4] In *Schott*, 2011 WL 2071725, at *2, this court found no abuse of discretion in the trial court having ruled inadmissible the defendant's proffered expert testimony about literature on false rape allegations and the motivations for false allegations. The *Schott* court cited *Myers*, 382 N.W.2d at 97, where the supreme court stated that "it seems experts will be allowed to express opinions on matters that explain relevant mental and psychological symptoms present in sexually abused children," but such experts will not be allowed to opine on matters "that either directly or renders an opinion on the credibility or truthfulness of a witness."

[5] The defendant cites to his January 9, 2012 motion in limine and the court's ruling thereon. Nowhere in that motion in limine or the court's ruling is a constitutional claim mentioned. *See* Iowa R. App. P. 6.903(2)(g)(1) (requiring a statement in an appellate brief addressing how an issue was preserved with references to the places in the record where the issue was raised and decided). Moreover, the defendant has not provided in the appendix the trial court's ruling on the offer of proof of Rypma's testimony. *See* Iowa R. App. P. 6.905(2)(b)(3) (noting it is appellant's duty to provide relevant portions of the transcript in the appendix). And our review of the transcript does not show the defendant raised his confrontation right claim.

B. Ineffective-assistance-of-counsel claim.

McEndree next contends his trial counsel offered ineffective assistance in two ways: (1) in failing to object to testimony regarding criminal acts alleged to have been committed by the defendant in Colorado and (2) in failing to seek a limiting instruction with regard to Anderson's testimony.

Claims of ineffective assistance of counsel are derived from the Sixth Amendment of the United States Constitution. *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). To prevail on his claims of ineffective assistance of counsel, the defendant must prove: "(1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* When "'there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different,'" prejudice results. *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

We normally preserve an ineffective-assistance-of-counsel claim for a postconviction relief proceeding where preserving the claim allows the defendant to make a complete record of the claim, allows trial counsel an opportunity to explain his or her actions, and allows the trial court to rule on the claim. *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986). We will affirm the defendant's conviction on direct appeal if the appellate record shows as a matter of law the defendant cannot prevail on an ineffectiveness claim. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

1. Failure of trial counsel to object to other-acts evidence. McEndree claims his trial counsel should have objected to B.V.'s statements

about the defendant inappropriately touched her in Colorado because it violates the rules prohibiting admission of propensity evidence and raises the question "whether the jury convicted the defendant based upon the out-of-state conduct" over which the courts of Iowa have no jurisdiction. *See* Iowa Code § 803.1; *State v. Liggins*, 557 N.W.2d 263, 266 (Iowa 1996).

The State argues the evidence is relevant under Iowa Rule of Evidence 5.404(b).[6] The State is correct in asserting evidence of prior sexual acts with the victim has been ruled admissible by the Iowa courts. *See State v. Munz*, 355 N.W.2d 576, 581 (1984) (observing "one of the exceptions to the general rule of exclusion allows the admission of evidence of prior sexual acts with the victim 'in order to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial'" (citation omitted)).

With respect to the claim that the jury based its findings on out-of-state conduct, we observe that the defendant was charged in the trial information for those incidents occurring in Iowa; the jury instructions described offenses occurring during dates when B.V. was fourteen and fifteen years old—at which times it was uncontested B.V. lived in Iowa; and the questioning of witnesses extensively addressed when the defendant was present in Iowa.

McEndree cannot prove he was prejudiced by trial counsel not objecting to the other-acts evidence.

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[6] Iowa Rule of Evidence 5.404(b) provides:

> 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.

2. *Failure of trial counsel to request limiting instruction as to Anderson testimony*. The defendant claims trial counsel was ineffective in not asking for a limiting instruction concerning Anderson's testimony. This claim is grounded upon a statement in *Payton*, 481 N.W.2d at 328,[7] that a "proper limiting instruction was given" that expert's testimony was not to be used as substantive evidence.

We conclude the defendant again fails to show the requisite prejudice to prove an ineffective-assistance-of-counsel claim. At the beginning of Anderson's testimony she acknowledged she was not testifying about this case specifically; she had not met the person claiming to have been sexually abused; she was testifying about her general knowledge of child abuse dynamics; and she was not "making a judgment call one way or the other." Defendant does not even attempt to show how a limiting instruction would have changed the result. *See State v*. *Lane*, 743 N.W.2d 178, 184 (Iowa 2007) (rejecting a claim that counsel was ineffective in failing to request an instruction where the defendant failed to demonstrate there was a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different); *cf*. *State v*. *Fountain*, 786 N.W.2d 260, 266 (Iowa 2010) (finding that even where

[7] The *Payton* case did not deal with an ineffectiveness claim. Moreover, the court accepted "as the law of this case" that expert testimony explaining why children delay reporting sexual abuse is limited to rehabilitation purposes pursuant to *State v*. *Dodson*, 452 N.W.2d 610, 612 (Iowa Ct. App. 1989). *See Payton*, 481 N.W.2d at 327-28. The court rejected defendant's claim that a limiting instruction should have been given prior to the expert witness testimony, noting one was given. *See id.* at 328. The rehabilitation "limitation" of such expert witness testimony has not been followed. *See Seevanhsa*, 495 N.W.2d at 355 (allowing expert witness CSAAS testimony in State's case in chief); *see also Meyers*, 799 N.W.2d at 137-38, 146-47 (upholding expert witness testimony concerning ability to consent and making no statement as to a limitation to rehabilitative purposes).

counsel should have requested an instruction of critical element of offense, the claim was preserved for possible postconviction proceedings because the court could not determine prejudice on the record before it). We reject his claim of ineffective assistance of counsel.

C. Sufficiency of evidence as to Counts IV and V.

McEndree contends the district court erred in denying his motion for judgment of acquittal as to counts IV and V, which alleged acts occurring "[o]n or about December 2001."

To sustain a conviction, there must be sufficient evidence of every fact necessary to support each count. *Meyers*, 799 N.W.2d at 138-39. "In reviewing sufficiency claims, we examine whether, taken in the light most favorable to the State, the finding of guilt is supported by substantial evidence in the record." *Id.* at 138. Evidence is substantial if it would convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Id.* "We draw all fair and reasonable inferences that may be deduced from the evidence in the record." *Id.* And in assessing the sufficiency of the evidence, circumstantial evidence is equally as probative as direct. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994).

As to Count IV, the jury was instructed that the State must prove "all of the following elements of Sexual Abuse in the Third Degree":

> 1. On or about the month of December 2001, the defendant did commit a sex act with [B.V.]
> 2. The defendant performed the sex act while [B.V.] was fourteen or fifteen years old and the defendant's granddaughter.
> 3. The defendant and [B.V.] were not living together as husband and wife.

See Iowa Code § 709.4(2)(c)(2001).

With respect to Count V, the instruction was similar, except the first element read: "On or about the month of December 2001, on a date different than in Count IV, the defendant did commit a sex act with [B.V.]" The second and third elements were identical to those in the instruction above.

On appeal, the defendant asserts he had an alibi for all of December 2001, and thus, there is insufficient evidence to sustain the convictions based on Counts IV and V.

The State responds that the complaining witness testified that the sex acts in question occurred during the wintertime and there was evidence that the defendant was in Iowa for much of January 2002, which is sufficient to sustain the convictions. We agree. The crime of sexual abuse in the third degree does not make a particular time period a material element of the offense. *Cf*. *State v*. *Griffin*, 386 N.W.2d 529, 532 (Iowa Ct. App. 1986) (discussing second-degree sexual abuse). Under the circumstances presented here, where there is no doubt the defendant was in B.V.'s home in January 2002, "any uncertainty as to the precise date is immaterial." *See State v*. *Laffey*, 600 N.W.2d 57, 60 (Iowa 1999) ("Although the witnesses disagreed as to the date that the children stayed at the Laffey home, no one disputed that the girls had on one occasion spent the night there.") (citing *State v*. *Brown*, 400 N.W.2d 74, 77 (Iowa Ct. App. 1986) ("The date fixed in the indictment or information for the commission of a crime is not material, and a conviction can be returned upon any date within the statute of limitations, absent a fatal variance between the allegations and proof.")).

B.V. testified to two distinct occurrences of the defendant performing sex acts with her in the winter when she was fifteen. Several witnesses testified McEndree and Nellie were in Iowa beginning January 12 or 13, 2002, for three weeks. B.V. was fifteen at time. We affirm the convictions.

AFFIRMED.