

FILED

JAN 26 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DAVID EUGENE RICHARDSON,)

Defendant-Appellant.)

8-472
87-1389

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Appeal from the Iowa District Court for Story County
(12682), Thomas R. Hronek, District Associate Judge.

Defendant appeals his conviction by a jury of assault
with intent to commit sexual abuse. **REVERSED AND REMANDED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and
Shari Barron, Assistant Appellate Defender, for
defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce
Kempkes, Assistant Attorney General, for
plaintiff-appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

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The defendant, David Eugene Richardson, appeals from his conviction by a jury of assault with intent to commit sexual abuse, an aggravated misdemeanor. For the reasons set out below, we reverse and remand.

I.

A jury found Richardson guilty of assault with intent to commit sexual abuse. The victim, Lisa Rosa, testified Richardson struck and attacked her when the two were alone after hours in the bar he managed after she refused his sexual advances. According to Rosa, Richardson grabbed her, threw her to the floor, and struck her before she struggled free and ran to the Ames police station where an officer observed her injuries.

II.

On appeal Richardson contends the trial court abused its discretion by restricting his cross-examination of Rosa, based on the following exchange:

Q. Ms. Rosa, I believe that you had said something earlier to the fact that Mr. Richardson had said something about you think your boyfriend treats you bad or hits you--Dave--Mr. Richardson had said--you said he said that to you during the course of--

A. No. He said you think your boyfriend treats you bad, I'm going to treat you three times as bad.

Q. Ms. Rosa isn't it true your boyfriend did treat you badly?

MS. PARKS: Your Honor, I'm going to object. I don't see the relevance.

THE COURT: Sustained. Proceed.

Richardson argues he had a right to pursue this line of questioning to show Rosa's boyfriend, and not Richardson, was responsible for the injuries the police officer observed. The State responds that: (1) Richardson failed to preserve error on this issue by making an offer of proof; (2) the proffered evidence was irrelevant because the defense failed to provide a foundation for it, specifying neither when her ex-boyfriend had allegedly assaulted Rosa nor how; and (3) any error in the trial court's ruling was in any event harmless and could not have affected the outcome of the trial.

Our scope of review in this matter is for errors at law. Iowa R. App. P. 4.

III.

When the victim reached the police station, an officer took photographs of her injuries which included bruises, a swollen lip, rug burns, and scratches. These injuries were inflicted, Rosa testified, by the defendant, during the attempted sexual assault. She claimed the defendant slapped her across the mouth and threw her to the floor and grabbed her neck.

The defendant, on the other hand, offered evidence through his witness, Bud Corieri, the owner of the bar where the assault took place and the defendant's employer, that Rosa already had bruises on her arm prior to the alleged attempted sexual assault. It was defendant's

theory Rosa sustained her injuries through a physical confrontation with her most recent former boyfriend. Defendant attempted to pursue this theory on cross-examination, but was unable to after a relevance objection was sustained by the trial court. Defendant claims it was prejudicial error for the trial court not to allow this line of testimony. Specifically, defendant asserts, because Rosa attributed the injuries to the defendant in her direct testimony, defendant had the right to fully and fairly explore this matter on cross-examination. Further, the trial court's actions worked to violate the defendant's sixth amendment right to cross-examine the witness.

It is well settled the sixth amendment right of an accused to confront a witness against him includes the right of cross-examination. State v. Carney, 236 N.W.2d 44, 46 (Iowa 1975). Thus, a reasonable latitude must be accorded a cross-examiner, but the final determination of the breadth of interrogation rests in the discretion of the trial court. Id.

To warrant reversible error, Richardson must make an unequivocal showing that the trial court abused its discretion and the abuse resulted in prejudice to him. State v. Chambers, 370 N.W.2d 600, 602 (Iowa App. 1985).

We first must determine whether the trial court's decision to not allow the defendant to pursue his desired

line of questioning was error. Despite the court's broad discretion over evidentiary matters, the discretion is a legal one and should not be exercised to exclude matters vital and proper to the defense of one accused. State v. VanRees, 246 N.W.2d 339, 346 (Iowa 1976). Therefore, the scope of cross-examination of State's witness should be extended liberally on behalf of the defendant charged with the offense. State v. Carney, 236 N.W.2d at 46. These principles apply especially in cases where "defendant's liberty and reputation are in jeopardy." See State v. Chambers, 370 N.W.2d 600, 602-03 (Iowa App. 1985).

In light of the foregoing principles, we determine the trial court abused its discretion and erred in not allowing the defendant to pursue his desired cross-examination. It is clear from the record the defendant was attempting to show the victim's estranged boyfriend was responsible for her injuries and her testimony that the defendant inflicted the injuries made defendant's attempted cross-examination relevant and well within the scope of reasonable cross-examination.

We next must determine whether the exclusion of this evidence constituted error prejudicial to the defendant. State v. Carney, 236 N.W.2d at 46. In making this determination, we consider first whether the witness was an important one or whether her testimony was incidental to the issue, and second, whether the volume of direct

evidence was so overwhelming that it was sufficient apart from the testimony of the witness sought to be cross-examined. Id. The State contends the district court's ruling could not have affected the outcome of the trial. Police officers testified for the prosecution. Their testimony was they observed the victim crying and shaking very badly. These officers also observed the victim's injuries. These injuries were a swollen lip, red face, and apparently fresh burns on her arms and elbows. The State argues this testimony by the police officers, together with the victim's testimony, is overwhelming in establishing defendant committed the attack.

We disagree with the State. We do not find without the victim's testimony the State's evidence is close to overwhelming. It is clear her testimony was the vital element of the State's case. Defendant was attempting to show the victim's ex-boyfriend caused her injuries. The victim claimed her injuries were caused by defendant in her direct examination. Therefore defendant was entitled to fully and fairly explore and pursue this matter on cross-examination. We hold the trial court's error was prejudicial. We reverse and remand this case for a new trial.

REVERSED AND REMANDED.

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

I respectfully dissent. The objectionable matter must be read with what took place earlier in the victim's testimony. Five or six questions prior to the one which causes the problem here, the victim was asked by defense counsel:

Ms. Rosa, isn't it true that the -- when you had on occasion stopped up in Dave's apartment to talk about different things, you would discuss your boyfriend's problems with him and ----

The State objected on the grounds of relevancy. The trial court stated:

Yes, I guess I'm not understanding in terms of foundation of time in connection with this occurrence. (emphasis added).

Nevertheless, the trial court overruled the objection. However, defense counsel was alerted that time was important to this line of questioning. Notwithstanding the statement of the trial court, defense counsel again without designating a specific time asked the question: "Ms. Rosa, isn't it true your boyfriend did treat you badly?"

This question was objected to and the trial court sustained the objection.

Until such time as defense counsel tied the question in to a general time frame, the question was clearly irrelevant. Reversible error does not appear.