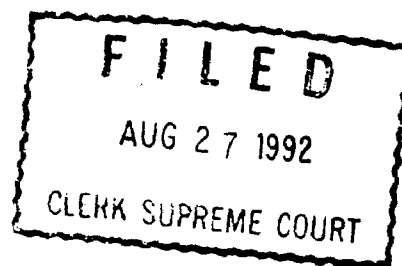


IN THE COURT OF APPEALS OF IOWA

No. 2-220 / 91-891



STATE OF IOWA,

Appellee,

vs.

HOLLIS E. SCRIVEN,

Appellant.

Appeal from the Iowa District Court for Scott County,
James E. Kelley, Judge.

The defendant, Hollis Scriven, appeals the judgment and sentence entered upon his conviction for sexual abuse in the second degree in violation of Iowa Code section 709.3 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Rachele B. Hjelmaas, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Sheryl A. Soich, Assistant Attorney General; William E. Davis, County Attorney; and James D. Hoffman, Assistant County Attorney, for appellee.

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

DONIELSON, J.

The defendant, Hollis Scriven, was charged with one count of second-degree sexual abuse. Scriven waived his right to a jury trial and was tried before Judge James Kelley of Scott County.

At trial, J.D., an eleven-year-old girl, offered testimony concerning three separate incidents of alleged sexual misconduct involving Scriven. J.D. testified the first incident occurred while she and Scriven were in a swimming pool and he touched her breasts and bottom. J.D. testified the second incident occurred when Scriven stayed overnight at J.D.'s home while J.D.'s mother was in the hospital. J.D. testified Scriven exposed himself and told her and a friend "Well, if you want to look at it, my thing, you can."

The third incident, upon which the criminal charge was based, allegedly took place in October 1990. J.D. stated that Scriven came over to her home to put a lock on her bedroom door. She testified while she was in bed, Scriven approached her, pulled down the covers, touched her breasts and fondled her genitals. J.D. testified she told him to leave and that she threatened to tell her mother about what had happened. Scriven left the home shortly thereafter.

Vicky Furne, a police detective, testified she conducted an investigation of the October 1990 incident. Furne interviewed J.D. and requested that J.D. telephone Scriven about the incident and tape the conversation. The

tape, lasting only two or three minutes, was admitted into evidence and played at trial.

The State's final witness, Gail Reich, was presented as a rebuttal witness. Reich testified she babysat for Scriven's children some thirteen to eighteen years prior to the trial. Reich testified Scriven used to make sexual jokes and comments in order to embarrass her. She stated on one occasion, Scriven approached her without any clothes on. She further testified that, on several other occasions, Scriven had touched and kissed her inappropriately. All of the alleged events about which Reich testified occurred some thirteen to eighteen years prior to the time of the trial.

Scriven denied all charges.

At the close of the State's case, Scriven moved for a directed verdict, which the trial court denied. Scriven renewed his motion for a directed verdict at the close of all the evidence, but the motion was denied. The trial court found Scriven guilty of one count of sexual abuse in the second degree. On April 2, 1991, Scriven filed a motion for new trial, which the trial court denied. Scriven was sentenced to a term of imprisonment not to exceed twenty-five years. Scriven has appealed.

Scriven argues he received ineffective assistance of counsel. Scriven argues his trial counsel was ineffective for failing to object to the State's introduction of the

testimony of J.D. and Reich regarding alleged prior conduct of Scriven.

Scriven argues the above testimony and evidence should have been excluded pursuant to Iowa Rule of Evidence 404(b), which generally excludes evidence of prior crimes or bad acts to prove a defendant acted in conformity therewith. Scriven believes that his trial counsel's failure to object to the rule 404(b) evidence had a pervasive effect on the inferences to be drawn from the evidence and therefore materially prejudiced his defense.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for her conduct. The failure to object to this testimony may be in keeping with the defense strategy which only defense counsel can explain. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

The costs of this appeal are taxed to Scriven.

For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.