IN THE COURT OF APPEALS OF IOWA

No. 9-447 / 88-1630

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

DEBORAH D. McGRANE,

Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles, Judge.

Defendant appeals her conviction on three counts of sexual abuse. **AFFIRMED.**

Thomas J. Miller, Attorney General, Sarah J. Coats, Assistant Attorney General, Paul L. Martin, County Attorney, and Candila Schickel, Assistant County Attorney, for plaintiff-appellee.

Philip L. Garland, Mason City, for defendant-appellant.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

Defendant Deborah McGrane appeals from her conviction on three counts of sexual abuse in violation of Iowa Code sections 709.1(3), and 709.3(2), and 703.1 (1987). She asserts that the trial court erred in: (1) denying defendant's motion for a mistrial after the prosecution attempted to introduce the past sexual conduct and convictions of an alleged accomplice, and (2) submitting the simplified Uniform Jury Instruction No. 10 on reasonable doubt to the jury. Our scope of review is for correction of errors at law. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa App. 1982); Iowa R. App. P. 4. We affirm.

Deborah McGrane was charged with two counts of sexual abuse in the second degree and one count of aiding and abetting another in the commission of sexual abuse in violation of Iowa Code sections 709.1(3), 709.3(2) and 703.1 (1987). At trial the defendant's eight-year-old son, J.D., testified that his mother and her boyfriend, Allen LaBayre, over a period of years performed numerous sexual acts on both himself and his younger brother. J.D. testified that both he and his brother had oral-genital and anal contact with both adults. J.D. additionally testified that he did have or attempted to have sex with other children as well.

On appeal the defendant alleges that the trial court erred in not granting a mistrial on the grounds that the

attempt to introduce evidence of LaBayre's convictions prejudiced the jury against the defendant.

In order to properly preserve error in the trial court as to the introduction of evidence, objections must be timely, State v. Thongvanh, 398 N.W.2d 182, 187 (Iowa App. 1986), and raised at the earliest time the error becomes apparent. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984). It has long been the rule in Iowa that:

> [W]hen an objection is made after an answer to a question is in the record, in order for the objection to be adequate, a motion to strike must be made, application must be made to have the objection precede the answer, or an excuse offered for the delay in objecting to the evidence.

State v. Steltzer, 288 N.W.2d 557, 558 (Iowa 1980) (citing State v. Reese, 259 N.W.2d 771, 775 (Iowa 1977)). See also State v. Brotherton, 384 N.W.2d 375, 379 (Iowa 1986); State v. Hinkle, 229 N.W.2d 744, 748 (Iowa 1975).

During the prosecution's cross-examination of the defendant, the county attorney asked the defendant the following questions:

> Q. (By Ms. Schickel)[PROSECUTOR]: Have you ever visited Allen LaBayre in prison?
>
> A. Yes, I did.
>
> Q. When was that?
>
> A. I can't remember the year. I visited once in Oakdale and once when I was in Rockwell City.
>
> Q. Approximately how many years ago?
>
> MR. GARLAND [DEFENSE COUNSEL]: I'm objecting to this line of questioning as being irrelevant, Your Honor.

> THE COURT: Sustained.
>
> Q. (By Ms. Schickel) You were aware, weren't you, that Allen LaBayre was convicted of indecent contact?
>
> MR. GARLAND: I'm objecting to this as irrelevant and I would have ask that a conference outside the jury.
>
> THE COURT: All right. The jury will be excused to the jury room. During the recess please heed the admonitions heretofore given.

Defendant's objection to the State's questioning came after the defendant's answer. The defense counsel made no motion to strike, and no application was made to have the objection precede the answer. On appeal defendant states in her brief that, "[i]t was not until those questions were asked that it became apparent to counsel that those questions were not being asked for purposes of impeachment, but essentially to prejudice the jury." At oral argument defense counsel stated he withheld making a motion to strike this evidence in order to prevent drawing any additional emphasis or attention to it. The offered excuse for the delay in objecting to the evidence was neither made at trial nor was it coupled with a motion to strike at trial. See Washington, 356 N.W.2d at 194. Therefore, defendant's objection was inadequate to preserve error in this case. We need not reach the merits of defendant's argument for we find that defendant did not preserve error on this issue because of his failure to lodge a timely objection.

The defendant also claims the trial court erred in submitting Jury Instruction No. 10 to the jury. She contends the instruction is too vague and allows a jury to find guilt at a lower standard of proof than the reasonable doubt standards.

The trial court submitted the following uniform jury instruction on reasonable doubt to the jury:

> The burden is on the State to prove the defendant guilty beyond a reasonable doubt.
>
> A reasonable doubt is one that fairly and naturally arises from the evidence or lack of evidence produced by the State.
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt, and you should find the defendant guilty.
>
> But, if after a full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt, and you should find the defendant not guilty. (Emphasis added).

Defense counsel objected to the instruction, arguing that the term "firmly convinced" was not definitive enough and would allow the jury to find guilt based upon "clear and convincing" evidence. The trial court overruled defense counsel's objection. The defendant was found guilty on all three counts, and was sentenced to fifty years. Defendant's motion for new trial was denied.

In State v. McFarland, 287 N.W.2d 162, 163 (Iowa 1980), cert. denied, 449 U.S. 853 (1980), the Iowa Supreme Court rejected a similar contention to an instruction virtually identical to the instruction in this case. The critical

words used there were "abidingly" and "firmly convinced." The court stated:

> The instruction submitted to the jury set out an objective standard for measuring the jurors' doubts. It was not deficient for failing to provide more than one standard. "[N]o particular model or form is required in advising the jury concerning the meaning of reasonable doubt as long as a suitable standard is given."

Id. (quoting State v. Finnegan, 237 N.W.2d 459, 460 (Iowa 1976)).

We find the jury instruction in this case to be adequate. The use of the term "firmly convinced" is a suitable standard for advising the jury concerning the meaning of reasonable doubt. We find defendant's contention without merit. The defendant's conviction is affirmed.

AFFIRMED.