

IN THE COURT OF APPEALS OF IOWA

No. 1-170 / 90-452

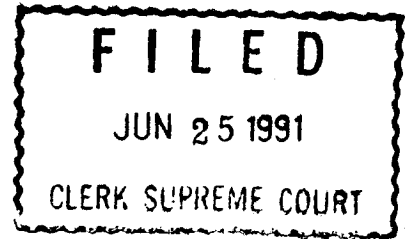
STATE OF IOWA,

Appellee,

vs.

BART HULBERT, SR.,

Appellant.



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Appeal from the Iowa District Court for Bremer County,
Ralph F. McCartney, Jr., Judge.

Hulbert appeals from his convictions, following a jury trial, for second-degree sexual abuse, lascivious acts with a child, and indecent contact with a child. Hulbert also appeals the sentence imposed by the trial court. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie Ann Halligan, Assistant Attorney General, and Lawrence A. Stumme, County Attorney, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

OXBERGER, C.J.

Bart Hulbert was accused of having sexual contact with his daughter on several occasions. The girl was approximately ten years old when the offenses allegedly occurred.

A jury found Hulbert guilty of one count of second-degree sexual abuse, one count of lascivious acts with a child, and one count of indecent contact with a child. He was sentenced to serve a prison term of up to twenty-five years on the second-degree sexual abuse charge, a term of up to five years on the lascivious acts charge, and a term of up to two years on the indecent contact charge. The sentencing court directed that the twenty-five-year term and the five-year term be served concurrently, but the two-year term be served consecutively to the others.

Hulbert has appealed his convictions and sentences.

Hulbert contends the district court abused its discretion by restricting the testimony of a psychologist he called as an expert witness. This witness was prepared to testify that: (1) a professional who interviewed his daughter used improperly suggestive interviewing techniques which could have planted or reinforced the concept of sexual abuse in the child's mind, and (2) Hulbert did not conform to a psychological profile of adults known to be sexual abusers of children.

Hulbert also contends the trial court erred by refusing to submit his requested "spoliation" instruction to the jury. The proposed instruction involved an audiotape of an interview with his daughter which a deputy sheriff partially erased, prior to trial, during a duplication attempt and then completely erased during another duplication attempt during trial. The proposed instruction allowed the jury to draw an inference favorable to the defendant from the State's destruction of evidence.

Finally, Hulbert contends the sentencing court abused its discretion by imposing one of the sentences consecutively. Hulbert argues the trial court impermissibly imposed a consecutive term to ensure he would have time to complete the sexual offenders' program before being paroled.

I. EXPERT OPINION TESTIMONY. Iowa Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

State v. Myers, 382 N.W.2d 91, 93 (Iowa 1986), discussed the general principles regarding expert testimony in Iowa:

We are generally committed to a liberal rule which allows opinion testimony if it will aid the jury in screening the properly admitted evidence to ascertain the truth. When a trial court has exercised its discretion to admit expert testimony, we will reverse only if we find an abuse of that discretion and prejudice. An abuse

of discretion occurs when the trial court's ruling is based on untenable grounds. Consequently, when a timely and specific objection under rule 702 challenges the propriety of expert testimony on a particular subject, the proponent has the burden to establish that the testimony is admissible.

(citations omitted).

A. INTERVIEWING TECHNIQUE. Hulbert contends the trial court abused its discretion by limiting the testimony of his expert, Dr. Underwager, with respect to testimony critiquing the interviewing techniques utilized by Kathryn Lee. Lee is a social worker at the Child Protection Center at St. Luke's Hospital in Cedar Rapids, Iowa. Lee interviewed the purported victim within two weeks of the day the child reported the abuse. The interview was videotaped.

Prior to the presentation of evidence at trial, the trial court sustained a motion in limine filed by Hulbert to exclude the contents of the interview conducted by Lee. Consequently, the State did not enter the videotape into evidence. After the close of the State's case-in-chief, Hulbert sought to introduce Dr. Underwager's testimony critiquing the interview techniques used by Lee. Dr. Underwager had viewed the videotape prior to trial.

The trial court refused to allow Dr. Underwager to testify about Lee's interview techniques he had seen on the videotape. The trial court based its ruling on the fact the videotaped interview was not part of the evidence before the jury. Hulbert then offered to admit the

videotape, but the trial court refused to admit the videotape stating "I do not think the Defendant can use this both as a shield in the State's case and a sword on his own case." We agree.

The trial court allowed Dr. Underwager to comment about matters in evidence. This included the effect on children of successive interviews, the use of anatomically correct dolls and diagrams when interviewing children reporting sexual abuse and the "good touch, bad touch, confusing touch" instructional material presented to the purported victim's elementary school class.

Iowa Rule of Evidence 702 provides that expert opinions are admissible to assist a jury in understanding evidence. Because the record did not contain any evidence about the contents of the videotape or the videotape itself, nothing existed in the record such that Dr. Underwager could assist the jury by critiquing Lee's interview technique.

Additionally, Hulbert's offer to admit the videotape came too late in his trial. As a result of Hulbert's motion in limine, the State did not attempt to admit the videotaped interview into evidence when it presented its case. Hulbert's motion also barred his presentation of the videotape into evidence. As the trial court succinctly stated, the videotaped interview could not serve as both a shield and a sword.

B. PSYCHOLOGICAL PROFILE. Hulbert also contends the trial court abused its discretion by refusing to allow Dr. Underwager to testify about the psychological profile of known sexual abuse perpetrators as compared to Hulbert's psychological profile. After the trial court's ruling on this issue, Hulbert made an offer of proof as to Dr. Underwager's proposed testimony.

The Iowa courts have not directly addressed this specific issue before. Expert opinion testimony which essentially passes on the guilt or innocence of the defendant is not admissible. State v. Myers, 382 N.W.2d at 95. These opinions are not admissible because they go beyond merely aiding the jury in understanding the evidence. Further, they invade the jury's exclusive domain -- the determination of the guilt or innocence of the accused. Id.

In Hulbert's offer of proof, Dr. Underwager testified about the usual psychological profile of adults who sexually abuse children. He then stated "[i]n the evaluation, the test results of Mr. Hulbert, we do not find anything that would suggest he is comparable to or like or produced a similar kind of test result that known child molesters do."

Hulbert asserts Dr. Underwager's testimony would have assisted the jury in understanding the personality traits of known abusers and the personality traits inconsistent

with such conduct, as well as showing his good character as a "normally functioning individual" and his nondisposition to commit the offenses he had been charged with. Hulbert further asserts the testimony would not have directly addressed his credibility or truthfulness, but rather would have raised a reasonable doubt as to his guilt.

In State v. Hobbs, 172 N.W.2d 268, 271 (Iowa 1969), the court discussed testimony offered to show a defendant's good reputation:

A defendant in a criminal case may elect to put his character in issue by producing evidence as to his good character as bearing on the probability or nonprobability of his guilt of the crime charged. This principle is based upon the philosophy that a man of good character would not be likely to commit the crime of which he is accused.

In Iowa this may be done by defendant showing his good character by proof of his real character - those peculiar qualities which the individual is supposed to possess which distinguish him from others and denote what a man really is, not what he is reputed to be - or of his general reputation - which is based on speech of his associates and is the sum of opinions generally entertained concerning what is reputed or understood to be the estimate of a person's character in the community in which he moves or resides.

Evidence of good character offered by defendant whether by direct proof or by proof of general reputation must relate particularly to the trait of character involved in the crime alleged.

(citations and authorities omitted).

In Hobbs the defendant had been charged with robbery with aggravation. The court stated the traits involved in robbery or larceny were honesty, integrity, and good citizenship, thus, whether a defendant possessed these

traits had a bearing on the probability or nonprobability the defendant committed the crime charged. Id. (citation omitted).

In State v. Hood, 346 N.W.2d 481 (Iowa 1984), the defendant (Hood) sought to exclude introduction of an expert opinion about his codefendant's (Snodgrass') "passive-dependent" personality. Both defendants had been charged with murdering Snodgrass' husband. Snodgrass offered the testimony to negate evidence she had the requisite intent to kill her husband. Id. at 484. Hood argued the expert's testimony should have been excluded under the relevancy rule barring proof of a person's character as evidence of conduct on a particular occasion. Id. at 485. The court disagreed, finding the testimony fell within an exception to the general rule:

'A defendant may introduce evidence of his good character for the traits involved in an offense as bearing on the probability he [or she] did or did not commit the crime charged. This may be done by proof of his real character for such traits or his general reputation for them.'

Id. (quoting State v. Buckner, 214 N.W.2d 164, 166-67 (Iowa 1974)(other citations and authorities omitted). The Hood court held the expert's opinion testimony on Snodgrass' unique character trait (a passive-dependent personality) came within the exception because it bore on the probability she committed the crime charged.

In People v. Stoll, 783 P.2d 698 (Cal. 1989), the California supreme court addressed an issue similar to the

one before us. In Stoll several defendants were charged with multiple counts of sexual abuse against several children. The alleged victims' pretrial statements contradicted their trial testimony, no physical evidence corroborated any of the victims' testimonies although the victims claimed photographs were taken during at least some of the episodes of abuse, and no medical examinations were ever done even though one of the victims told investigators he had been sodomized two weeks before the interview. Additionally, the defendants attacked the techniques of the individuals who interviewed the victims as being suggestive and coercive.

Stoll addressed whether the trial court abused its discretion by excluding the testimony of a psychologist who was prepared to testify one of the defendants "showed no 'possibility for sexual deviancy in her personality profile.'" Id. at 706 (emphasis in original). In an offer of proof, the expert testified he based his opinion on psychological tests of the defendant as well as an interview with the defendant.

The California court found the testimony admissible under a California statute which allows an accused to present expert opinion testimony of this kind to indicate his or her nondisposition to commit a charged sex offense. The court also found the expert's opinion admissible under the state's rule of evidence requiring expert testimony be

"[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Id. at 708 (emphasis in original). The court stated "[s]ince the jury could not otherwise have been aware of personality traits inconsistent with such misconduct [sexual abuse of a child], [the expert's] testimony had potential to 'assist' the jury on a pertinent point." Id.

The Stoll court also discussed the State's argument the testimony would carry a misleading aura of scientific infallibility to the jury. The court emphasized the State was free to impeach the expert's opinion and the jury was not required to accept the expert's opinion, as is the case in any trial involving expert testimony. The court opined no reasonable juror would mistake an expert's reliance on standardized psychological tests as a source of infallible "truth" on issues of personality, predisposition, or criminal guilt. Id. at 712.

The Stoll court further found denial of the admission of the evidence to be reversible error and remanded the case for a new trial. The court stated the denial was prejudicial because the defendant mounted a thorough attack on the victims' credibility, no physical or medical evidence corroborated the victims' testimonies and no direct nonvictim accounts existed of the pertinent charged events.

We find the Stoll court's reasoning persuasive even though Iowa does not have a statute specifically allowing defendants to present expert opinions about their nondisposition to commit a charged sexual offense. As previously discussed, Iowa allows defendants to introduce evidence of character traits bearing on the defendant's nonprobability to commit the crime he or she has been charged with. Further, in State v. Hood, 346 N.W.2d at 485, our supreme court held an expert's opinion testimony about a defendant's unique character trait was admissible because it bore on the defendant's probability of committing the crime charged.

We find the expert opinion testimony Hulbert sought to admit regarding his nondisposition to have committed the crimes charged was admissible. Further, we find the trial court abused its discretion by refusing to allow Hulbert to present his expert's opinion to the jury. We reach this decision in light of the circumstance that this case involved essentially the purported victim's assertion against the defendant's denial. None of the other evidence, such as the medical examination of the child, served to decisively corroborate her assertions. Additionally, Hulbert attacked the interviewing techniques used with the purported victim as coercive and suggestive. Further, the State may attempt to impeach the expert's opinion as well as his methodology for reaching that

opinion. The State has not argued the expert lacked credentials or the tests he administered are not relied upon by others in his profession.

We are mindful of the need to protect children in cases involving allegations of sexual abuse, but we must weigh this need against a defendant's right to present a meaningful defense. In sexual abuse cases such as this, where the case is essentially the purported victim's allegation against the accused's denial of conduct, we find it reversible error to disallow a defendant's expert opinion evidence regarding his nondisposition to sexually abuse children.

INSTRUCTION ON DESTRUCTION OF EVIDENCE. Hulbert also contends the trial court erred by refusing to submit a "spoliation" instruction to the jury permitting it to draw an inference favorable to him from the destruction of evidence. We address this issue even though we are remanding this case for a new trial on another issue because this issue is likely to reoccur during Hulbert's next trial.

The destroyed evidence was an audiotape of an interview conducted by a child abuse investigator for the Department of Human services with the purported victim. The investigator testified at the trial and Hulbert and his attorney listened to the tape before trial, although the tape was apparently barely audible.

Hulbert requested a transcript or copy of the tape prior to trial so his expert, Dr. Underwager, could testify about the interviewer's techniques. The police officer who attempted to duplicate the tape testified at trial that when he attempted to duplicate the tape he inadvertently erased all but four minutes of the tape. The officer testified that after the erasure, he listened to the tape and heard nothing. The officer further testified that during the morning of the day he testified, he listened to the tape again and heard the remaining portion of the tape. The officer suggested at trial he was able to hear the portion of the tape he previously could not because he had cleaned his tape machine in the intervening period of time. At that juncture in the trial, the trial court granted Hulbert a brief continuance to allow him and his expert to hear the remainder of the tape. Hulbert, his attorney and Dr. Underwager heard the remainder of the tape at least twice that same day and also took notes while listening.

The same police officer then took the audiotape and obtained professional assistance in duplicating the remainder of the interview. Unfortunately, the remainder of the tape was also inadvertently erased during this second duplication attempt.

Hulbert claims the trial court's refusal to include a spoliation instruction to the jury denied him due

process. We review claims asserting a violation of constitutional safeguards de novo and make an independent evaluation of the totality of the circumstances. State v. Maniccia, 355 N.W.2d 256, 258 (Iowa App. 1984)(citation omitted).

When a criminal defendant claims a due process violation premised upon an allegation of the State's "suppression" of evidence, we begin our analysis with the three-part test set forth in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). State v. Brown, 337 N.W.2d 507, 509 (Iowa 1983). The Brady test requires: (1) a proper defense request for the evidence; (2) a showing the evidence would be favorable to the defendant; and (3) a showing the evidence was material. Id.; See also State v. Maniccia, 355 N.W.2d at 258-59. When a due process violation occurs due to the State's destruction of evidence, the appropriate remedy is a jury instruction permitting a favorable inference for the defendant from the destruction of the evidence. State v. Maniccia, 355 N.W.2d at 259 (citation omitted).

Additionally, in order for the destruction of evidence to justify an unfavorable inference, there must be a showing the destruction was intentional. State v. Langlet, 283 N.W.2d 330, 334 (Iowa 1979). The issue of the inference to be drawn from the destruction of evidence should be submitted to a jury "only where substantial

evidence exists to support findings that such evidence had been in existence, . . . and that the party responsible for its destruction did so intentionally." Id. at 335 (authorities omitted). The threshold determination with respect to whether the destruction justifies submitting the issue to the jury is with the trial court. Id. at 336. We review the trial court's determination about whether to submit a spoliation instruction to the jury for abuse of discretion. Id.

Hulbert has met the first prong of the Brady test because he properly requested a copy or transcript of the tape prior to trial. He asserts he has also shown the tape was material to his defense because Dr. Underwager could have critiqued the interview techniques of the interviewer to determine whether she was coercive or suggestive. Additionally, Hulbert asserts he could have used the child's prior statements for impeachment purposes. Lastly, Hulbert argues he has also met the third prong of the Brady test because Dr. Underwager's critique would have been favorable to his defense. Hulbert reaches this conclusion by asserting that because the case rested significantly on the child's credibility, any impeachment of her statements would have bolstered a reasonable doubt of his guilt.

Upon our de novo review of the record we question whether Hulbert has shown the audiotape was favorable to him as well as material or probative of a matter in issue.

See State v. Maniccia, 355 N.W.2d at 259. The assertions Hulbert makes with respect to the favorability of the tape rests within the realm of the credibility of witnesses. We find this favorability speculative at best.

Regardless of whether Hulbert has met the Brady test, the trial court found no showing the State "knowingly and intentionally" destroyed the evidence. We agree. Hulbert was allowed to hear the tape prior to trial. We find no support in the record for any claims the State attempted to suppress the substance of the tape or limit Hulbert's access to the original tape prior to trial. Therefore, we conclude the trial court did not abuse its discretion by refusing to submit a spoliation instruction to the jury.

SENTENCING. Hulbert asserts the sentencing court impermissibly based the length of the sentence imposed upon him on its desire to ensure he would not be paroled before he completed the sexual offenders' program. The State concedes this was an impermissible consideration.

Because we are remanding Hulbert's case for a new trial we need not address this issue at this time.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Sackett, J., concurs; Habhab, J., concurs in part and dissents in part.

HABHAB, J. (concurring in part and dissenting in part)

I respectfully dissent only to that part of the majority opinion that remands this case for a new trial. Before setting forth my reasoning, I note that I would not find the testimony of Dr. Underwager objectionable if this was a case of first impression. However, I believe under present case law the trial court was correct in sustaining the objection to the disputed testimony of the doctor and in addition sustaining the objection to the offer of proof.

It is the law in this state that expert opinion testimony which essentially passes on the guilt or innocence of the defendant is not admissible. State v. Myers, 382 N.W.2d 91, 95 (Iowa 1986). Such opinion testimony is not admissible because it goes beyond merely aiding the jury in understanding the evidence. It does, for the most part, invade the jury's exclusive domain--the determination of the guilt or innocence of the accused. Id.

I have no quarrel with the statement that Dr. Underwager's testimony would assist the jury in understanding the personality traits of known abusers. However, his testimony goes beyond that for it indirectly, if not directly, infers the defendant is innocent of the charge lodged against him. It has long been the law of this state that determination of the guilt or innocence of the accused rests exclusively with the jury.

I agree that under present law a defendant in a criminal case may elect to put his character at issue by

producing evidence as to his good character as bearing on the probability or nonprobability of his guilt in the crime charged. State v. Hobbs, 172 N.W.2d 268, 271 (Iowa 1969). However, I am unable to find from the record before us that the testimony of Dr. Underwager was offered for the purpose of proving character.

The majority is correct in its analysis of People v. Stoll, 783 P.2d 698 (Cal. 1989). As the majority points out, the testimony is somewhat similar to the testimony offered in this case. It was admitted under a California statute which allows an accused to present expert opinion to indicate his or her nondisposition to commit a charged sex offense. We have no such comparable statute in Iowa.

The receiving of expert testimony rests to a great extent with the discretion of the trial judge. When expert testimony is rejected by the trial court, we reverse only when there has been an abuse of that discretion. I do not find an abuse here.