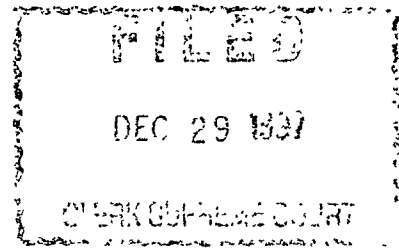


IN THE COURT OF APPEALS OF IOWA

000385

No. 7-518 / 95-1944
Filed December 29, 1997



STATE OF IOWA,
Appellee,

vs.

ROBERT H. ROUNDS,
Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant appeals from judgment and sentence entered, following a jury trial,
for second-degree sexual abuse and third-degree sexual abuse. **AFFIRMED.**

David Pargulski, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, John P. Sarcone, County Attorney, and Catherine Thune, Special Assistant
County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

STREIT, P.J.

Defendant, Robert Rounds, was convicted of second-degree and third-degree sexual abuse for molesting his daughter, Erica. He appeals his conviction and sentence contending the trial court erred in excluding evidence of Erica's past allegations of sex abuse; admitting his confession to the crimes; and exercising its jurisdiction. We affirm the trial court on all issues.

I. Background & Facts.

In 1993 Erica reported to school officials her father, Robert Rounds, had sexually abused her from the time she was seven to fourteen years of age. Preliminary complaints were filed against Rounds in 1993 and arrest warrants were issued. The State filed the trial information on March 30, 1995. The State alleged Rounds committed second-degree sexual abuse between February 4, 1987 and April 20, 1990, at which time Erica was ten and eleven years old. It alleged the third-degree sexual abuse occurred between February 4, 1991 and February 4, 1993, when Erica was twelve years old.

The jury found defendant guilty as charged. The court denied all post-trial motions and sentenced defendant to consecutive, indeterminate twenty-five and ten-year prison terms. Defendant appeals.

II. Admissibility of the Victim's Past Sexual Behavior or Sexual Abuse Allegations.

Prior to trial, Rounds brought a motion requesting he be allowed to present evidence that in the past Erica had made false allegations she was sexually abused by men other than her father. He also sought to introduce evidence Erica had made false allegations against him. The court denied the motion to the extent he sought to introduce evidence of sexual allegations of abuse by other men, but allowed him to present evidence of past false allegations against him. Rounds argues the court erred in excluding the evidence pursuant to Rule of Evidence 412.¹

¹ Iowa Rule of Evidence 412 provides:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual abuse is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) . . . constitutionally required to be admitted; or

(2) admitted in accordance with subdivision "c" and is evidence of:

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) . . . upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual abuse is alleged.

...

(c)(3) If the court determines on the basis of [a rule 412 hearing] that the evidence which the accused seeks to offer is relevant and the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which sexual abuse is alleged.

Review of the district court's ruling on the evidence regarding false allegations of rape by other men is for abuse of discretion. See *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 885 (Iowa 1994) (generally where assignments of error attack trial court's evidentiary rulings, this court will reverse only upon a showing of abuse of discretion); *State v. Forsyth*, 547 N.W.2d 833, 839 (Iowa App. 1996). An abuse of discretion occurs only when the district court "exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Peters*, 525 N.W.2d 854, 859 (Iowa 1994).

Rounds disputes the application of Iowa Rule of Criminal Procedure 412 to this evidence arguing the evidence goes to Erica's credibility, not the sexual nature of the activities. There is no merit to this contention. A similar argument was urged by the defendant in *State v. Jones*, 490 N.W.2d 787, 790 (Iowa 1992) and rejected by the Iowa Supreme Court. The term "past sexual behavior" as it is used in the rule clearly encompasses prior sexual abuse perpetrated upon the victim. *Jones*, 490 N.W.2d at 790.²

² The *Jones* decision is in line with the reasoning of other state and federal decisions ruling on similar "rape shield" rules, identical or highly similar to Iowa Rule of Evidence 412. *Jones*, 490 N.W.2d at 790 citing *United States v. Nez*, 661 F.2d 1203 (10th Cir.1981); *State v. Oliver*, 158 Ariz. 22, 760 P.2d 1071 (1988); *State v. Jacques*, 558 A.2d 706, 707 (Me.1989); *People v. Arenda*, 416 Mich. 1, 2-3, 330 N.W.2d 814, 815 (1982); *State v. Padilla*, 110 Wis.2d 414, 426-28, 329 N.W.2d 263, 270 (1982); Annotation, Admissibility of Evidence that Juvenile Prosecuting Witness in Sex Offense Case had Prior Sexual Experience for Purpose of Showing Alternative Source of Child's Ability to Describe Sex Acts, 83 A.L.R.4th 685 (1991) [Annotation]; Note, *State v. Oliver: Children With a Past: The Admissibility of the Victim's Prior Sexual Experience in Child Molestation Cases*, 31 Ariz.L.Rev. 677, 685 (1989) (noting the "general consensus is that rape shield statutes do apply to cases involving minor victims") [Note].

Because Rule 412 was applicable to the evidence of past sexual abuse allegations, the district court correctly proceeded to conduct its analysis under Rule 412. Rule 412, Iowa's "rape shield" law, is an exception to the general rule that relevant evidence is admissible. *State v. Clarke*, 343 N.W.2d 158, 160-61 (Iowa 1984). Evidence under the purview of the rule is admissible only if it fits under one of the conditions for admissibility defined in the rule. Iowa R. Evid. 412. Rounds argues the evidence is admissible under the conditions of Rule 412(c)(3) because the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice.

The court conducted a relevancy analysis under Rule 412 and decided the disputed evidence was not relevant. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. The test of relevancy is "whether the evidence offered would render the desired inference more probable than it would without such evidence." *Alvey*, 458 N.W.2d at 852. The rape shield law and the general rules of relevancy require a balancing of the probative value of the information weighed against the victim's privacy, and policies behind the rule.³

³ The purposes behind the rule are to encourage the reporting and prosecution of sex offenses, and prevent the parties from delving into distractive, irrelevant matters. *Clarke*, 343 N.W.2d at 161-62.

The evidence excluded by the court regarding alleged false accusations of sexual abuse by other men had no relevancy to whether Rounds committed sexual abuse crimes against Erica. Even if the evidence had impeachment value on Erica's credibility, the unfair prejudice, as it affects Erica's privacy and other Rule 412 matters, not outweighed by the value of the evidence.⁴ See Iowa R. Evid. 403; 412(c)(3). Evidence is unfairly prejudicial if it may cause a jury to base its decision on something other than the established propositions in the case. *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988).

The court did not abuse its discretion in excluding Round's proffered evidence that Erica had made false accusations of rape against men other than himself.

III. Adequacy of Trial Information and Charges.

Rounds contends the trial information was duplicitous⁵ and the court erred by not instructing the jury they unanimously agree on a date certain for each offense Rounds was convicted. This objection was not voiced at any time during the trial proceedings. A party cannot raise an issue for the first time on appeal. *Conner v.*

⁴ The trial court reasoned even if the evidence was relevant in terms of credibility, the probative value was definitely outweighed by the prejudice and confusion to the jury which would result from the court having to try a rape case within this case.

⁵ Count I charges Rounds with committing or aiding and abetting in the commission of sexual abuse in the second degree between the dates of February 4, 1991 and April 20, 1990. Count II charges Rounds with the commission or aiding and abetting in the commission of sexual abuse in the third degree between the dates of February 4, 1991 and February 4, 1993.

State, 362 N.W.2d 449 (Iowa 1985). A party is limited on appeal to the objections he made at trial regarding jury instructions. *State v. Williams*, 256 N.W.2d 207 (1977).

Even if Rounds would have properly preserved this issue, his contentions are without merit. We review a challenge to the sufficiency of the trial information for errors at law. *State v. Grice*, 515 N.W.2d 20, 22 (Iowa 1994). The wording of the jury instructions required each juror to find Rounds sexually abused Erica at some point during the years of February 1987⁶ and April of 1990. There is no doubt the jurors unanimously agreed Rounds had committed the crimes. *See State v. Draper*, 457 N.W.2d 606, 608-09 (Iowa 1990)(the jury need not have been unanimous as to the mode of commission of the crime as long as it was unanimous as to the commission of the crime). It is not necessary for them to have identified a date certain upon which the crime occurred, especially in this case where the evidence supported the fact the victim was abused monthly, then weekly, and at times, every other day. *See State v. Brown*, 400 N.W.2d 74, 77 (Iowa Ct. App. 1986)(“[t]he 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”).

⁶ After it was pointed out to the State the defendant and his family did not live in Iowa until November of 1988, the State was allowed to amend the trial information to conform to proof. The statement of the case after amendment read between November of 1988 and April 20, 1990. The jury instructions contained these dates.

IV. Admission of Defendant's Confession to Child Protection Investigator.

Rounds contends his Sixth Amendment right to counsel was violated because he was interrogated by a Department of Human Services investigator without the presence of an attorney. During the interrogation he confessed to the crimes against his daughter. Rounds further contends his trial counsel was ineffective because he did not seek to suppress the admission.

The investigator, Chrys Harvey, testified defendant called her in 1993, after preliminary complaints were filed, inquiring about the Intra-Family Sexual Abuse Program. She told him to participate in the program he would have to admit to the sexual abuse. Harvey testified Rounds admitted he sexually abused Erica.

A defendant's Sixth Amendment right to counsel attaches at the time adversary judicial criminal proceedings are initiated against the defendant. *State v. Jackson*, 380 N.W.2d 420, 423 (1986). It was well after the preliminary complaint was filed that Rounds contacted Harvey, and his right to counsel had attached. *See id.* The question thus becomes whether Rounds waived his right to counsel by initiating the conversation with Harvey. We hold he did. Although Harvey, as an investigator for the Department of Human Services, had been assigned to investigate this case, it was not during the investigation that Rounds admitted his crimes. Weeks after the investigation was concluded Rounds contacted Harvey and inquired about the program. Rounds initiated the conversation which ultimately led to his making the

confession and Harvey merely responded to him by telling him the prerequisites for admission into the program.

Rounds cannot assert an ineffective assistance of counsel claim on this issue. Rounds chose to proceed pro se. The defendant cannot elect to proceed pro se and then seek a reversal on appeal by claiming ineffective assistance of counsel. *See State v. Hutchison*, 341 N.W.2d 33, 42 (Iowa 1983).

V. Iowa's Jurisdiction Over Rounds' Crimes.

At the close of the evidence Rounds challenged Iowa's jurisdiction over the crimes he had committed because some of the acts allegedly took place in Missouri. The State amended the trial information to conform to the evidence⁷ and the court changed the jury instructions to reflect only the dates of the alleged occurrences in Iowa. The amendment to the trial information and to the jury instructions changed the date for which the defendant could be found guilty for sexual abuse from February 1987 to November 1988. There is no dispute the family moved to Iowa in November 1988. Iowa had jurisdiction of crimes occurring after that time. The amendment to the trial information and the modification to the jury instructions to reflect the date the family moved to Iowa cured any jurisdictional problem.

AFFIRMED.

⁷ Amendments to conform to proof are proper. *State v. Zuch*, 267 N.W.2d 52 (Iowa 1978).