IN THE COURT OF APPEALS OF IOWA

No. 6-663 / 05-1000
Filed December 13, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RAYMOND REYES,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Raymond Reyes appeals his conviction and sentence for second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann Brenden, Assistant Attorney General, Matthew Wilber, County Attorney, and Daniel McGinn and Shelley Sedlak, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Raymond Reyes appeals his conviction and sentence for second-degree sexual abuse in violation of Iowa Code section 709.1(3), 709.3(2), and 901A.2(3) (2003). He argues the district court erred by admitting testimony concerning Reyes's alleged previous sexual abuse of the victim. He also claims he received ineffective assistance of counsel when his attorney failed to (1) object to the limiting instruction concerning the testimony about previous abuse and (2) object to or request a limiting instruction for the tape of Reyes's interview with police. We affirm the conviction and preserve the ineffective assistance of counsel claims for possible postconviction relief proceedings.

I. Background Facts and Proceedings

A.G. was eleven years old when she was visiting her grandparents in the summer of 2003. During her time at her grandparents' home, she slept with her two-year-old brother on an air mattress in the basement family room. At the time, Reyes was married to A.G.'s aunt. Reyes and the aunt were also staying with A.G.'s grandparents. They normally slept in a bedroom off the basement family room.

A.G. stayed up late one night to watch television with her grandparents. At bedtime, she carried her already-sleeping brother downstairs. Reyes was sleeping on the couch in the family room. A.G. laid on the mattress and went to sleep. She awoke to find Reyes on top of her, having sexual intercourse with her. She tried to get out from under Reyes, but he told her to hold still and be quiet. When Reyes finished, he went into the bathroom, then went to bed inside

the bedroom. A.G. felt a liquid on the inside of her thighs and wiped it off. She then went back to bed.

A.G. did not tell anyone about the incident until October 30, 2004. At that time, she told a friend, but made him promise not to tell anyone else. Later, during a phone call in December 2004, she told her friend's mother about the assault. She also told a school nurse, in whom she had confided she did not want to spend time with her family over the holidays because Reyes would be there. Later, A.G. also alleged Reyes raped her when she was nine years old, approximately a year before the first incident she reported.

On January 6, 2005, Reyes was charged with sexual abuse in the second degree for the summer 2003 incident. Later, the trial information was amended to include the sentencing enhancement section 901A.2(3).[1] Just before trial, the defense made an oral motion in limine to exclude testimony about the incident A.G. alleged occurred prior to the summer 2003 assault. The district court denied the motion.

At trial, A.G. testified about both alleged rapes. The court gave the following instruction about the first incident:

> You have heard evidence that the defendant allegedly committed other acts with A.G. before the summer of 2003. If you decide the defendant committed these other acts, you may consider those acts only to determine whether the defendant has a sexual passion or desire for A.G. You may not consider them as proving that the defendant actually committed the act charged in this case.

[1] Reyes had a 1986 conviction for sexual assault of a child in Lancaster County, Nebraska, and a 1988 conviction in the same county for attempted sexual assault of a child. Evidence of these prior convictions was used only for sentencing enhancement and is not part of this appeal.

The State played an audio recording of Reyes's interview with police. In the interview, officers told Reyes that they knew that he had sex with A.G., but were interviewing him to find out why. They questioned why Reyes did not seem upset. They also asked him how A.G. could describe things about his body, or why she would know whether he was circumcised or uncircumcised. They repeatedly told Reyes they knew he had sex with A.G. When Reyes denied it, they told him denying it did not change the past. Reyes then related a dream he claimed to have had one night when A.G. was sleeping in the basement. He told officers he woke up near the bathroom door and his dog was licking his face. He told them he could have had "physical contact" with A.G. while sleeping. When officers asked what "physical contact" meant, Reyes told them he could have touched her with his finger or penis. Eventually, when an officer asked him whether they were all in agreement that he had sex with A.G. while he was asleep, Reyes agreed.

No instruction was specifically requested or given relating to the interview. However, the jury received the stock instruction on evidence. The jury convicted Reyes of second-degree sexual abuse. He was sentenced to a term of incarceration not to exceed fifty years. Reyes appeals.

II. Standard of Review

We review the rulings on the admission of evidence of prior bad acts for abuse of discretion. *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). In doing so, we give the district court leeway to determine the evidence's probative value against its danger of unfair prejudice. *Id.* We will disturb the district court's determinations only if the grounds on which they rely are clearly unreasonable or

untenable. *State* v. *Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). We review claims of ineffective assistance of counsel de novo. *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004).

III. Merits

A. *Prior Acts*

A.G. testified concerning the alleged prior act as follows:

> Q: Now, you said that—a little bit earlier you said that this had happened before. And who did it happen before with? A: Raymond.
> Q: And when was this? A: I don't remember the year. It was like a year before it happened the second time.
> Q: Were you about 9 years old? A: Yes.
> Q: And where was this at? A: In Lincoln.
> Q: And have you told someone about that? A: No.
> Q: You told someone before today, though, haven't you? A: Yes.
> Q: What happened at that time? A: I was raped.
> Q: What specifically did he do to you? A: Stuck his penis in my vagina.

However, when cross-examined concerning the 2003 incident, she stated as follows:

> Q: Do you recall the police asking you if this was the only time Raymond had touched you? A: Yeah.
> Q: And you—do you remember telling them yes? A: Yeah.
> Q: And do you remember them saying, "Are you sure just the one time," and you said, "Yeah"? A: Yeah.

On redirect examination, A.G. testified:

> Q: Can you explain why [you told police this was the only time Raymond touched you]? A: I had said that because I felt that if I would have brought that up, I felt that they wouldn't believe me, that maybe I was just trying to add onto my story.

Reyes argues evidence concerning A.G.'s testimony that he raped her prior to the summer 2003 incident should not have been allowed at trial. He claims the evidence violates Iowa Rule of Evidence 5.404(*b*), which 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.

Iowa R. Evid. 5.404(*b*). He argues the prior act A.G. alleges is both not relevant and highly prejudicial.

Reyes concedes our case law has allowed evidence of prior acts of sexual abuse under a general exception to the exclusionary rule found in 5.404(*b*). *See State v. Spaulding*, 313 N.W.2d 878, 880 (Iowa 1981). He argues, however, that our supreme court "revitalized" its approach to prior bad acts evidence in *State v. Sullivan*, 679 N.W.2d 19 (Iowa 2004). He urges us to overrule *Spaulding* and its progeny. We decline.

In *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004), our supreme court concluded, in part:

> So it is not surprising that we have required the State to establish the following conditions before bad-acts evidence can be considered admissible: (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.
>
> (Citations omitted.)

In *Spaulding*, the court noted that prior acts with a particular victim are considered to be exceptions to the exclusionary rule because they tend to show a passion or propensity for illicit sexual relations with that victim. *Spaulding*, 313

N.W.2d 878, 880 (Iowa 1981). Subsequent sex abuse cases have allowed similar evidence. *See State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988); *State v. Query*, 594 N.W.2d 438, 443 (Iowa Ct. App. 1999); *State v. Schaffer*, 524 N.W.2d 453, 456 (Iowa Ct. App. 1994). Most recently, this exception has been codified in Iowa Code section 701.11, which states:

> In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence 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. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

The exception has been modified and applied to domestic violence cases. *See State v. Taylor*, 689 N.W.2d 116, 122-30 (Iowa 2004); *State v. White*, 668 N.W.2d 850, 853-55 (Iowa 2003); *State v. Rodriquez*, 636 N.W.2d 234, 239-44 (Iowa 2001). In *Taylor*, the court addressed virtually the same argument that Reyes makes here. The *Taylor* court allowed evidence of the defendant's previous violence toward his wife. It wrote:

> Our conclusion that the evidence at issue here is relevant is not a retreat from our decision in *Sullivan* that prior-acts evidence must show more than the defendant's mere propensity to criminal conduct to be admissible on the issue of intent. As we noted in *Sullivan*, [e]vidence of an unconnected prior crime is always evidence of propensity and never evidence of a specific intent to commit the crime charged. Importantly, we were not concerned in that case with evidence of other crimes that are somehow connected to the crime charged in the indictment. Instead, we were concerned with a completely unconnected, but arguably similar, occurrence as probative of the intent to commit the specific crime then at issue. *In contrast, in the present case, the prior misconduct and the present crimes are connected: Domestic violence is never*

> *a single isolated incident. Rather, domestic violence is a pattern of behavior, with each episode connected to the others.*

Taylor, 689 N.W.2d at 129 n.6 (quotations and citations omitted) (emphasis added). Thus, we are confident in the continuing viability of the exception for evidence concerning previous illicit sexual acts with the same victim, especially children.

In order to determine the admissibility of the evidence, we must then determine (1) whether the evidence is relevant and (2) whether its probative value outweighs the danger of unfair prejudice. First, Reyes argues the evidence is not relevant because his defense was a straight-forward denial of the charges. However, in his interview with police, which the jury heard, Reyes told officers that if he touched A.G., he was asleep. Thus, evidence of a prior incident was relevant in showing Reyes's actions in the summer 2003 incident were neither innocent nor accidental. *See Query*, 594 N.W.2d at 444; *Spaulding*, 313 N.W.2d at 881. In addition, the evidence shows a "passion or propensity for illicit sexual relations" with A.G.

Second, Reyes argues that, because there is no evidence of the abuse beyond A.G.'s report, testimony concerning any prior incidents unfairly bolsters her story. In determining whether the probative value of the evidence is outweighed by its prejudicial impact we evaluate (1) the actual need for the evidence in light of the other issues and evidence at trial; (2) the strength of the evidence showing the accused committed the other crime; (3) the strength or weakness of the prior acts evidence in supporting the issue at trial; and (4) the degree to which the jury's hostility will be roused by the evidence. *White*, 668

N.W.2d at 854-55; *Rodriquez*, 636 N.W.2d at 240; *Query*, 594 N.W.2d at 444. The most pertinent evaluation we must make is the last: whether the evidence will cause the jury to make a decision based on an emotional response to the defendant. *Taylor*, 689 N.W.2d at 130.

Again, though Reyes's claims his defense was a straight-forward denial of the charges, the jury nonetheless heard him initially tell police he was asleep when the incident occurred. Further, A.G. was cross-examined on her failure to come forward about the sexual abuse earlier. Evidence concerning a prior incident, therefore, was probative in showing the absence of mistake or accident, and Reyes's "passion or propensity for illicit sexual relations" with A.G. *See Query*, 594 N.W.2d at 444; *Spaulding*, 313 N.W.2d at 880-81. The doctor who examined A.G. was thoroughly cross-examined. A.G. was also cross-examined on her failure to report the first incident, even after she told police about the summer 2003 abuse. Therefore, it is unlikely A.G.'s allegations of previous abuse would have incited the jury to "overmastering hostility." *White*, 668 N.W.2d at 855 (concluding evidence of prior bad acts not prejudicial where State spent little time developing their details and the prior acts were not the focus of the trial). We conclude the district court did not abuse its discretion in overruling the motion in limine.

B. Ineffective Assistance

Reyes claims he received ineffective assistance of counsel when his attorney (1) failed to object to the limiting instruction concerning the testimony about previous abuse and (2) failed to object to or request a limiting instruction for the tape of Reyes's interview with police. In order to establish ineffective

assistance of counsel, Reyes must show not only that his counsel breached a duty, but that the breach prejudiced his defense. *Strickland v. Washington*, 433 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). We may resolve the claim on either prong. *Id.* at 697, 104 S. Ct. at 2052, 80 L. Ed. 2d at 699. Generally, we preserve ineffective assistance of counsel claims for postconviction relief actions. *State v. Tate,* 710 N.W.2d 237, 240-41 (Iowa 2006). This practice ensures both that an adequate record of the claim may be developed and that the attorney charged with ineffectiveness may have an opportunity to respond. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We conclude the record here is inadequate to address Reyes's claims. We therefore preserve said claims for possible postconviction relief proceedings.

IV. Summary

First, we conclude the district court correctly overruled the motion in limine and properly admitted evidence of Reyes's alleged previous abuse. Second, we preserve Reyes's ineffective assistance claims for possible postconviction relief proceedings. The verdict and sentence against Reyes is affirmed.

AFFIRMED.