

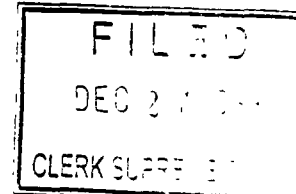
IN THE COURT OF APPEALS OF IOWA

No. 1999-334 (9-587) / 98-1547
Filed December 27, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES LEE JESSOP,
Defendant-Appellant.



Appeal from the Iowa District Court for Davis County, Annette J. Scieszinski,
Judge.

The defendant appeals his conviction and sentence, following a jury trial, for
third-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, and Rick L. Lynch, County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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HECHT, J.

James Lee Jessop appeals his conviction and sentence, following a jury trial, for third-degree sexual abuse. We affirm.

I. Factual Background and Proceedings. James Lee Jessop ("Jessop") was charged with sexual abuse in the third degree on May 1, 1998. The charge was based on an alleged incident of sexual abuse that occurred on April 20, 1997. The victim, H.S., stated her stepfather, Jessop, performed an unwanted sexual act on her while she was doing chores on the family farm. H.S. testified Jessop pushed her down into the hay in the barn, got on top of her, and put his hand down her pants and underwear. The incident lasted about ten to fifteen minutes until H.S.'s mother, Becky Jessop, called H.S. back into the house.

H.S. wrote about the incident in her diary on the date it occurred. However, she did not tell her mother or another adult about the incident until her aunt, Cindy Durflinger ("Durflinger"), read the diary entry. When confronted by Durflinger about the writing, H.S. originally stated it was not true. H.S. later told Durflinger the entry was truthful. Durflinger helped H.S. move out of the house to live with her biological father.

H.S. testified she told several of her friends the incident had happened, and she reported it to her school counselor. Jessop subsequently grounded H.S. for discussing the incident with her school counselor. Several of H.S.'s friends testified at trial and indicated H.S. had disclosed several incidents of abuse by Jessop to them.

H.S. testified Jessop beat her mother and was always drunk. She also testified Jessop kissed her for two minutes once and had hit her "on the butt" several times. On one occasion, Durflinger observed an inappropriate kiss between H.S. and Jessop. Jessop's wife, Becky, testified Jessop treated her badly and beat her.

The State presented testimony from Dr. Kathleen Opdebeek ("Opdebeek"), a developmental pediatrician who examined H.S. approximately seven months after the incident. Opdebeek testified as to H.S.'s medical history and her physical exam. Opdebeek also stated H.S. told her that her stepfather had some problems with drinking.

Jury trial in this matter commenced on July 6, 1998. Steve Stoessel ("Stoessel"), a friend of Jessop's in attendance at the trial, testified he overheard several comments from one of the potential jurors. Stoessel testified he overheard one of the potential jurors say during voir dire, "they ought to hang him. They ought to hang the bastard." The declarant was ultimately selected to be a member of the jury. Stoessel did not notify the court or counsel about the statements until after the jury had been sworn and trial had started. Defense counsel moved for a mistrial because of juror misconduct. After hearing Stoessel's testimony, the district court denied the motion because the statements occurred before the jurors were administered the oath.

The district court entered a witness sequestration order. Notwithstanding the order, the parties agreed Becky Jessop, the mother of H.S., could stay in the courtroom after her testimony to provide support for H.S. Later in the trial, when it

became evident Becky Jessop could provide rebuttal testimony with reference to Jessop's denial he had "grounded" H.S. for reporting the abuse to a school counselor, the prosecutor notified the court of his intent to call Becky Jessop as a rebuttal witness. The district court permitted the State to call Becky Jessop to testify over Jessop's objection she should be excluded from further testimony because of the sequestration order.

The jury returned a guilty verdict on July 8, 1998. Jessop filed a motion for new trial on August 14, 1998, which the district court denied at the time of sentencing on August 20, 1998. Jessop appeals.

II. Standard of Review. We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4; *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We review evidentiary issues for an abuse of discretion. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998).

We review the district court's decision to deny Jessop's request for a mistrial due to juror misconduct for abuse of discretion. *See State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). We also review the district court's decision to allow the testimony of a witness who has violated a sequestration order for abuse of discretion. *See State v. Don*, 318 N.W.2d 801, 806 (Iowa 1982).

III. Sufficiency of Evidence. Jessop contends the district court erred by not granting his motions for judgment of acquittal and new trial based on insufficiency of the evidence. The jury's findings of guilt are binding on appeal if supported by

substantial evidence. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence is such evidence as could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *State v. Query*, 594 N.W.2d 438, 445 (Iowa App. 1999).

Jessop contends the evidence at trial was insufficient in part because the State's expert witness, Dr. Opdebeek, testified there was no physical evidence of sexual abuse, and H.S.'s hymen was intact. This evidence tends to show there was no physical proof of vaginal penetration, but does not conclusively countermand the other substantial evidence of sexual abuse in this case. Skin-to-skin contact is not required. *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994). Whether contact is sexual in nature is determined by considering the type of contact and the circumstances surrounding it. *State v. Capper*, 539 N.W.2d 361, 363 (Iowa 1995). In short, even if we accept the expert testimony as true, there is other compelling evidence of contact between Jessop's hand and H.S.'s genitalia sufficient to support the guilty verdict in this case.

Jessop also relies on inconsistencies in H.S.'s testimony to support his claim of insufficiencies in the evidence. Jessop contends the lack of truthfulness of H.S.'s diary entry calls into question his guilt. Initially, when confronted about the entry, H.S. stated the entry was not true. Later, she told her aunt the incident had actually

happened as described. Jessop also points to the conflicts between H.S.'s trial testimony and what she told her friends about his alleged acts of sexual abuse.

Although Jessop presented evidence of inconsistent statements made by H.S. and other witnesses regarding the specifics of the incidents, the jury was free to accept or reject both H.S.'s testimony and the testimony of the other witnesses. *See State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). The credibility of the witnesses is for the jury to decide. *Allen*, 348 N.W.2d at 247. H.S.'s testimony was not "so impossible, absurd, and self-contradictory that the court should deem it a nullity." *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998) (quoting *State v. Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997)). We conclude a rational juror could have found defendant guilty beyond a reasonable doubt. We affirm the district court's denial of Jessop's motions for acquittal and mistrial.

IV. Evidentiary Rulings. Jessop alleges the district court erred by allowing evidence of prior bad acts such as beating his wife and inappropriate prior conduct with H.S. In determining whether evidence of "other crimes, wrongs, or acts" is admissible, the district court must employ a two-step analysis. *Query*, 594 N.W.2d at 443. The court must first decide whether the evidence is relevant and whether there is clear proof the individual against whom the evidence is offered committed the prior acts. *State v. Zeliadt*, 541 N.W.2d 558, 560-61 (Iowa App. 1995). If the court finds it is relevant, the court must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403; *State*

v. Casady, 491 N.W.2d 782, 785 (Iowa 1992). Iowa recognizes a special exception in sexual abuse cases which permits use of prior acts “to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial.” *State v. Schaffer*, 524 N.W.2d 453, 456 (Iowa App. 1994) (quoting *State v. Spaulding*, 313 N.W.2d 878, 880 (Iowa 1981)).

A. Testimony of Becky Jessop. Becky, Jessop’s wife, testified at trial that Jessop treated her badly and would “beat on her.” This testimony was relevant to rebut Jessop’s assertions (1) since Becky reconciled with Jessop between December of 1997 and March of 1998, her conduct indicated her belief in his innocence; and (2) Becky’s decision to seek a divorce was dictated by her need to choose her daughter over Jessop. Defendant opened the door to this testimony by his questions of Becky on cross-examination. *See State v. Deases*, 479 N.W.2d 597, 600 (Iowa App. 1991). The trial court did not abuse its discretion here because the evidence was not offered to establish Jessop’s propensity to commit a specific offense, but to rebut the defense’s implications Becky had a good relationship with Jessop and her decision to seek a divorce was motivated by her need to choose her daughter over her husband.

B. Testimony of Cindy Durflinger. Cindy Durflinger testified she had on one occasion observed an “inappropriate kiss” between Jessop and H.S. As noted above, prior acts with the same victim are admissible under a recognized exception to the exclusionary rule. *Spaulding*, 313 N.W.2d at 880; *Schaffer*, 524 N.W.2d at 456. The similarity of the prior acts with the same victim affects the weight of the evidence, not

its admissibility. See *State v. Tharp*, 372 N.W.2d 280, 281-82 (Iowa App. 1985). The district court did not abuse its discretion by allowing evidence of prior acts with the same victim.

C. Testimony of H.S. H.S. testified as to other instances of improper touching by Jessop. She stated he would often “touch her butt” as she went by him and, on at least one other occasion, he put her on the bed, fondled her, and simulated a sexual act with her. As discussed above, prior acts with the same victim are admissible. *Spaulding*, 313 N.W.2d at 880. The victim’s testimony in this case was sufficiently credible and detailed to clearly support the admission of her testimony about prior acts of abuse. See *State v. Seevanhsa*, 495 N.W.2d 354, 358 (Iowa App. 1992). The State met its burden to show clear proof of the prior inappropriate touching through the testimony of H.S. Accordingly, the trial court did not abuse its discretion in permitting the complainant’s testimony regarding the prior sexual abuse acts.

After concluding the above-mentioned testimony is relevant, we must next consider whether the evidence’s probative value is substantially outweighed by unfair prejudice. Iowa R. Evid. 403; *Casady*, 491 N.W.2d at 785. Probative value gauges the strength and force of the relevancy of the evidence presented. *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988). Unfair prejudice is:

an undue tendency to suggest decisions by the fact finder based on an improper basis, often an emotional one. Unfairly prejudicial evidence is evidence which appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a jury to base its decision on something other than the established propositions in the case. The

appellate court may conclude that 'unfair prejudice' occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

State v. Alderman, 578 N.W.2d 255, 259 (Iowa App. 1998) (citation omitted). In making the rule 403 determination, we must consider (1) the actual need for the evidence in view of the issues and the other available evidence; (2) the strength of the evidence showing the prior bad acts were committed by the accused; (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven; and (4) the degree to which the jury will probably be roused by the evidence to overmastering hostility and use the evidence improperly. *Zeliadt*, 541 N.W.2d at 562.

First, the need for the evidence of prior bad acts, especially instances with the same victim, is particularly high in sexual abuse cases where there is often little evidence of the crime. The testimony of the victim may be the only evidence available. Secondly, in this case, the evidence of Jessop's prior bad acts was strong and corroborated by other witnesses. Thirdly, the prior bad acts directly supported the main issue at trial: whether Jessop sexually abused H.S. Finally, though the nature of Jessop's prior bad acts could tend to raise passion in the jury, the specific prior bad acts were not more prejudicial than the evidence of the actual crime charged. We conclude the probative value of the prior bad acts outweighs any prejudice. Therefore, the admission of the evidence of Jessop's prior bad acts was not an abuse of the court's discretion.

V. Denial of Mistrial. Jessop contends statements by made by a juror before voir dire resulted in grounds for mistrial, and the district court abused its discretion by not granting his motion for mistrial. A friend of Jessop's who was present at trial allegedly overheard a juror say, "they ought to hang him. They ought to hang the bastard." We have articulated a three-part test to determine whether a jury verdict must be impeached because of juror misconduct:

First, the evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct. Second, the acts or statements complained of must exceed tolerable bounds of jury deliberation. Third, and finally, it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

Smith, 573 N.W.2d at 18 (quoting *State v. Wells*, 437 N.W.2d 575, 580 (Iowa 1989)).

No objective facts in the record establish juror misconduct in this case. Stoessel, a friend of Jessop's, was not able to say whether the declarant juror's comments were directed at Jessop, nor could he identify the persons to whom the declarations were made. Defense counsel did not request an opportunity to question the subject juror individually about the alleged comments which were made prior to the administration of the oath to the jury. The parties were permitted full and fair voir dire after the alleged statements were made by the juror. Jessop had the opportunity to detect the juror's bias if it had, in fact, existed before he was selected and sworn. The district court correctly concluded Jessop failed to meet his burden to prove his rights were prejudiced or, by a reasonable probability, juror misconduct influenced

the verdict. Jessop's allegations of bias or misconduct did not warrant a mistrial. See *State v. Hendrickson*, 444 N.W.2d 468, 472 (Iowa 1989).

VI. Rebuttal Witness. Jessop alleges the district court abused its discretion by allowing the State to present rebuttal testimony from Becky Jessop in violation of the court's witness rule.¹ Defendant stipulated to Becky Jessop's presence notwithstanding the sequestration order where she was called as the State's first witness and then stayed in the courtroom to provide support for H.S., her daughter. By stipulating to this procedure, defendant waived any objection when the witness was called in rebuttal. The subject matter of the rebuttal testimony was limited to whether defendant had disciplined H.S. for reporting the abuse to a school counselor. The limited scope of this rebuttal leads us to conclude Jessop suffered no prejudice as a result of the procedure followed in connection with the sequestration order in this case.

Jessop also alleges the prosecutor engaged in misconduct by allowing Becky Jessop to remain in the courtroom and then to call her in rebuttal. We note it was the prosecutor who alerted the court of the prospect Becky Jessop might be called on rebuttal as soon as it became apparent she had information which was inconsistent

¹ The court stated:

there will be a rule on witnesses. And counsel will be responsible for monitoring whether the witnesses are in the courtroom or not because the Court doesn't know who they are and can't keep track of them. So keep an eye on the gallery, and make sure your witnesses aren't in the courtroom before they are excused from testimony.

with Jessop's testimony about grounding H.S. for reporting the abuse to her school counselor. Upon receipt of notice the witness might be called on rebuttal, the district court promptly had her sequestered until she was called back to the stand. Under the circumstances, the district court did not abuse its discretion in permitting the testimony of a rebuttal witness who, despite a sequestration order, heard defendant's testimony.

VII. Ineffective Assistance of Counsel. Jessop claims he had ineffective assistance of counsel because trial counsel failed to object to certain evidence, failed to object to jury instructions, and failed to present certain evidence. Generally, ineffective-assistance-of-counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to respond. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). Accordingly, we will preserve Jessop's claims of ineffective assistance of counsel for postconviction relief proceedings.

AFFIRMED.