IN THE COURT OF APPEALS OF IOWA

No. 8-697 / 06-1987
Filed December 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY ALAN KENNEDY,
Defendant-Appellant.

Appeal from the Iowa District Court for Palo Alto County, Joseph J. Straub, Judge.

Defendant appeals his conviction for assault with intent to inflict serious injury. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Gregory Kennedy, Emmetsburg, appellant pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Peter C. Hart, County Attorney, for appellee.

Considered by Sackett, C.J., and Miller, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.

I. Background Facts & Proceedings

Gregory Kennedy is married to Janet Kennedy. Janet testified that on June 8, 2005, Kennedy became very angry with her and he threw her down beside the bed and dresser in the mobile home where she was living.[1] She testified he yelled, "I'm going to kill you bitch," and then choked her, causing her to lose consciousness. She testified Kennedy then helped her up and said, "Why do you make me so mad?" and that all she understood was a "beating." Janet testified she told Kennedy to get away from her, and he started punching her in the head.

Janet went to work that evening at a residential care facility. A co-worker noticed she had red marks by her ears and neck. Janet left work early and went to the hospital, where she reported the incident to police officers. Officers observed Janet's injuries and took several photographs. Janet testified that after the incident she could not swallow or eat anything for three days.

Kennedy was charged with willful injury. A protective order was issued prohibiting contact between Kennedy and Janet. After the incident Janet moved to Ohio, where she lived with her adult daughter and then later with her mother-in-law. While in Ohio, Janet spoke to Kennedy on the telephone at least once a day, and sometimes several times a day. She sent letters recanting her previous statements that Kennedy had assaulted her.

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[1] Janet and the parties' son, Christopher Kennedy, lived in a mobile home behind their family-run motel.

The State requested a material witness arrest warrant for Janet, and the district court approved the application on May 19, 2006. Janet was taken into custody in Ohio and transported to Iowa. Following her arrest, Janet agreed to cooperate with the prosecution of her husband.

The case proceeded to trial. Janet, her co-worker, and two police officers testified as outlined above. On cross-examination, defense counsel asked Janet about the letters she wrote recanting her previous incriminations. She stated Kennedy had told her what to write in those letters.

Kennedy testified that on June 8, 2005, he went to wake up Janet whereupon she got mad at him and started hitting him. Kennedy stated he grabbed her hands, and they both fell over. He stated that when he let go, Janet threw her hand up and struck it on the dresser. He testified Janet began slapping herself in the face, so he grabbed her hands. Kennedy stated they fell down a second time, and he held her head so she would not slam her head against the floor. He denied choking or striking her.

In discussing Janet's letters, defense counsel asked Kennedy, "Were there any threats, an incident, to her agreeing to do that?" and Kennedy replied, "No, You don't threaten Jan. She would pick up the phone and call the law in a heartbeat." Based on this answer, the district court agreed with the State's argument that Kennedy opened the door to permit questioning about a 1995 Ohio police report in which Janet had reported being injured as the result of an altercation with Kennedy.

The jury found Kennedy guilty of the lesser included offense of assault with intent to inflict serious injury. Kennedy filed a motion in arrest of judgment and a motion for new trial. Kennedy agreed to withdraw these motions, however, and in exchange the State agreed to recommend a sentence of a term of imprisonment not to exceed two years, suspended, and probation. The district court approved the sentencing agreement, and ordered Kennedy to complete a domestic abuse intervention program. Kennedy appeals.

II. Prior Bad Acts

Kennedy claims the district court erred by permitting the State to present evidence of prior bad acts, specifically by reference to the 1995 police report. Defendant's motion in limine asked the court to exclude "[e]vidence of specific other crimes, wrongs, or acts of the Defendant that will be offered to show that the Defendant acted in conformity thereto." After a discussion about Iowa Rule of Evidence 5.404(*b*), the court ruled, "I will allow evidence of prior wrongful acts if those prior wrongs or acts constituted willful injury."

On cross-examination, the prosecutor questioned Kennedy about his earlier statement that "nobody pushed Janet around or she would call the police in a heartbeat." Kennedy was asked if Janet had "called the law" on him in the past. He acknowledged she had. The prosecutor then went further and inquired about the November 1995 incident. Kennedy indicated he did not remember dates and the prosecutor showed him the Ohio police report from November 4, 1995. Kennedy was asked again if Janet had "called the cops" on him on that date. He acknowledged she had. The prosecutor proceeded to ask Kennedy

about the contents of the report. Defense counsel objected, stating the matter had already been ruled upon by the court, but the objection was overruled. The court ruled the police report was an exhibit used to refresh the witness's recollection, and it would not be taken to the jury room.

We review the district court's ruling admitting evidence of prior bad acts for an abuse of discretion. *State v. Matlock*, 715 N.W.2d 1, 3-4 (Iowa 2006). We will reverse only when the ruling is untenable under the substantive limitations of the Iowa Rules of Evidence. *Id*. at 4.

A. The State asserts the evidence was not admitted under Iowa Rule of Evidence 5.404(*b*) as evidence of prior bad acts, but was instead admissible under the doctrine of curative admissibility.[2] The State claims Kennedy's statement, "You don't threaten Jan. She would pick up the phone and call the law in a heartbeat," permitted it to present evidence that would otherwise be inadmissible in order to counteract his statement.

The doctrine of curative admissibility provides that "when one party introduces inadmissible evidence, with or without objection, the trial court has discretion to allow the adversary to offer otherwise inadmissible evidence on the same subject when it is fairly responsive." *State v. Pepples*, 250 N.W.2d 390, 394 (Iowa 1977) (citation omitted). The doctrine only applies, however, when one party has first introduced inadmissible evidence. *See State v. Judkins*, 242 N.W.2d 266, 267 (Iowa 1976) (finding prosecution could not present inadmissible

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[2] The State raises several arguments to support the admissibility of the testimony concerning the 1995 police report that were not raised before the district court. There is an exception to the error preservation requirement for evidentiary rulings admitting or not admitting evidence. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002).

evidence because defendant had not introduced inadmissible evidence). Furthermore, the "curative" evidence must relate to the previous inadmissible evidence. *See State v. Williams*, 427 N.W.2d 469, 472 (Iowa 1988) (finding hearsay testimony concerning threats was not justified by previous hearsay testimony on another subject). Kennedy's statement was not inadmissible, and therefore, we conclude the doctrine of curative admissibility does not apply in this case. *See Judkins*, 242 N.W.2d at 267.

B. The State also claims Kennedy "opened the door" to permit cross-examination concerning the 1995 police report because his statement that a person could not threaten Janet or she would call the police was false. The State asserts it could properly cross-examine Kennedy regarding the earlier incident to test his credibility.

We note the supreme court has recently stated:

> More importantly, there is no "open the door" principle of evidence that permits the State to engage in unrestricted cross-examination of a defendant once it believes the defendant has presented false and misleading testimony on direct examination. . . . Like all witnesses, a defendant is subjected to procedures that exist to provide an assurance of accuracy in testimony. . . . Yet, the State can only test the accuracy of the testimony as provided by the governing rules. The rules of evidence open the door for the State to expose false statements and claims, but only as far as specifically provided by the rules.

State v. Parker, 747 N.W.2d 196, 206-07 (Iowa 2008).

Even if we assumed Kennedy's statement was false, this does not permit the State to engage in cross-examination using evidence otherwise inadmissible under the Iowa Rules of Evidence. *See id.* Kennedy's statement did not "open the door" to permit the State to present inadmissible evidence. *See United*

States v. Napue, 834 F.2d 1311, 1324 (7th Cir. 1987) (noting the "opening the door" doctrine does not permit the prosecutor to pursue improper questioning).

C. The State additionally claims its cross-examination of Kennedy regarding the 1995 police report was admissible under rule 5.608(*b*). Rule 5.608(*b*) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in rule 5.609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

"This part of rule [5.608] permits cross-examination of a witness concerning a specific instance of conduct by the witness; it does *not* permit such conduct to be proved by extrinsic evidence." *State v. Greene*, 592 N.W.2d 24, 28 (Iowa 1999). The district court has discretion to permit inquiry into specific instances of conduct if it is probative of the witness's truthfulness or untruthfulness. *State v. Knox*, 536 N.W.2d 735, 740 (Iowa 1995).

In the present case, the State sought to cross-examine Kennedy about a specific instance of conduct through extrinsic evidence, the 1995 police report. The report was not probative on the issue of Kennedy's truthfulness or untruthfulness. The fact of the report (Janet called the police) is consistent with Kennedy's testimony. The prosecutor's questions about Kennedy's memories of the incident and contents of the report merely served as an attempt to present

extrinsic evidence to prove specific instances of Kennedy's conduct. We conclude the evidence was not admissible under rule 5.608(*b*).

D. We turn now then to Kennedy's claim the district court abused its discretion by permitting the State to introduce evidence of prior bad acts. Rule 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.

Evidence must be probative of some fact or element in issue, other than the defendant's criminal disposition, in order to be admissible under rule 5.404(*b*). *State v. Newell*, 710 N.W.2d 6, 20 (Iowa 2006). "If a court determines prior-bad-acts evidence is 'relevant to a legitimate factual issue in dispute, the court must then decide if its probative value is *substantially* outweighed by the danger of unfair prejudice to the defendant.'" *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004) (citation omitted).

Evidence is considered unfairly prejudicial if it "appeals to the jury's sympathies, arouses it sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action that may cause the jury to base its decision on something other than the established propositions of the case." *State v. White*, 668 N.W.2d 850, 854 (Iowa 2003) (citation omitted). Unfairly prejudicial evidence has "an undue tendency to suggest decisions on an improper basis commonly, though not necessarily, an emotional one." *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988).

In determining whether the probative value of evidence is outweighed by the danger of unfair prejudice,

> the court should consider the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

Taylor, 689 N.W.2d at 124.

We first consider whether the evidence was relevant. *State v. Duncan*, 710 N.W.2d 34, 40 (Iowa 2006). Kennedy was charged with willful injury, in violation of Iowa Code section 708.4 (2005), and specific intent to cause serious injury to another is an element of the offense. *See State v. Floyd*, 466 N.W.2d 919, 924 (Iowa Ct. App. 1990). In discussing the use of prior bad acts as evidence of specific intent for the crime of willful injury, the Iowa Supreme Court stated, "bad acts may only be allowed as evidence of the required mens rea for the crime charged if the acts are probative of that intent in a manner other than a propensity of the accused to act in a particular manner." *Matlock*, 715 N.W.2d at 5 (citing *State v. Sullivan*, 679 N.W.2d 19, 28 (Iowa 2004)).

On appeal, the State does not advance a theory for the relevance of the evidence. Before the district court the State argued the unique relationship between the parties, and Kennedy's similar behavior over the years was sufficient to show his intent. The Iowa Supreme Court has stated, "the defendant's prior conduct directed to the victim of a crime, whether loving or violent, reveals the emotional relationship between the defendant and the victim and is highly probative of the defendant's probable motivation and intent in

subsequent situations." *Taylor*, 689 N.W.2d at 125. Under *Taylor*, we conclude the evidence was relevant.

Next, we must weigh the need for the evidence, its reliability, and its probative strength against the danger of unfair prejudice. *Newell*, 710 N.W.2d at 23. When there are only two witnesses to an incident, the defendant and the victim, with differing accounts, the court has found the need for the evidence, in order to shed light on the defendant's intent, is substantial. *See State v. Rodriquez,* 636 N.W.2d 234, 242 (Iowa 2001).

There must be "clear proof" of the prior bad acts. *White*, 668 N.W.2d at 855. "Clear proof" need not be established beyond a reasonable doubt, but there must be sufficient proof to prevent the jury from engaging in speculation. *Newell*, 710 N.W.2d at 23. Kennedy denied the allegations in the 1995 police report. Janet did not testify about the 1995 incident or at any time affirm its contents. There was no prosecution of the incident in the report. Furthermore, the report was hearsay under Iowa Rule of Evidence 5.802. We conclude there was not "clear proof" Kennedy committed the acts alleged in the 1995 police report.

In addition, the lengthy interval between the incident in 1995 and the trial in 2006 casts doubt on the weight of the evidence. *See Sullivan*, 679 N.W.2d at 29 (noting a temporal separation of three years cast doubt on the weight of the evidence). The 1995 police report does not provide strong evidence on the relevant issue of intent because the report provides only unsubstantiated, hearsay allegations of Kennedy's conduct. *See Taylor*, 689 N.W.2d at 129 (discussing strength of evidence); *Rodriquez*, 636 N.W.2d at 242-43 (same).

Against these factors, we weigh "the degree to which the fact finder will be prompted to decide the case on an improper basis." *Taylor*, 689 N.W.2d at 124. The evidence is prejudicial because it could have led the jury to find Kennedy guilty based on allegations made against him in the past. We conclude the evidence does not pass the balancing test. There is not "clear proof" of the prior acts, the strength of the evidence is not that great, and the evidence is prejudicial.

We conclude the district court abused its discretion in admitting the evidence of Kennedy's prior bad acts. Under rule 5.103(*a*), we presume prejudice arises from non-constitutional error and reverse the decision of the district court unless the record establishes a lack of prejudice. *See State v. Reynolds*, 746 N.W.2d 837, 843 (Iowa 2008). Where we are considering non-constitutional error, we determine whether a party's rights have been injuriously affected or the party has suffered a miscarriage of justice. *Sullivan*, 679 N.W.2d at 29. We presume prejudice unless the record affirmatively establishes otherwise. *State v. Moorehead*, 699 N.W.2d 667, 673 (Iowa 2005). The record here does not establish a lack of prejudice, and we conclude the decision of the district court must be reversed and the case remanded for a new trial.

III. Rebuttal Testimony

Kennedy contends the district court abused its discretion by permitting Janice Alfred to testify as a rebuttal witness. On rebuttal, the State presented the testimony of Alfred, the director for the Centers Against Abuse and Sexual Assault, on the issue of why domestic abuse victims sometimes recant their

testimony. He asserts Alfred's testimony was merely cumulative to evidence already introduced at the trial. Because it is not clear what evidence will be admitted on remand, or the order of the witnesses, we decline to comment on whether the court abused its discretion by allowing Alfred to testify as a rebuttal witness.

IV. Ineffective Assistance

A. Kennedy claims he received ineffective assistance because his trial counsel did not object when the prosecutor vouched for the State's witnesses, discredited the witnesses for the defense, and interjected his own opinions. We point out that under *State v. Graves*, 668 N.W.2d 860, 875 (Iowa 2003), it is improper for a prosecutor to personally vouch for the credibility of witnesses. Also, a prosecutor may not express his or her personal beliefs. *See id.* at 874; *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). We remind the prosecutor not to make personal statements on the remand of the case.

B. Kennedy also asserts he received ineffective assistance due to trial counsel's failure to object when the prosecutor developed themes of a hereditary pattern of domestic abuse. Kennedy claims the prosecutor's statements were not supported by the record, were irrelevant, and were highly inflammatory. Because we have granted Kennedy's request for a new trial, we decline to comment on the prosecutor's statements made during closing argument at the first trial.

V. Pro Se Issues

Kennedy raises several issues in a pro se brief. None of his issues are supported by legal authority. "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 6.14(1)(*c*). We conclude Kennedy has waived these issues on appeal.

We reverse Kennedy's conviction for assault with intent to inflict serious injury, and remand for a new trial.

REVERSED AND REMANDED.