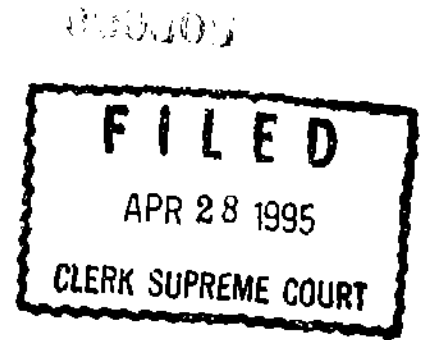


IN THE COURT OF APPEALS OF IOWA

No. 5-005 / 93-1556



STATE OF IOWA,

Appellee,

vs.

ROY HAROLD JOHNSON,

Appellant.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,
Judge.

Roy Harold Johnson appeals the judgment and sentence entered upon his conviction, following a jury trial, of indecent contact with a child in violation of Iowa Code section 709.12 (1993). **AFFIRMED IN PART; SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Guy P. Booth, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Denver D. Dillard, County Attorney, and Russell G. Keast, Assistant County Attorney, for appellee.

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

DONIELSON, C.J.

The defendant, Roy Johnson, appeals his conviction from the crime of indecent contact with a child. He contends the trial court: 1) admitted improper rebuttal evidence; 2) erred in admitting evidence of prior bad acts; and 3) impermissibly considered his refusal to admit guilt in imposing a prison sentence. We affirm with respect to the first two issues and vacate the defendant's sentence and remand for resentencing.

BACKGROUND

The defendant was charged with committing the offense of indecent contact with a child on November 15, 1992. The defendant was alleged to have grabbed his thirteen-year-old daughter's breasts. The defendant entered a not guilty plea, and the case proceeded to a jury trial.

At trial the defendant's daughter testified the defendant had sexually abused her since she was six or seven years of age. Defense counsel objected to the daughter's testimony about instances of abuse other than the incident which allegedly occurred on November 15, 1992. The objection was overruled.

The defendant denied any acts of abuse had taken place. The theory of his defense was that his daughter was lying because she no longer wished to live with him. Following her parents' separation in June 1992, the daughter lived with her mother, but the mother and daughter did not get along. The mother did not approve of her daughter's relationship with a boyfriend, and she asked that the daughter leave her house and live with the defendant in late summer 1992.

The defendant testified about numerous problems he had with his daughter. He was concerned she was too seriously involved with her boyfriend. He was also

concerned about his daughter's falling grades, her reluctance to take the ACT test, her abuse of phone privileges and her performance of household chores.

The defendant left on a business trip on November 15, 1992. During the preceding weekend he claims to have informed his daughter that upon his return he would take her for an overnight stay in a children's home. An overnight visit at the children's home was a prerequisite to the daughter's permanent placement there. The defendant contends it was his discipline of his daughter and her wish to avoid placement in the children's home which prompted her to make allegations of sexual abuse and indecent contact.

The State called Carol Nigh, an interviewer with the Cedar Rapids Child Protection Center, as a rebuttal witness. Nigh testified about her interview with the daughter on November 18, 1992, and the State moved to introduce evidence of a videotape of the interview. The defendant objected to the admission of the tape. The State argued it was being offered to show the daughter had made prior consistent statements and would rebut the defendant's implied or express charge of recent fabrication or improper influence or motive. The court admitted the tape citing *State v. Gardner*, 490 N.W.2d 838 (Iowa 1992).

During its deliberations the jury sent a note to the court requesting to view the videotape again. The defendant objected, but the court allowed the jury to view the tape during its deliberations.

The jury found the defendant guilty. At the sentencing hearing the court stated it did not believe the counseling which would accompany the entry of a deferred judgment or probation would be of any benefit to the defendant given his denial of guilt. The court determined incarceration for a term not to exceed two years would provide the greatest benefit to the defendant and protection to the community.

REBUTTAL EVIDENCE--IOWA RULES OF EVIDENCE 801(d)(1)(B)

The defendant claims the trial court abused its discretion in admitting the videotaped interview of his daughter and the testimony of the interviewer as rebuttal evidence. The State contends the defendant did not preserve the issue of whether the videotaped statement was inadmissible hearsay. We have reviewed the entire transcript pertaining to this issue and conclude the issue was adequately preserved.

"Rebuttal evidence includes any competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence introduced by the accused or which is brought out on his or her cross-examination." *State v. Nicholson*, 402 N.W.2d 463, 466 (Iowa App. 1987). A district court is allowed a good deal of discretion in determining the scope of proper rebuttal testimony, and its ruling regarding the propriety of rebuttal evidence will be disturbed on appeal only upon a clear showing of abuse of discretion. *Id.* That testimony used in rebuttal might have been used as part of the State's main case does not render it inadmissible as rebuttal evidence. *State v. Mayberry*, 411 N.W.2d 677, 684 (Iowa 1987).

The rebuttal evidence was offered by the State pursuant to Iowa Rule of Evidence 801(d)(1)(B). That rule provides in relevant part--

A statement is not hearsay if-- . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive

The cross-examination of the defendant's daughter and his own direct testimony raised express and implied charges that the daughter's allegations were fabricated and/or improperly motivated. Introduction of the videotaped interview was intended to demonstrate the daughter's trial testimony was consistent with statements she made shortly after the alleged indecent contact occurred. The admission of similar rebuttal testimony has been upheld in several cases. *See, e.g., State v.*

Brotherton, 384 N.W.2d 375, 380 (Iowa 1986) (statement child made to social worker not hearsay under rule 801(d)(1)(B)); *State v. Wells*, 522 N.W.2d 304, 309 (Iowa App. 1994) (statements child victim made to stepfather and grandfather admissible under rule 801(d)(1)(B)); *State v. Brown*, 400 N.W.2d 74, 76 (Iowa App. 1986) (prior statement to police officer admissible to rebut charge of improper influence).

During oral argument the defendant brought to this court's attention a recent United States Supreme Court decision which supports his argument for excluding the videotape of his daughter's prior statements. In *Tome v. United States*, ___ U.S. ___, ___, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574, 588 (1995), the United States Supreme Court held Federal Rule of Evidence 801(d)(1)(B) "permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive." This holding is consistent with positions taken in various legal treatises. See M. Graham, Handbook of Federal Evidence, § 801.12 (3rd ed. 1991); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(1)(B)[01] (1994).

The *Tome* case involved circumstances very similar to the facts of the case now before us. A child, who had been placed in her father's primary physical custody following her parents' divorce, accused her father of sexual abuse. *Id.* at ___, 115 S. Ct. at 699, 130 L. Ed. 2d at 579. It was alleged at trial the child's accusation had been motivated by her desire to live with her mother. Over the objection of the defendant, six witnesses were allowed to testify about statements the child had made about the alleged sexual abuse. *Id.* at ___, 115 S. Ct. at 699, 130 L. Ed. 2d at 580. The trial court admitted the statements as prior consistent statements pursuant to Federal Rule of Evidence 801(d)(1)(B).

In reviewing the admission of the prior consistent statements in *Tome*, the United States Supreme Court instructed that courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers, and it noted in almost all cases a youth is the prosecution's only eye witness. *Id.* at ___, 115 S. Ct. at 705, 130 L. Ed. 2d at 588. The court looked to the common law which had prevailed for more than a century before the adoption of the Federal Rules of Evidence, and it found at common law "a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence or motive came into being, but it was inadmissible if made afterwards." *Id.* at ___, 115 S. Ct. at 700, 130 L. Ed. 2d at 581. The court concluded this temporal requirement of the common law was embodied in rule 801(d)(1)(B). *Id.* at ___, 115 S. Ct. at 700, 130 L. Ed. 2d at 583.

The defendant argues we should adopt a similar interpretation of Iowa Rule of Evidence 801(d)(1)(B). "Our rules of evidence are patterned after the federal rules, and we give considerable weight to their rationale and the cases interpreting them." *Brunner v. Brown*, 480 N.W.2d 33, 35 (Iowa 1992). However, federal court interpretations are not conclusive or binding authority for the interpretation of Iowa's rules of evidence. *Cf. State v. Snodgrass*, 346 N.W.2d 472, 475, n.2 (Iowa 1984) (federal rule of criminal procedure not conclusive authority for construction and application of analogous Iowa rule).

We find the *Tome* analysis persuasive. Prior consistent statements are arguably only probative when they were made before an improper motive to fabricate came into existence. *See* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(1)(B)[01] (1994) ("Evidence that merely shows that the witness said same thing on other occasions when his motive was the same does not have much probative

force, for the simple reason that mere repetition does not imply veracity")(internal quotation omitted).

Under *Tome*, the videotaped statements of the defendant's daughter would be nonadmissible because they were made after an improper motive to fabricate arose. However, we are bound by contrary Iowa Supreme Court precedent which holds a prior consistent statement may be introduced under rule 801(d)(1)(B) whether or not the statement was made prior to the existence of a motive to fabricate. *See Gardner*, 490 N.W.2d at 841. We must rely on *Gardner* and other Iowa case law in concluding the daughter's videotaped statement was not hearsay under Iowa Rule of Evidence 801(d)(1)(B).

That we find the videotaped statement not hearsay under rule 801(d)(1)(B) does not conclude our analysis. The defendant argues admission of the tape was unduly prejudicial and cumulative. Evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or by considerations of needless presentation of cumulative evidence. *Gardner*, 490 N.W.2d at 841.

The videotaped interview was made three days after the alleged occurrence of indecent contact for which the defendant was charged. The interview was done over seven months prior to trial, and it offered considerable insight to the jury as to the consistency of the daughter's statements. It was relevant to the defendant's claim of fabrication or improper motive, and its probative value outweighs the danger of unfair prejudice or cumulative presentation of the evidence.

The defendant further objects to the decision of the trial judge to grant the jury's request to view the videotape during its deliberations. Our rules provide for the consideration of exhibits by the jury. Iowa R. Crim. P. 18(5)(e). In determining whether an exhibit shall be submitted to the jury during its deliberations, numerous considerations arise. *See State v. Jackson*, 387 N.W.2d 623, 629 (Iowa App. 1986).

We have reviewed those considerations, as well as the purposes served by Iowa Rule of Evidence 403, and find no abuse of discretion in either the admission of the videotape as an exhibit at trial or its review by the jury during its deliberations.

IOWA RULES OF EVIDENCE 404(b)

The defendant contends the trial court, in contravention of Iowa Rule of Evidence 404(b), erred in admitting evidence of alleged prior acts for the purpose of establishing his character. This evidence was admitted through the daughter's direct testimony and through admission of her videotaped statements as rebuttal evidence. The State contends error was not preserved on this issue. We have reviewed the record and find the defendant's objection at trial to the admission of character evidence was sufficient to preserve error.

The daughter testified about numerous acts of sexual abuse which the defendant had allegedly inflicted upon her since she was approximately six or seven years of age. The trial court noted one of the elements the State had to prove with respect to the charge of indecent contact was that the contact took place for the purpose of arousing the sexual desire of either party. The trial court advised the jury it would allow the admission of evidence of the prior acts because it could relate to establishing the purpose of the contact which allegedly occurred on November 15, 1992.

We review for an abuse of discretion by the trial court. *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992). "The general rule is that 'one crime cannot be proved by proof of another.'" *State v. Ripperger*, 409 N.W.2d 693, 694 (Iowa App. 1987) (quoting *State v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979)). The purpose of rule 404(b) is to exclude from a jury's consideration evidence which has no relevancy except to show the defendant is a bad person and likely to have committed the crime

in question. *Ripperger*, 409 N.W.2d at 694. Rule 404(b) involves a two-pronged test of admissibility requiring us to determine the relevancy and danger of unfair prejudice of the disputed evidence. *Id.*

The daughter's testimony indicated the alleged contact for which the defendant was charged occurred when he was trying to compel her to some household work. Evidence of prior acts of sexual abuse was relevant to establishing that the contact which allegedly occurred on November 15, 1992, was not merely physical compulsion to do household chores, but was in fact for the purpose of arousing or satisfying the defendant's sexual desires. Under these circumstances, evidence of the prior acts was relevant to the defendant's motive or intent in grabbing his daughter's breasts on November 15, 1992. We find the relevancy of this evidence outweighed its potential prejudice, and there was no abuse of discretion in its admission. The court's statements to the jury regarding admission of this evidence were appropriate, and we reject the defendant's argument that they unduly emphasized or favored the State's case.

SENTENCING

At the sentencing hearing the defendant requested the entry of a deferred judgment. The sentencing court found incarceration would provide the greatest benefit to the defendant and protection to the community, and it ordered the defendant be incarcerated for a period of time not to exceed two years. The defendant argues the court impermissibly considered his refusal to admit guilt in imposing this sentence.

The State contends the defendant has not preserved error on this issue as the alleged "error became apparent during the sentencing hearing and the defendant was required to object or waive error." We disagree. We have previously recognized

there is no procedure which allows a defendant to address the court during or after the pronouncement of sentence, and there is no rule which expressly requires the claim of an improper sentence be submitted to the trial court prior to an appeal. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994).

Sentencing decisions are cloaked with a strong presumption that the trial court's sentencing discretion was rightfully exercised. *State v. Bragg*, 388 N.W.2d 187, 190 (Iowa App. 1986). The defendant bears the burden to overcome this presumption by showing an abuse of discretion and prejudice. *Id.*

As part of the presentence investigation, the defendant was examined by a psychologist who concluded the defendant did "not appear to be a good candidate for the outpatient sex offender treatment program given his high level of denial" of the allegations against him. The presentence investigator incorporated the psychologist's conclusions in reaching her recommendation that the defendant be incarcerated.

"[I]t is impermissible for a sentencing court to base its decision on a defendant's refusal to admit guilt." *State v. Ruan*, 419 N.W.2d 734, 738 (Iowa App. 1987); *see also State v. Nichols*, 247 N.W.2d 249, 256 (Iowa 1976) (resentencing warranted where sentencing court's comments indicated it took into account that defendant had not plead guilty); *State v. Drake*, 224 N.W.2d 476, 480 (Iowa 1974) (sentencing court erred when it denied probation simply because defendant refused to plead guilty).

A review of the sentencing hearing transcript reveals the judge made numerous references to the defendant's refusal to admit he had committed the act of which he was accused and convicted. These comments were made in the context of the sentencing court's belief that counseling (which would be imposed as a condition of probation or a deferred judgment) would be of no benefit to the defendant as long as he continued to deny his guilt.

Imposition of counseling as a condition of a deferred judgment or probation was within the court's discretion. See Iowa Code §§ 907.1, 907.6. However, the sentencing court effectively conditioned a grant of a deferred judgment or probation upon the defendant's admission of guilt, and this is an impermissible basis for a sentencing decision.

The State's reliance on *State v. Bragg*, 388 N.W.2d 187 (Iowa App. 1986), is misplaced. In *Bragg* the defendant did not deny injuring the victim but claimed he did so in self-defense. Under those circumstances we held the sentencing court did not abuse its discretion in considering the defendant's lack of remorse or acknowledgment of the jury's finding of his guilt. *Bragg*, 388 N.W.2d at 192.

In this case the defendant has steadfastly denied guilt throughout the proceedings. At one point during the sentencing hearing, the court said to the defendant "I'm not suggesting that because of the threat of sentencing that you should say anything to me that you don't feel that you can say." This statement indicates the court was aware it was placing the defendant in a difficult position--if he continued to refuse to admit guilt he would clearly face the harsher sentence of imprisonment. The court's repeated references to the defendant's refusal to admit guilt cannot be excused as merely "unfortunate phraseology." See *Ruan*, 419 N.W.2d at 738. It was impermissible for the sentencing court to base its decision on the defendant's refusal to admit guilt, and we vacate the sentence and remand for resentencing.

AFFIRMED IN PART; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

Habhab, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I would follow the decision of the U.S Supreme Court in *Tome v. U.S.*, --- U.S. ---, ---, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574, 588 (1995). I would reverse and remand for a new trial.