

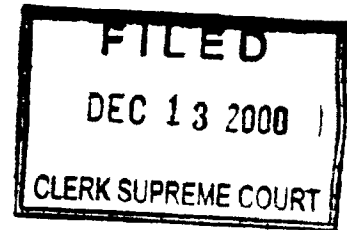
IN THE COURT OF APPEALS OF IOWA

No. 0-426 / 99-1661
Filed December 13, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LINDA SUE BENNETT,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, James D. Coil,
District Associate Judge.

Linda Bennett appeals her conviction and sentence following a jury trial on
the charge of aggravated child endangerment. **AFFIRMED.**

Victoria A. Feilmeyer of Sharp, Jahn, Feilmeyer & Feilmeyer, P.L.C.,
Ames, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Joel A. Dalrymple, Assistant
County Attorney, for appellee.

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

ZIMMER, J.

Linda Bennett appeals her conviction and sentence following a jury trial on the charge of aggravated child endangerment. She contends the trial court erred by admitting certain evidence and her trial counsel was ineffective for failing to object to certain evidence. We affirm.

On July 21, 1998, Linda Bennett was arrested and taken into custody on drug charges. While incarcerated, Bennett left her two youngest sons in the care of her parents, George and Sharon Bennett. At the time, Cr.B. was eight years old and C.B. was five. While the boys were in their grandparents' care, George sexually abused C.B. The abuse came to the attention of the Iowa Department of Human Services in September or October of 1998. The boys were removed from the grandparents' home and placed in foster care.

George had a long history of pedophilia. In 1980, Linda herself had reported to police that her father sexually abused her and her sister, Tammy. Linda reported she was abused multiple times over a period of approximately two years. Linda was around age eleven at the time. The record indicates George was subsequently convicted of sexually abusing his daughters. In 1983, Linda reported another incident of abuse perpetrated by her father. In the early 1990s, Linda's older son, K.K., told Linda that George had sexually abused him. DHS also investigated another allegation of George's sexual abuse of Cr.B. in February of 1998. No charges appear to have resulted from these later incidents. However, George was subsequently convicted of the September 1998 abuse of C.B.

On July 22, 1999, the State charged Linda with child endangerment for leaving C.B. in George's care, in violation of Iowa Code section 726.6(1)(a) (1997). The case proceeded to trial and the jury returned a guilty verdict. She now appeals. She contends the trial court abused its discretion by admitting at her trial evidence of George's conviction for the September 1998 abuse of C.B. She also maintains she received ineffective assistance of counsel because her trial attorney failed to object to: (1) the admission of George's conviction on the grounds that it was hearsay; (2) testimony from a social worker that she had confirmed the instances of sexual abuse of C.B. and Linda's denial of critical care on the grounds it was improper opinion testimony; and (3) testimony from a social worker regarding C.B.'s statements during an interview about the abuse at a child protection center on the grounds it was hearsay.

I. Scope of Review. We review a trial court's evidentiary ruling for an abuse of discretion. *State v. Wixom*, 599 N.W.2d 481, 487 (Iowa App. 1999). We grant the court wide latitude regarding admissibility. *Id.* An abuse of discretion occurs when the trial court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999). Even if an abuse of discretion is found, reversal is required only when the abuse is prejudicial. *Id.*

II. Evidence of George's Conviction. Officer Darwin Cunningham was a witness in George's 1999 trial for the sexual abuse of C.B. At Linda's trial, Cunningham also testified regarding his investigation of C.B.'s abuse:

Q. . . . In 1998 did you come into contact or have—were you involved in an investigation involving George Bennett? A. Yes.

Q. And can you tell us, did you speak to any of the victims in this case? A. Yes, I did.

Q. Who were the victims?

MR. CALLAHAN: Objection. Assumes facts that are not in evidence.

THE COURT: Sustained.

Q. Investigator Cunningham, did you testify in any trials in relation to that particular incident? A. Yes, I did.

Q. And did you stick around for any of the verdicts? A. Yes.

Q. Are you aware of whether or not George Bennett was convicted of any offenses that were alleged to have occurred in 1998? A. Yes. He was found guilty.

Q. And what was he found guilty of? A. Of sexual abuse.

Q. Who was the victim in that particular case? A. [C.B.].

Cunningham went on to testify C.B. had resided with his grandparents in 1998, why he had been placed there, and that sexual abuse allegations arose. Linda's attorney requested a mistrial based on the State's use of Cunningham's testimony regarding the verdict in George's case. The court denied the motion.

On appeal, Linda contends the testimony regarding George's 1999 conviction of sexual abuse was improper because the conviction was not yet final, it was irrelevant, and it was more prejudicial than probative. We deal in section III with her contention that trial counsel should have objected to this evidence on the grounds it was hearsay.

A. Finality of George's Conviction. Linda claims a criminal conviction is not final until after sentencing and thus cannot be used. She points out Officer Cunningham merely testified he "stuck around" for George's verdict—no evidence of a judgment entry in George's case was presented at her trial. She cites *State v. Farmer*, 234 N.W.2d 89 (Iowa 1975) in support of her argument. That case dealt with the issue of what constitutes a final judgment for purposes of determining appellate jurisdiction in a criminal case. See *Farmer*, 234 N.W.2d

at 90. While Linda correctly states that a criminal conviction is not a final judgment until after sentencing, this is not George's appeal and *Farmer* is of little use here.

B. Relevancy and Prejudice. Linda points out the State needed to prove what she knew about her father's tendencies in July of 1998 in order to establish the offense of child endangerment. Since his conviction for the abuse did not occur until long after she was charged, she argues George's conviction was not relevant to prove any element of child endangerment. Citing Iowa Rule of Evidence 403, she also claims the danger of unfair prejudice outweighed any probative value of this evidence because it suggested to the jury she should be found guilty based on the fact another jury ultimately found George guilty of abuse. Finally, she urges introduction of George's conviction violates Iowa Rule of Evidence 404(b).

The State alleged Linda committed child endangerment by knowingly acting "in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety." Iowa Code § 726.6(1)(a). We agree the fighting issue at trial was what Linda knew about her father when she turned the children over to him in July of 1998. George's conviction is not relevant to prove her 1998 state of mind. His conviction is relevant, albeit remotely, to show that a substantial risk was created by letting George care for young children because the risk, in fact, materialized. The information also helps establish background, such as who the victim was and why Linda was charged with child endangerment. Furthermore, defense counsel invited the evidence by objecting to the prosecutor's question asking Cunningham to identify the victim in a 1998

investigation of George. It then became fair game for the prosecutor to establish a crime and a victim.

We also reject Linda's invocation of rule 403. Rule 403 only protects against the danger of *unfair* prejudice. See Iowa R. Evid. 403; *State v. Howell*, 557 N.W.2d 908, 912 (Iowa App. 1996) (noting rule 403 only renders *unfairly* prejudicial evidence inadmissible). Of course, any of the evidence regarding George's convictions for and allegations of sexual abuse would be *prejudicial* to Linda's case. "*Unfair* prejudice" is an undue tendency to suggest decisions by the fact finder based on an improper basis, often an emotional one. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997) (citation omitted). Evidence is unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror or provokes its instinct to punish. *Id.* (citation omitted). Evidence of George's conviction was not unfairly prejudicial. No emotional details of the abuse were elicited and the child did not testify. We find no risk of unfair prejudice arising from this evidence.

Linda also claims rule 404(b) renders evidence of George's conviction inadmissible in her trial "to prove that *he* acted in conformity therewith on a particular occasion." (emphasis added). Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b) contemplates the admission of evidence of prior bad acts committed *by the defendant*. See *State v. Nelson*, 480 N.W.2d 900, 904 (Iowa App. 1991); see also *State v. Ramey*, 471 N.W.2d 900, 902 (Iowa App. 1991). George's

sexual abuse of C.B. did not involve Linda. Consequently, a rule 404(b) analysis is inappropriate. The trial court did not abuse its discretion in permitting testimony about George's conviction for sexual abuse of C.B.

Even if the trial court abused its discretion in concluding the evidence was admissible, reversal is required only when such an abuse is prejudicial. See *Greene*, 592 N.W.2d at 27. Linda suffered no prejudice because there was overwhelming evidence of guilt and evidence of the same facts established by George's conviction was brought in through other testimony without objection. Clearly, Linda knew of her father's lascivious propensity for young girls and boys. George had sexually abused Linda multiple times when she was young. He had also abused her sister. George was convicted of child sexual abuse and spent time in prison in the 1980s. Linda's older son, K.K., testified he had been sexually abused by his grandfather in the 1990s and told his mother about the ongoing abuse at the time it occurred. DHS informed Linda of an abuse investigation it initiated in February of 1998 regarding Cr.B., C.B.'s brother, who had been staying with George at that time. Despite this history, which was clearly known to Linda, she permitted her son to reside with her father, creating a substantial risk he would be sexually abused. In addition, other evidence of C.B.'s abuse by George came in without objection. Social worker Becky Frost testified about the fact of the abuse and the circumstances leading to the prosecution of Linda. For all of these reasons, we affirm on this ground.

III. Ineffective Assistance of Counsel. Linda maintains she received ineffective assistance of counsel because her trial attorney failed to object to: (1) the admission of George's conviction on the grounds that it was hearsay; (2)

testimony from a social worker regarding C.B.'s statements during an interview about the abuse at a child protection center, on the grounds it was hearsay; and (3) testimony from a social worker that she had confirmed the instances of sexual abuse of C.B. and Linda's denial of critical care, on the grounds it was irrelevant and improper opinion testimony.

We review ineffective assistance of counsel claims de novo. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999). Linda must demonstrate two elements to succeed on her claim: (1) counsel failed to perform an essential duty; and (2) this failure resulted in prejudice. *Id.* (citation omitted). Prejudice is shown where there is a reasonable probability the result would have been different. *Id.* at 211. Ordinarily, such claims are preserved for postconviction relief, however, where the record is adequate, we address them on direct appeal. *Id.* at 207.

We consider the record inadequate to address Linda's ineffectiveness claims on direct appeal. Counsel's failure to object to some of this testimony could be explained by reasonable trial strategy. We preserve Linda's claims for postconviction proceedings so the facts may be developed and the allegedly ineffective attorney may have the opportunity to explain his or her conduct. *State v. Mulvany*, 603 N.W.2d 630, 633 (Iowa App. 1999).

AFFIRMED.