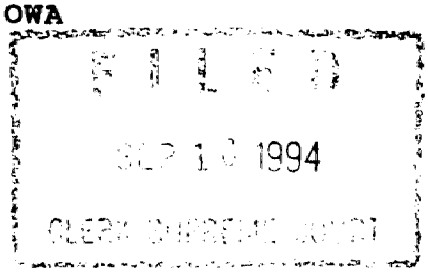
IN THE COURT OF APPEALS OF IOWA

No. 4-312 / 93-1733



IN THE INTEREST OF S.K.T., A Child,

S.K.T.,

Appellant.

Appeal from the Iowa District Court for Emmet County, W. B. MacDonald, Judge.

S.K.T. appeals an order adjudicating him to have committed the delinquent act of third-degree sexual abuse in violation of Iowa Code sections 709.4(1) and 232.2(12)(a) (1993).

AFFIRMED

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; John M. Parmeter, Special Assistant Attorney General; Judy Sheirbon, Assistant Attorney General and Richard Meyer, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

DONIELSON, C.J.

This is an appeal from an adjudication of the juvenile court finding S.K.T. had committed sexual abuse in the third degree. Iowa Code §§ 232.2(12)(a), 709.4(1) (1993). S.K.T. was found to have committed an act of anal intercourse on May 23, 1993, against a female friend, T.I., without her consent. S.K.T. and the female were both fifteen years of age. S.K.T. does not deny having anal intercourse with T.I. but contends the act was consensual and not against her will. He testified he got the idea from T.I. to have anal intercourse with her.

During the weekend when the sexual abuse was alleged to have occurred, D.W., S.K.T.'s friend, was a guest staying at the home of S.K.T.'s family. D.W. observed the conduct of S.K.T. and T.I. both before and subsequent to the intercourse. He testified after S.K.T. and T.I. exited S.K.T.'s bedroom, there was a "marked separation" between them and he had the impression T.I. was extremely upset with S.K.T. when she left. D.W. subsequently reported to the police S.K.T. had told him three different versions of what had happened in the bedroom and had described T.I. as a "dead fuck."

After leaving S.K.T.'s home, T.I. visited a friend, M.S., and told her S.K.T. had raped her. Later in the evening S.K.T. called M.S. and asked her if having sex with a close friend would change the relationship. He told M.S. he was sorry if he had offended T.I. in any way. D.W.

subsequently called M.S. and told her S.K.T. was threatening to commit suicide and he asked if M.S. and T.I. would come to S.K.T.'s house and talk to him. The girls went to the home and S.K.T. said he was sorry for what he had done and asked T.I. if they could still be friends. S.K.T. told M.S. he "didn't want to be by girls because he was scared . . . of what might happen." He also told M.S. he could not control himself around girls, especially T.I.

In his appeal S.K.T. contends: 1) the judge erred in admitting adult magazines into evidence; 2) the judge abused his discretion in allowing evidence of a prior act of sexual abuse; 3) he was denied effective assistance of counsel; and 4) the State failed to prove him guilty beyond a reasonable doubt. Our review is de novo and although we are not bound by the juvenile court's findings we give weight to them and to its credibility determinations. See In Interest of E.P., 478 N.W.2d 402, 403 (Iowa 1991); In Interest of S.C.S., 454 N.W.2d 810, 814 (Iowa 1990). De novo review permits us to arrive at a new or modified determination based on only the evidence we determine to be properly admissible. In Interest of Meek, 236 N.W.2d 284, 290 (Iowa 1975); In Interest of Wheeler, 229 N.W.2d 241, 244 (Iowa 1975).

Additional significant facts which bear upon our decision are stated and considered in the following discussion of the legal issues raised by S.K.T.

I. Admission of Adult Magazines

S.K.T. objected to the admission into evidence of the State's exhibits "B" ("Big Butt"), "C" ("Adult Action Guide") and "D" ("Easyriders"). These exhibits were adult magazines found in S.K.T.'s closet when police officers conducted a search of his room on May 26, 1993. Testimony at the adjudicatory hearing revealed another boy (B.B.) had brought four adult magazines to S.K.T.'s home a few hours prior to S.K.T.'s alleged sexual abuse of T.I. S.K.T., D.W. and B.B. viewed the magazines in depth and discussed sexual topics prior to T.I.'s arrival at S.K.T.'s home. Pictures in the magazines appeared to depict acts of anal intercourse.

A review of the transcript of the proceedings reveals the judge spent a considerable amount of time deliberating about the admissibility of these magazines. He excluded one of the magazines from admission as well as an anatomy textbook found with the magazines and pictures of the closet in which the magazines and textbook were found by the police. The judge concluded three of the magazines would be admitted into evidence and he articulated several reasons for his decision. The most significant of these reasons for purposes of this appeal are the proximity in time between S.K.T.'s examination of the magazines and his call to invite T.I. to his home; the content of the magazines; the issue of whether T.I. consented to the act

of anal intercourse; and S.K.T.'s statements regarding his inability to control himself around girls, especially T.I.

The judge distinguished the decision of State v. Turecek, 456 N.W.2d 219 (Iowa 1990). In Turecek the Iowa Supreme Court held a variety of sexually explicit magazines, photographs, catalogs and other materials were not admissible in a prosecution for sexual abuse. In Turecek the State attempted to admit the sexually explicit materials for the purpose of impeachment and to bolster the testimony of the victim. See Turecek, 456 N.W.2d at 224-25. We do not find Turecek prohibits the admission of all sexually explicit magazines in all cases. Instead, the Turecek decision held only that the evidence was inadmissible for the purposes for which the State offered it in that case.

The rules of evidence apply to an adjudicatory hearing. Iowa Code § 232.47(5) (1993). "Relevant evidence" is evidence which has a tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Iowa R. Evid. 401. Whether the necessary minimum level of logical connection between the offered evidence and the fact to be proven exists is a legal question lying within the broad discretion of a trial court. State v. Tracy, 482 N.W.2d 675, 680-81 (Iowa 1992). Relevant evidence may be excluded if its probative

value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403.

Exhibits B, C, and D are sexually explicit in nature, and in his ruling the judge expressed reservations about whether he would have admitted them had this case involved a jury. However, this was a case tried to court and the judge was deliberately careful in admitting the magazines subject to his later determination of what weight they would be accorded. At the conclusion of the adjudicatory hearing he specifically found the magazines had "absolutely no bearing" on his finding that S.K.T. had committed sexual abuse.

We agree the evidence was relevant for the purposes cited by the judge. In light of the fact this was a trial to the court, we cannot find the potential prejudicial effect of this evidence warranted its exclusion. We affirm this evidentiary ruling.

II. Admission of Evidence of Prior Act

S.K.T. contends it was an abuse of discretion for the judge to admit evidence regarding a prior incident of sexual abuse which he had committed on August 10, 1992. That incident arose when S.K.T. was baby-sitting a nine-year old girl. Lying on a bed beside the girl S.K.T. had fallen asleep, had a sexual dream and awakened with an erection. He then removed the girl's underwear, masturbated, placed his erect penis between the child's

buttocks and made movements indicative of sexual intercourse. S.K.T. proceeded to engage in similar conduct with his penis in the girl's vaginal area when he realized what he was doing was wrong. He stopped, put the girl's underwear back on her and told he her was sorry.

The judge considered the dictates of Iowa Rule of Evidence 404 and concluded evidence of the August 10, 1992, act was admissible.[1] The judge found anal intercourse constitutes an unusual sex act bringing this case within the unnatural sex crimes exception addressed in State v. Spaulding, 313 N.W.2d 878, 881 (Iowa 1981).

"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 the rule 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.

On several occasions the Iowa Supreme Court has affirmed the admissibility of evidence of a defendant's prior acts in sexual abuse cases. See State v. Casady, 491 N.W.2d 782, 786 (Iowa 1992); State v. Plaster, 424 N.W.2d

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1. While the trial judge found evidence of this prior act admissible, he indicated it had "absolutely no weight" in his decision finding S.K.T. had committed sexual abuse as charged in the State's delinquency petition. The judge specified even if the 1992 incident had not occurred he would have found the State met its burden of proof.

226, 232-33 (Iowa 1988); State v. Spargo, 364 N.W.2d 203, 209 (Iowa 1985); State v. Spaulding, 313 N.W.2d 878, 881-82 (Iowa 1981). There is less danger of unfair prejudice resulting from the admission of evidence of prior bad acts when a matter is tried to the court. State v. Casady, 491 N.W.2d 782, 786 (Iowa 1992) (prejudicial effect of other crimes evidence is reduced in the context of a bench trial); see also State v. Williams, 445 N.W.2d 408, 410 (Iowa App. 1989) (prejudicial effect of prior acts evidence is minimal given no jury was involved and evidence was not the sort to rouse a fact finder to hostility).

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. See Ripperger, 409 N.W.2d at 694. Rule 404(b) contains a nonexclusive list of purposes for which evidence of prior crimes, wrongs or acts may be offered. See Plaster, 424 N.W.2d at 228. In light of the unusual sex acts involved in both the August 1992 and May 1993 incidents, the presence of sexual stimuli (erotic dream and sexually explicit magazines) prior to the occurrence of each act, S.K.T.'s statement regarding his inability to control himself around girls and the importance of the issue of consent, we find the relevance of the evidence of the August 1992 incident outweighed any prejudice associated with its admission. We affirm the judge's evidentiary ruling on this issue.

III. Effective Assistance of Counsel

S.K.T. claims he was denied his right to effective assistance of counsel. To establish this claim he must show his counsel failed to perform an essential duty and prejudice resulted therefrom. State v. Tracy, 482 N.W.2d 675, 679 (Iowa 1992). S.K.T. must overcome the presumption his counsel is competent. Id.

S.K.T. claims his counsel was ineffective in failing to to object to the State's questioning of D.W. about the magazines and it was this failure to object which enabled the judge to admit the magazines as merely cumulative of D.W.'s testimony. He contends this line of questioning of D.W. was in direct contravention of the Iowa Supreme Court's decisions in State v. Tracy, 482 N.W.2d 675 (Iowa 1992) and State v. Turecek, 456 N.W.2d 219 (Iowa 1990). In those cases the court held there are limits on the State's ability to impeach its own witnesses and impeachment may not be used merely to obtain the admission of otherwise inadmissible evidence.

This case does not fall within the realm of a Turecek or Tracy violation. A review of the record reveals no manipulation by the State to impeach D.W. as a vehicle for admitting otherwise inadmissible evidence. Unlike Turecek, this was not a case in which the evidence was not relevant to the State's case in chief. The magazines were not merely collateral to the issues in the case but were relevant to S.K.T.'s alleged lack of control around girls,

the veracity of his contention that he got the idea to have anal intercourse from T.I. and the ultimate issue of whether the intercourse was consensual in nature. This testimony was probative of the circumstances surrounding the commission of the sexual abuse and could be considered in determining if the act was done against the will of T.I. Iowa Code § 709.5 (1993). D.W.'s testimony about the magazines was not inconsistent with Tracy or Turecek and defense counsel did not violate an essential duty in not objecting to this line of questioning.

IV. Sufficiency of the Evidence

S.K.T. argues the State failed to prove him guilty beyond a reasonable doubt of third-degree sexual abuse. The State has the burden of proving the allegations of a petition alleging a child has committed a delinquent act. In Interest of D.L.C., 464 N.W.2d 881, 882 (Iowa 1991). A child is presumed to be innocent of the charges, and no finding a child has engaged in delinquent conduct may be made unless the State has proved beyond a reasonable doubt the child engaged in such behavior. Id. at 883.

S.K.T. was alleged to have committed sexual abuse in the third degree.[2] In proving whether S.K.T. performed

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2. **Sexual abuse in the third degree.** A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances: 1. The act is done by force or against the will of the other participant, whether or not the other participant is the person's spouse or is cohabiting with the person. Iowa Code §709.4(1).

the act against the will of T.I. it was not necessary for the State to prove physical resistance. Iowa Code § 709.5. The circumstances surrounding the commission of the act may be considered in determining whether or not the act was done by force or against the will of T.I. Id. As the fact finder we are not required to accept the testimony of S.K.T. regarding T.I.'s purported consent to the act nor does that testimony automatically create reasonable doubt. See In Interest of D.L.C., 464 N.W.2d 881, 883 (Iowa 1991).

The juvenile judge specifically found his decision rested on the credibility of the witnesses. While he expressed reservations as to whether T.I. had been completely forthcoming about prior physical contact she and S.K.T. had, he conclusively found she had not consented to anal intercourse.

Numerous factors support an adjudication of guilt: T.I. and S.K.T. had not dated and did not have a boyfriend-girlfriend relationship; T.I. had not been responsive to S.K.T's requests to date and his professions of love; T.I. was having painful menstrual cramps at the time the abuse occurred and S.K.T. was aware of this; S.K.T. admitted T.I. expressly did not consent to vaginal intercourse; S.K.T.'s description of the anal penetration was unbelievable in light of the fact no condom or lubricant was used; T.I. testified she repeatedly told S.K.T. to "knock it off" and resisted his efforts to remove her clothing and have intercourse; S.K.T.'s statements

regarding his inability to control himself around girls, especially T.I.; and T.I.'s upset demeanor and exit from S.K.T.'s home immediately following the sexual abuse. Based on our de novo review of the record we conclude the State met its burden and the juvenile court's adjudication should be affirmed.

AFFIRMED