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IN THE COURT OF APPEALS OF IOWA

No. 3-244 / 92-986

STATE OF IOWA,

Appellee,

vs.

BRYAN T. REYNOLDS,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Reynolds appeals his conviction, following a jury trial, of sexual abuse in the second degree and indecent contact with a child. **REVERSED AND REMANDED FOR A NEW TRIAL.**

Paul H. Rosenberg of The Rosenberg Law Firm, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas S. Mullin, County Attorney, Carol Chase and James Katcher, Assistant County Attorneys, for appellee.

Heard by Oxberger, C.J., Schlegel, J., and McCartney, S.J.*

*Senior judge from the 2nd judicial district serving on this court by the order of the Iowa Supreme Court.

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SCHLEGEL, J.

The defendant, Bryan T. Reynolds, appeals his conviction, following a jury trial, of sexual abuse in the second decree and indecent contact with a child. He contends: (1) he was improperly denied the right to cross-examine adverse witnesses and to present a defense; and (2) the trial court erred in admitting evidence of prior bad acts.

Bryan and Lisa Reynolds were married in 1988. It was the second marriage for each party, and Bryan adopted Lisa's two children from a prior marriage, Josh and J.R. That year the parties had their own child, Billy, as well. In June of 1990 Lisa filed for divorce, and the parties separated. On August 17, 1990, Bryan obtained a court order granting him visitation from 9 a.m. to 6 p.m. every other Saturday.

When the first court-ordered visitation took place on August 25, 1990, Bryan saw only Billy and Josh. J.R., who was born August 23, 1982, was at her eighth birthday party. Lisa canceled the next scheduled visit and attempted to have visitation ended by court order. After a hearing on September 17, 1990, the district court let the visitation order stand with stipulations. The scheduled visits with all three children occurred September 22, October 6, and October 20.

On one of these visits J.R. alleges Bryan touched her genital and anal areas beneath her underwear. Lisa and

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J.R. identified the date on which the alleged abuse occurred as September 22. During this visit, Bryan gave Josh a bean-bag chair as a birthday present, and J.R. says the abuse took place on the chair while she and Bryan were alone.

J.R. told her mother about the abuse on October 25, 1990, and the next day Lisa contacted the Iowa Department of Human Services (DHS). J.R. was interviewed by DHS workers on October 26 and October 31 and by the police on November 13. The police interview was videotaped.

The State filed a trial information charging Bryan with sexual abuse in the second degree in violation of Iowa Code section 709.3(2) and indecent contact with a child in violation of Iowa Code section 709.12(1). The State indicated in its minutes of testimony that R.L., Bryan's natural daughter from his previous marriage, would testify to being sexually abused by Bryan five years earlier. The court sustained Bryan's motion in limine to exclude R.L.'s testimony.

At the time of trial, the State made an offer of proof of R.L.'s testimony, and the court reversed the order, permitting only testimony as to digital contact Bryan had with R.L. The court excluded testimony involving Bryan's penis or oral contact with R.L. The court stated the testimony was admissible under Iowa Rule of Evidence 404(b) to prove motive, intent, and possibly identity.

Bryan's theory of defense was that Lisa implanted an imaginary sexual abuse allegation in J.R.'s mind. He contends the trial court erred and prevented him from presenting his defense in: (1) sustaining hearsay objections to his testimony that Lisa had earlier threatened to use child abuse allegations against him to coerce a favorable property settlement in their divorce; (2) refusing to allow Bryan to cross-examine Lisa concerning her asking her father to negotiate a favorable property settlement in exchange for dropping criminal proceedings; (3) sustaining hearsay objections to Bryan testifying to his conversations with Lisa's father; (4) excluding tape recordings of these conversations; and (5) refusing to admit evidence of Lisa's attempts to terminate Bryan's visitation with Billy. The State argues, among other things, that Bryan did not preserve error for all of the excluded testimony. We reverse and remand for a new trial.

To the extent Reynolds' claims are evidentiary in nature, review of the district court's rulings is for abuse of discretion. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984). In order to show an abuse of discretion, one generally must show the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)). To the extent Reynolds'

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constitutional rights are implicated, our review is de novo on the totality of the circumstances. State v. Vincik, 436 N.W.2d 350, 353 (Iowa 1989).

Having reviewed the record extensively, we agree with the State that the defendant has failed to preserve most of the issues raised for appellate review. In addition, several of the defendant's claimed instances of abuse of discretion by the district court simply did not occur. However, we find the district court did abuse its discretion in sustaining the State's hearsay objection to Reynolds' testimony concerning conversations with Charles Condon, Lisa's father. The excluded conversations pertained specifically to Reynolds' claim that Lisa fabricated the sexual abuse allegations in an effort to coerce the defendant into agreeing to a more favorable property settlement in the couple's divorce.

The defendant's theory at trial was that Lisa hired her father as her attorney to effect a more favorable property settlement by authorizing her father to negotiate with Reynolds. Specifically, the defendant contends he engaged in conversations with Charles Condon in which Condon told Reynolds that Lisa would refuse to go forward with the present sexual abuse allegations if Reynolds would make certain property concessions in the dissolution proceeding.

Admission of Reynolds' testimony concerning such conversations with Condon were essential to Reynolds' ability to support his theory at trial. This is especially

true in light of the fact that Condon was unavailable as a witness because he had invoked his Fifth-Amendment right against self-incrimination. In addition, Lisa denied any knowledge of or participation in the coercive scheme alleged by Reynolds.

The State argues that evidence regarding such a scheme was irrelevant since the prosecuting witness was J.R., not Lisa. However, the record clearly indicates that Lisa Reynolds was the State's central corroborating witness who was permitted, over defense objections, to repeatedly reiterate and elaborate on J.R.'s allegations. The State clearly chose to utilize Lisa's testimony, almost exclusively, to support the veracity of J.R.'s allegations. J.R. was nine years old at the time of trial and was called upon by the State to recall events that occurred one and one-half years earlier. During the course of the relatively short period of time that J.R. testified, she answered numerous questions by stating, "I don't remember."

Given the importance of Lisa's testimony and her decisive role in developing and reporting J.R.'s allegations, evidence exposing her possible bias and threats to use child abuse allegations as leverage in the Reynolds' divorce was essential to the fact-finding process. Without being aware of evidence of Lisa's possible bias, threats, and involvement in a coercive scheme that allegedly led to offers of "hush money," the

jury was deprived of the opportunity to consider important evidence while assessing the weight and credibility to be afforded Lisa's actions and testimony.

The proffered testimony in the record illustrates Reynolds' statements concerning Condon's coercive comments. In order to be admissible, such testimony must be shown to be nonhearsay or to fall within an exception to the hearsay rule. State v. Williams, 427 N.W.2d 469, 471 (Iowa 1988); State v. Evans, 169 N.W.2d 200, 205-06 (Iowa 1969). Here, even if the proffered testimony is determined to constitute hearsay evidence, the testimony would nonetheless be admissible. Reynolds' testimony concerning Condon's alleged coercive statements is clearly admissible under Iowa Rule of Evidence 804(b)(3) (statement against interest where declarant is unavailable as a witness).

Having determined that the district court abused its discretion by excluding the defendant's testimony about his conversation with Charles Condon concerning the coercive scheme upon which the defendant's entire theory was based, we reverse and remand this case for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.