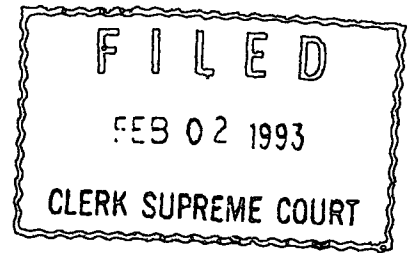


IN THE COURT OF APPEALS OF IOWA

No. 2-587 / 91-1439



STATE OF IOWA,

Appellee,

vs.

FRANK HENRY MOBLEY,

Appellant.

Appeal from the Iowa District Court for Woodbury
County, Gary E. Wenell, Judge.

The defendant appeals from the judgment and sentence of
the district court entered following his conviction of
second-degree sexual abuse in violation of Iowa Code
section 709.3(2) (1989). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari
Barron, Assistant State Appellate Defender, 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 Donielson, P.J., Sackett, J., and Keefe, S.J.*

*Senior Judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

The defendant, Frank Mobley, appeals from the judgment and sentence entered following his conviction of second-degree sexual abuse in violation of Iowa Code section 709.3(2) (1989).

Mobley was convicted, following a jury trial, of second-degree sexual abuse stemming from an incident in which Mobley allegedly sexually abused a six-year-old girl while in her parents' home on Thanksgiving of 1989. At trial, the victim, Anne,¹ testified she was sitting on the left side of Mobley's lap on the couch in the living room. Anne testified Mobley put his finger up her bottom and moved it back and forth. She further testified Mobley told her not to wake up her father, who was asleep on another couch. Anne's mother testified that the next summer Anne developed a bladder infection and told her about the alleged sexual abuse. Anne's examining doctor testified Anne exhibited several physical symptoms which could be consistent with sexual abuse.

The investigating officer, Anthony Sunclades, testified he had interrogated Mobley in August 1990. During the one and one-half hour interview, Mobley initially denied having abused Anne. However, by the end of the interview, he admitted he had sexually abused Anne. A videotape of a

1. The child's initials are A.S. Anne is not her real name.

six-minute portion of this interview, which included Mobley's confession, was played to the jury. The State also presented the testimony of Katey Boley, the coordinator at the Child Protection Center in Sioux City. She testified that it is unusual for a child to report an incident of sexual abuse immediately after its occurrence. Finally, Tracy,² Anne's sister, testified that when she was six, Mobley had sexually abused her.

In his defense, Mobley denied that he had sexually abused Anne. He maintained the only reason he admitted the crime was because he knew he could not prove his innocence and he was telling Officer Sunclades what he wanted to hear. Mobley testified he had lied in making the confession.

The jury found Mobley guilty as charged and the district court sentenced Mobley to a term of imprisonment not to exceed twenty-five years. Mobley now appeals.

Mobley argues the district court abused its discretion in (1) admitting evidence that he had improperly touched Anne's sister, (2) failing to require the State to play the entire videotape of Mobley's confession to the jury as requested, (3) allowing Katey Boley to testify about "delayed reporting syndrome," and (4) excluding evidence that the defendant had accepted an offer from Officer

2. The child's initials are T.S. Tracy is not her real name.

Sunclades to take a polygraph test. On our review, we affirm the district court.

On these evidentiary issues, we review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that 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) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

I. Evidence of Prior Bad Acts. Mobley first argues the district court abused its discretion in admitting evidence that he had improperly touched Tracy. Mobley specifically contends such evidence was inadmissible pursuant to Iowa Rules of Evidence 403 and 404(b) and there was no "clear proof" that the incident occurred. He also argues the evidence is not relevant to the issue of identity because the incidents are not sufficiently similar and this evidence should have been excluded due to its highly prejudicial effect.

Iowa Rule of Evidence 404(b) provides that evidence of "other crimes, wrongs or acts" is inadmissible to prove the defendant acted in conformity with the character the acts may show, but it is admissible for other purposes. In other words, evidence which has no relevancy except to show the defendant is more likely to have committed the crime charged because he is a bad person is inadmissible. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979). The exceptions

to rule 404(b) are based upon the relevancy of certain evidence to the proof of some fact or element in issue other than the defendant's criminal disposition. Id. However, the purposes listed in rule 404(b) are not exclusive. State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987). The key is "whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts." Id.

The admissibility of rule 404(b) evidence is determined by a two-part test: first, the evidence must be relevant to establish a legitimate issue in the case; and second, the probative value of the evidence must not be outweighed by the danger of unfair prejudice under rule 403. Id. at 187 n.2. "Clear proof" of the alleged acts is also required when prior bad acts are admitted. State v. Spargo, 364 N.W.2d 203, 209 (Iowa 1985). Clear proof is a lesser standard than "beyond a reasonable doubt." Id.

Evidence of the alleged prior incident of sexual abuse between Anne's sister, Tracy, and Mobley was highly relevant in establishing the similarities between the alleged offenses and that Mobley was the likely perpetrator of the sexual abuse. The courts have long followed the rule allowing evidence of prior acts with the victim. State v. Plaster, 424 N.W.2d 226, 231 (Iowa 1988) (citations omitted). In State v. Spaulding, 313 N.W.2d 878, 880 (Iowa 1981), the supreme court extended the rule to allow prior acts with a person other than the victim.

See also Plaster, 424 N.W.2d at 230. In Spaulding, the defendant was convicted of third-degree sexual abuse. The victim was the defendant's fifteen-year-old stepdaughter. 313 N.W.2d at 879. The court permitted the victim's seventeen-year-old sister to testify about the defendant's sexual conduct with her. Id. at 881.

In upholding the admissibility of this evidence, the supreme court focused on the similarities between the sisters' stories and found the sister's testimony "gave considerable credence to the victim's story." Id. Here, we find significant similarities existed between Anne's allegations and Tracy's testimony. Both girls testified the abuse occurred while they were sitting in Mobley's lap in the living room of their own home. Mobley had allegedly abused both by digitally manipulating their genitals on the inside of their underwear. These similarities are relevant in identifying Mobley as the likely perpetrator of the sexual abuse experienced by Anne.

We agree there was clear proof of Tracy's allegations. This proof included the testimony of Tracy, who was nine years old at the time of trial. She testified Mobley had abused her when she was six years old. Where the victim's testimony alone constitutes clear proof, the "clear proof" requirement does not require corroborative evidence. State v. Jones, 464 N.W.2d 241, 243 (Iowa 1990).

Finally, noting the district court issued a jury instruction limiting the purpose of this evidence, we find

the probative value of this evidence was not outweighed by the danger of unfair prejudice. Therefore, the evidence is admissible under rule 403. See State v. Barrett, 401 N.W.2d 184, 187, n. 2 (Iowa 1987). As a result, we also find this evidence was admissible under Iowa Rule of Evidence 403. The district court did not abuse its discretion in admitting this evidence.

II. Evidence of the Videotaped Interview. Mobley next contends the district court abused its discretion in failing to require the State to play the entire videotape of Officer Sunclades' interview of Mobley to the jury as requested.

Iowa Rule of Evidence 106(b) provides, in relevant part:

Upon request by an adverse party, the court may, in its discretion, require the offering party to introduce contemporaneously with the act, declaration, conversation, writing, or recorded statement, or part thereof, any other part or any other act, declaration, conversation, writing or recorded statement which is admissible under subdivision "a" of this rule.

Iowa R. Evid. 106(b) (emphasis added).

Here, the district court did not require the State to play the entire videotape of Officer Sunclades' interview of Mobley, which lasted over one and one-half hours. Rather, the district court allowed the State to play only a six-minute portion which contained Mobley's confession. The excluded portion contained, among other statements, the repeated denials of having abused Anne which Mobley made

before finally confessing to Officer Sunclades. However, the district court gave Mobley the opportunity to play any version of the tape he desired during his defense. We find this remedy was equitable and well within the court's discretion. The district court did not abuse its discretion by refusing to require the State to play the remaining portion.

III. Evidence of the Delayed Reporting Syndrome.

Mobley next contends the district court abused its discretion in allowing Katey Boley's testimony about the "delayed reporting syndrome." At trial, Boley testified about why Anne had not reported the alleged sexual abuse until months after it had occurred. She testified it was unusual for a child to report sexual abuse soon after its occurrence. Mobley specifically contends this testimony was improper because it was likely used by the jury as substantive evidence of the crime.

The admissibility of evidence offered to explain why children delay reporting sexual abuse should be limited to rehabilitative functions and the fact finder must be instructed that the testimony is limited to rehabilitation. State v. Dodson, 452 N.W.2d 610, 612 (Iowa App. 1989). Otherwise, there is a danger that this type of evidence may be incorrectly used by the fact finder as evidence of abuse. Id. However, it is not necessary that this evidence be introduced on rebuttal by the State. State v. Payton, 481 N.W.2d 325, 326-27 (Iowa 1992).

Evidence of the delayed reporting syndrome is admissible in the State's case in chief where there have been extensive attempts by defense counsel to impeach the children's testimony on cross-examination regarding their prior inconsistent statements. Id.

Here, the record reflects defense counsel made numerous attempts to impeach the testimony of both Anne and Tracy. Noting the district court issued a limiting instruction which cautioned the jury against using this evidence as substantive evidence of the crime charged, we find the district court properly admitted the evidence of the "delayed reporting syndrome." The district court did not abuse its discretion in admitting this testimony.

IV. Evidence of Mobley's Offer to Take a Polygraph Test. Mobley finally contends the district court abused its discretion in refusing to admit evidence that he had offered to take a polygraph test. Specifically, Mobley contends the evidence was relevant to corroborate his claim that he was attempting to prove his innocence during the interview with Officer Sunclades.

"The general rule is that polygraph evidence is inadmissible, at least in the absence of a stipulation by the parties." Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98, 101 (Iowa 1985) (citations omitted). However, in Haldeman, the supreme court found evidence of discussions about the polygraph test were admissible where

the evidence was not offered to establish the plaintiff's truthfulness. Id. at 102.

Here, evidence of Mobley's offer to take a polygraph test would likely have been used for the improper purpose of determining Mobley's truthfulness. The district court did not abuse its discretion in excluding this evidence.

The costs of this appeal are taxed to Mobley.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.