

IN THE COURT OF APPEALS OF IOWA

No. 1-382 / 90-1262

FILED

DEC 31 1991

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RONALD BASKIN,

Appellant.

709

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell and Richard J. Vipond, Judges.

Defendant appeals his convictions, following a jury trial, for sexual abuse in the second degree, lascivious acts with a child, and indecent contact with a child.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol and Brian K. Sissel, Assistant Appellate Defenders, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Carol J. Chase, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Ronald Baskin was accused of sexual activity with L.R., the ten-year-old daughter of his live-in girlfriend. He was accused of oral-genital contact and use of a vibrator on the girl; except for one incident with the vibrator, he was not accused of any act involving penetration. However, a doctor testified the girl's vagina and rectum both showed signs of penetration.

A jury found Baskin guilty of three charges: one count each of second-degree sexual abuse, lascivious acts with a child, and indecent contact with a child. Baskin appeals the resulting convictions on five grounds. We address each issue below.

I.

Baskin first contends the trial court erred in overruling his application to admit L.R.'s prior allegations of sexual abuse. In addition, he argues he should have been able to present evidence that the child masturbated. He asserts both of these items of evidence are admissible under Iowa Rule of Evidence 412(b).

We will not reverse a trial court's denial of admission of evidence without a showing of an abuse of discretion. State v. Clarke, 343 N.W.2d 158, 163 (Iowa 1984); State v. Chadwick, 328 N.W.2d 913, 917 (Iowa 1983); State v. Beeman, 315 N.W.2d 770, 775 (Iowa 1982). In order to show an abuse of discretion, one generally must show the court exercised

its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (citation omitted).

In sexual abuse cases evidence of a victim's prior sexual behavior is inadmissible unless it falls within one of three narrowly tailored exceptions to the rape shield statute. Iowa R. Evid. 412; see Clarke, 343 N.W.2d at 160. Those exceptions are: 1) when admissibility of the evidence is constitutionally required; 2) when the evidence is relevant on the issue of whether the defendant was the source of semen or injury; and 3) when the evidence is relevant on the issue of whether the victim consented to previous sexual behavior with the defendant. Iowa R. Evid. 412. Baskin claims the evidence of the existence of other perpetrators falls within the "constitutionally required" exception and the "source of semen or injury" exception and that the evidence of masturbation falls within the "source of semen or injury" exception.

A. The victim testified at the hearing that Baskin and another person had both "touched [her] in places where you don't need to be touched." She noted that the other person "didn't go inside [her] body," but did touch her "[w]ith her clothes on three times." There is conflicting testimony as to whether or not L.R. has made allegations of sexual abuse against one other man.

We address first the constitutional requirements referred to in Iowa Rule of Evidence 412(b)(1). Evidence that is irrelevant is not constitutionally required to be admitted. Clarke, 343 N.W.2d at 161 (citations omitted). In addition, even relevant evidence is not constitutionally required to be admitted if the prejudicial effect outweighs the probative value. Id. (citations omitted). On the issue of the constitutionally required exception, the trial court noted:

The court finds nothing about this evidence which rises to the level of constitutional admissibility. As previously stated, it's [sic] probative value is weak and the probative value is substantially outweighed by the danger of unfair prejudice.

To admit this evidence would be tantamount to holding that in any case involving sexual abuse where there is evidence of an injury that any evidence of prior sexual conduct is admissible regardless of whether it has any tendency to explain the injury.

We agree.

Baskin also claims the allegations of prior sexual abuse are admissible under the source of injury exception. We disagree. Because the evidence of other perpetrators was not constitutionally required, nor specifically relevant to the issue of the victim's injuries of an enlarged and scarred hymen and a tear near the rectum, the trial court properly excluded the evidence. The evidence has no tendency to show that anyone other than the defendant was the source of injury to the victim. L.R. testified that the acts done to her by the other

perpetrator were done while she was fully clothed and that there was no penetration. Her statements clearly show the sexual conduct involved was not of a type which could have caused these specific injuries to L.R. There is evidence the child has been the victim of past sexual abuse, but there is no evidence of any past sexual abuse of a type which could explain her injuries. We believe this evidence has no relevance to the issue of how the injury occurred.

B. Baskin next claims evidence the victim would "put her hands between her legs and rock" was relevant to show the source of injuries to her hymen and rectum. The victim's mother testified L.R. had a habit of rocking. She stated the victim would rock before going to sleep, while wearing clothes, with her hands outside her clothes. After a hearing at which the victim testified that she did not "touch herself in a naughty place," the trial court excluded this evidence.

Baskin contends the evidence shows the victim's "general propensity towards masturbation and therefore maybe something happened which no one knows about which would explain her injuries." In order for this evidence to be admissible, it must be admissible on the issue of whether the defendant was the source of the injury. The testimony of the victim's mother, however, did not show any knowledge of any extensive masturbation on the part of the child. The only testimony is that the child would place

her hands on the clothed genital area and rock. We determine there is nothing about the evidence which would tend to show a source of the injury.

We believe this evidence is not intended to be admissible under Iowa Rule of Evidence 412(b)(2)(A). The evidence offers nothing other than speculation as to an alternate source of injury. Baskin has given us no compelling reason to pierce the rape shield statute. Because the victim's alleged rocking could not reasonably account for the injuries at issue, the trial court properly exercised its discretion in excluding the evidence.

II.

Baskin next claims the trial court erred in admitting the victim's testimony that he had on various occasions hit or beaten the child, her mother, and her siblings. He argues this was evidence of other bad acts and was inadmissible under Iowa Rule of Evidence 404(b). We review this issue for an abuse of discretion. State v. Plaster, 424 N.W.2d 226, 229 (Iowa 1988); State v. Spaulding, 313 N.W.2d 878, 881-82 (Iowa 1981).

Iowa Rule of Evidence 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 [or she] 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.

Evidence that has no relevance except to show the defendant is more likely to have committed the crime because he or

she is a bad person is not admissible. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979). However, when evidence is relevant to establish a legitimate issue in the case, rule 404(b) does not bar its admission. State v. Richardson, 400 N.W.2d 70, 72 (Iowa App. 1986).

Baskin states "[t]he evidence of L.R.'s abuse, which was admitted, would concedingly tend to explain her behavior, however, other acts of violence toward her mother and siblings have no tendency to aid the jury." We believe the evidence Baskin threatened and whipped the victim's mother and siblings was relevant. The victim testified Baskin threatened to beat her with a whip or belt if she did not comply with his demands. She further stated she was afraid of Baskin because she had seen him use the whip and belt on her siblings and that she was fearful he would hurt or kill her mother.

The evidence is relevant for purposes other than showing the defendant's character and for proving he acted in conformity with that character. The evidence is extremely relevant to the actions of the child and her behavior; it is difficult to understand her conduct without evidence of the surrounding circumstances. The trial court's determination that evidence of Baskin's threats and whippings was relevant to explain the victim's submission to him was a proper exercise of its discretion since the evidence tended to establish a material proposition. The trial court also properly exercised its discretion in finding any prejudice would be minimal.

III.

Baskin argues the trial court erred in not striking or limiting the testimony of the State's medical expert. He submits the evidence is irrelevant, prejudicial, and not supported by the victim's testimony. Because L.R. was examined in December 1989, nine months after the last alleged act, Baskin claims the results of the examination are remote in time. He also states that because L.R. did not allege he penetrated her, the expert testimony focusing on penetration of both the vagina and rectum is irrelevant. We review this issue for an abuse of discretion. State v. Hall, 297 N.W.2d 80, 86 (Iowa 1980), cert. denied, 450 U.S. 927, 101 S. Ct. 1384, 67 L. Ed. 2d 359 (1981).

Dr. Budensiek's testimony was relevant. Relevant evidence is evidence that makes the existence of a material fact more or less probable than it would be without the evidence. Iowa R. Evid. 401. The fact this victim had injuries consistent with penetration of her hymen and rectum makes more probable the inference she was sexually abused.

Baskin also claims this evidence was prejudicial. The fact that evidence is damaging or prejudicial does not make it inadmissible. State v. Walsh, 318 N.W.2d 184, 187 (Iowa 1982). We believe the evidence here was not unfairly prejudicial. See State v. Cott, 283 N.W.2d 324, 329-30

(Iowa 1979). Dr. Budensiek's testimony was very probative and had little potential for unfair prejudice. See State v. Coen, 382 N.W.2d 703, 707-08 (Iowa App. 1985).

Because "remote in time," Baskin claims the State's expert testimony is not supported by the victim's testimony. L.R. testified the vibrator went "inside a little bit." Because of this statement, the record indicates the victim has testified she was penetrated by Baskin. The victim has stated without elaboration that while on top of her, Baskin's penis would touch her vagina. She also testified that Baskin used "lotion" with the vibrator. The jury was presented with evidence reasonably establishing penetration. We agree with the trial court that this expert testimony was admissible.

IV.

Baskin's fourth contention is that the trial court erred in allowing the State to present rebuttal testimony from a psychiatric social worker. This witness was called to rebut Baskin's evidence suggesting he had no reason to sexually abuse a child because he had a very active sex life with consenting adult women. The social worker testified on rebuttal that sexual abuse of children is frequently committed by men who have active sex lives with adults. Baskin argues this was improper rebuttal because his case in chief did not focus on the number of partners, but "rather on the size of his penis and his inability to inflict injury upon [L.R.]." He also contends the social

worker's testimony exceeded the proper scope of expert testimony because it essentially constituted an opinion on the ultimate fact of his guilt.

We review this issue for an abuse of discretion. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978). Rebuttal testimony is "that which explains, repels, controverts, or disproves evidence produced by the other side." Id. (citations omitted). The trial court has broad discretion concerning the admission of rebuttal evidence, and will be disturbed only upon a clear abuse of that discretion. State v. Maniccia, 355 N.W.2d 256, 262 (Iowa App. 1984).

Baskin called four former or current girlfriends for his defense. Three of these women testified that Baskin was a "ladies' man." Each of these four women, and Baskin himself, testified that his penis was unusually large. During the opening statement to the jury, Baskin's lawyer stated:

You're going to hear from basically two sets of witnesses in this case on behalf of my client. One set of witnesses will testify as to why Ron Baskin had absolutely no reason and no need to do this type of thing, conduct that type of act with [L.R.].

Evidence will show that he had plenty of girl friends. In fact, the evidence will show that Ron was kind of a stud. He had all the girl friends he could ever need, all the girl friends he could take care of. And he had no reason in the world whatsoever to sexually abuse [L.R.].

During his direct testimony, Baskin was asked several questions relating to the number of his sexual partners.

SCHLEGEL, J.

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Under the fourteenth amendment the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215, 218 (1963); see State v. Brown, 337 N.W.2d 507, 509 (Iowa 1983). To prevail on a claim the prosecution suppressed exculpatory evidence, Baskin must satisfy a three-prong test: (1) the prosecutor withheld evidence from the defendant; (2) the evidence was material to the defense; and (3) the evidence was favorable to the defendant. Brewer v. State, 444 N.W.2d 77, 82 (Iowa 1989).

We believe the evidence the victim may have masturbated was not material. The supreme court noted in Brewer that "[e]vidence is 'material' for Brady purposes only if the defendant shows a reasonable probability that if the evidence had been produced, the outcome of the trial would have been different." Id. at 83 (citation omitted). The evidence of rocking by the fully dressed victim would not have exculpated Baskin. The allegedly suppressed evidence would not have with reasonable probability affected the outcome of the trial.

In addition, we determine the victim's interview with David Graham, the DHS worker, was not suppressed. Graham had interviewed L.R. for a child in need of assistance proceeding, and she indicated to him Baskin touched her

only twice and that he did not insert anything in her. The prosecutor knew of only one of the two interviews conducted by Graham. She testified she was not aware of the second interview and report. The guardian ad litem later provided the report to the prosecutor who then gave it to defense counsel. The guardian ad litem also testified that until the time of the suppression hearing, she had not discussed or presented the report in question to the prosecutor.

The evidence about which Baskin complains was not in the prosecutor's possession. After review of the record, we agree with the trial court that this particular report was not known to the assistant county attorney.

VI.

We affirm Baskin's convictions for second-degree sexual abuse, lascivious acts, and indecent contact with a child.

AFFIRMED.