IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KEVIN THOREN, Defendant-Appellant.	)))))))))	S.CT. NO. 20-0192

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE JEFFREY D. FARRELL, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED MARCH 17, 2021

MARTHA J. LUCEY
State Appellate Defender

ASHLEY STEWART
Assistant Appellate Defender
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEY'S FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On the 2nd day of April, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Kevin Thoren, No. 6112720, Newton Correctional Facility, Box 218, 307 S. 60th Avenue W., Newton, IA 50208.

APPELLATE DEFENDER'S OFFICE

ASHLEY STEWART
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us

AS/lr/7/20
AS/sm/10/20

QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court erred in allowing irrelevant testimony from the Iowa board of massage therapy's investigation into sexual misconduct allegations against Thoren and his subsequent self-surrender of massage license?

II. Whether the district court's admission of testimony from several past clients who reported sexual misconduct – some over ten years old - to the Iowa Department of Health was error. The prior bad act testimony was irrelevant and more prejudicial than probative?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Rules:

STATEMENT IN SUPPORT OF FURTHER REVIEW

The Court of Appeals erred in failing to address the merits of Thoren's argument that any evidence of the Iowa Board of Massage Therapy non-criminal investigation and the self-surrender of his license by concluding that error was not preserved. The preservation of the error was established when Thoren moved that any evidence from the Iowa Department of Public Health's investigation into Thoren's professional license and its subsequent surrender be excluded under due to relevancy and prejudice.

Thoren argues that the allowance of the board's investigator outcome was dependent on a preponderance of the evidence standard and not based on the heavier and higher standard of a reasonable doubt thus making them inadmissible, irrelevant and prejudicial. Thoren argued that the admission of the evidence was erroneous and asks the Iowa Supreme court to find its allowance was an abuse of discretion.

Finally, Thoren argues that the district court erroneously allowed remote in time evidence of prior bad acts – some more than 10 years old. Thoren requests that the Iowa Supreme Court determine that the prior bad acts evidence should not have been allowed, especially because of the time lapsed between incidents.

STATEMENT OF THE CASE

Nature of Case

Defendant-Appellant Kevin Thoren appeals his conviction, sentence and judgment following a jury trial resulting in guilty verdict for Sex Abuse in the 3rd Degree, a class C felony, in violation of Iowa Code Section 709.4(1)(a).

Course of Proceeding

On May 23, 2019, a trial information was filed charging Thoren with Sexual Abuse in the Third Degree in violation of Iowa Code § 709.4(1)(a). (Trial Info)(App. pp. 4-5). On May 24, 2019, Thoren plead not guilty to the charges. (Written Arraignment and Plea of Not Guilty)(App. pp. 6-7).

On August 22, 2019, Thoren filed a motion in limine requesting that all evidence of his prior criminal history be deemed inadmissible. Thoren also requested that "all evidence from Tony Alden from the Iowa Department of Public Health, or any evidence that the defendant self-surrendered his license" be excluded as irrelevant and inadmissible

testimony. (8/22/2019 Motion)(App. pp. 8-9). The defense followed up with a brief in support of the motion on September 10, 2019. (09/10/19 Other Event: Brief in Supp. Of Motion)(App. pp. 16-20). The State filed a resistance to the motion on September 6, 2019 and an additional brief on September 13, 2019. (Resistance, 09/13/19 Brief)(App. pp. 10-15, 21-25). On September 20, 2019, the Court denied the defendant's motion. (Other Order: Ruling on Motion)(App. pp. 26-32).

Thoren's jury trial began on December 16, 2019. (Tr. Vol. I, p. 1, L7). On December 20, 2019, the jury convicted Thoren of all charges. (Criminal Verdict 12/20/19)(App. p. 38). The Court sentenced Thoren to the custody of the Iowa Department of Corrections for period not to exceed 10 years on January 29, 2020. (Order of Disposition)(App. pp. 39-44).

Thoren filed a timely notice of appeal on January 30, 2020. (Notice of Appeal)(App. p. 45).

Facts

Kevin Thoren was a licensed massage therapist in Iowa until September 2018. (Tr. Vol. IV., p. 99, L14-16).

On September 4, 2018, the Iowa Board of Massage completed an investigation into Thoren due to allegations of sexual misconduct with a client. (Ex. 1)(Conf. App. pp. 4-6). The alleged incident involved the touching of a client's breast for non-therapeutic purposes. (Ex. 1)(Conf. App. pp. 4-6).

The Iowa Board of Massage Therapy began investigating Thoren after the following allegations, which were reported in 2017-2018: (1) a complaint filed by Amy Nelson alleging that Thoren took a massager and held it close to her breasts and pubic bone in 2009; (2) Lisa Kamphuis alleged that Thoren pulled her nipples during a session in 2014; (3) Jennie Jacobs alleged that Thoren massage on top of her breast tissue toward her nipples when she did not ask him to do so; (4) Mary LaMair alleged that while Thoren was massage her breast area and went further onto the side of the breast then

she felt appropriate, (5) Susan Thoren alleged that Thoren used a massager to touch her crotch and clitoris area. (Tr. Vol II, p.72, L22-p.73, L23; p. 77, L4-9, p. 74, L20-23; p. 96, L24-p. 93, L3; p. 102, L21-p. 104, L4; p. 109, L24-p. 110, L12; p. 114; L10-p.116, L15; p. 121, L14-21; p. 124, L14-16; Vol. III, p. 9, L6-13; p. 10, L13-23; p. 15, L19-25).

At some point, during the investigation, Thoren agreed to self-surrender his massage license. (Tr. Vol. II, p. 30, L15-17; Ex. 1)(Conf. App. pp. 4-6). There was no admission of guilt by Thoren.

Following the self-surrender of his massage license, Thoren, still operated his therapy business but focused on who is also trained in craniosacral, Reiki therapy and Pranic healing, and not massage. (Tr. Vol. IV, p. 98, L18-23; p. 99, L24-p. 100, L6; p. 100, L10-16).

On November 2, 2018, L.R. had her first craniosacral therapy session with Thoren. (Tr. Vol. IV, p. 113, L3-7; p. 117, L15-18; Ex. F)(Conf. App. p. 10). On November 21,

2018, L.R. went to her second therapy session with Thoren. (Tr. Vol. III, p. 31, L4-8). The second session was for Reiki Therapy. (Tr. Vol. IV, p. 121, L9-14; Ex. C)(Conf. App. p. 9).

L.R.'s version of the second therapy session:

During her session, L.R. alleged that Thoren asked her about her sexual energy and if her partner was enjoying her sexual energy. (Tr. Vol. III, p. 32, L25-p. 33, L2). Thoren put a cloth over her eyes and said "I am going to work on your vaginal area." (Tr. Vol. III, p.33, L21-24). L.R. alleged that during her massage Thoren began to rub her pubic bone around her stomach and kept saying "tell me how you are feeling." (Tr. Vol. III, p. 24, L14-18). L.R. also alleged that Thoren briskly rubbed her clitoris down toward her anal region and kept asking her how she was feeling. (Tr. Vol. III, p. 34, L19-21). Thoren did not touch any other part of her body. (Tr. Vol. III, p. 34, L22-25). When the massage was completed, L.R. left. (Tr. Vol. III, p. 37, L8-13). During the

massage, L.R. remained fully clothed. (Tr. Vol. III, p. 35, L6-8).

Thoren's version of the second therapy session:

The session began with L.R. sitting and Thoren went through the question-and-answer process requesting a full update since the prior massage. (Tr. Vol. IV, p. 125, L5-10). During the question-and-answer, L.R. told that she felt great and had a lot of energy. (Tr. Vol. IV. p. 128, L23-25). She reported no longer have headaches and that her sexual energy was back. (Tr. Vol. IV, p. 129, L2-7). Thoren then asked L.R. to lay face up on the table and he applied an eye mask and began the Reiki treatment. (Tr. Vol IV, p. 125, L11-14). Thoren never touched L.R.'s vaginal region at any point nor did her ever do anything inappropriate. (Tr. Vol. IV, p. 125, L5-8).

L.R. reported the alleged incident to the police in January or February of 2019. (Tr. Vol. III, p. 40, L5-10). On February 8, 2019, Officer Ryan Bowens, of the Windsor Heights Police

Department, took a sexual abuse report from L.R. (Tr. Vol. II, p. 8, L-5-8; p. 8, L20-p. 9, L1).

Any additional relevant facts will be discussed below.

Argument

I. The trial court erred in allowing irrelevant testimony from the Iowa board of massage therapy's investigation into sexual misconduct allegations against Thoren and his subsequent self-surrender of massage license.

Preservation of Error: Thoren presented a motion objecting to any evidence of the "self-surrender of defendant's professional licensure…" and Thoren filed a brief in support on September 10, 2019. (8/22/19 Motion, 09/10/19 Other Event)(App. pp. 8-9, 16-20). The State filed a resistance and an additional brief. (09/06/19 Resistance, 09/13/19 Brief)(App. pp. 10-15, 21-25). The court denied the motion and therefore error was preserved. (Other Order: Ruling on Motion)(App. pp. 32-36).

Standard of Review: The court reviews evidentiary rulings for abuse of discretion. State v. Huston, 825 N.W.2d 531, 536 (Iowa 2013).

Discussion: In this case, the question is whether evidence from the Iowa Board of Massage Therapy within the Department of Health and Bureau of Professional Licensures, investigation into sexual abuse misconduct allegations against Thoren and the eventual voluntary self-surrender of his license was relevant to a criminal sexual abuse case.

In order to determine whether the evidence is admissible under Iowa Rules of Evidence 402 and 403, the court must undergo a two-step process. First, the court must determine if the evidence is relevant and second the court must determine if the evidence has probative value. State v. Plaster, 424 N.W.2d 226 (Iowa 1988).

Iowa Rule of Evidence provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice." State v. Huston, 825 N.W.2d 531 (Iowa 2013).

"Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable then it would be without the evidence." State v. Castenada, 621 N.W.2d 435, 400 (Iowa 2001); see Iowa R. Evid. 5.401.

Over the defendant's objections, the State offered evidence by the Iowa Board of Massage Therapy administrative representative Tony Alden that there was a report against Thoren that contained factual licensure violations, specifically that Thoren touched the breast of a client for non-therapeutic purposes. (Tr. Vol. II 17, L16-24; p. 19, L14-16, p. 27, L17-p.28, L1, Ex. 1)(Conf. App. pp. 4-6). Alden provided documentation from the Iowa Board of Massage investigation detailing the instance of sexual misconduct. (Tr. Vol. II. p.33, L5-14). Alden also confirmed that due to the investigation, Thoren voluntarily surrendered his license. (Tr. Vol. II, p. 30, L15-17; Ex. 1)(Conf. App. pp. 4-6).

The evidence of allegations sexual abuse of misconduct during therapy sessions made to and investigated by the Iowa Board of Massage Therapy were irrelevant.

Evidence of the Iowa Board of Massage Therapy's investigation detailing accusations of alleged sexual misconduct during treatment by Thoren was irrelevant to the question of whether Thoren committed the crime of sexual abuse. The Iowa Board of Massage proceeding was an agency action which required a lower burden of proof. Agency actions require proof by a preponderance of the evidence. See In re C.C., 670 N.W.2d 433 (Iowa Ct. App. 2003) (Department required only a preponderance of evidence in the finding). Further, there was no showing that the requirements, or elements, for an Iowa Board of Massage Therapy investigation into a sexual misconduct report were the same as a criminal finding of sexual abuse. In order to determine the relevancy of the evidence, the court must determine if the evidence is relevant. State v. Plaster, 424 N.W.2d 226 (Iowa 1988).

"Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence." State v. Castenada, 621 N.W.2d 435, 400 (Iowa 2001); see Iowa R. Evid. 5.401.

In order for the finding by the Iowa massage board to have any relevance there must be a showing of equity between the burdens of proof and a similarity between the requirements for sexual abuse report leading to self-surrender and the offense of sexual abuse. In re C.C., 670 N.W.2d 433 (Iowa Ct. App. 2003). In the present case, there was no such showing in the present case. Therefore, evidence of a sexual abuse report does not have any tendency to make the existence of any fact that was of consequence to the determination of the criminal sexual abuse offense more probable or less probable than it would be without the evidence.

The evidence of allegations sexual abuse of misconduct during therapy sessions made to and investigated by the Iowa Board of Massage Therapy were unfairly prejudicial.

Further, any relevance of the agency finding and the appeal process, were outweighed by the danger of unfair prejudice. Unfairly prejudicial evidence is evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case." State v. Plaster, 424 N.W.2d 226, 231 (Iowa 1988).

Clearly, the danger here was that the jury would find Thoren guilty because he self-surrendered his massage therapy licenses, which could be deemed as an admission of guilt that he committed sexual abuse/misconduct. The jurors did not know that the agency uses a different standard of proof. Nor did the jurors know that there are different requirements for a finding of abuse in an agency investigation versus a criminal investigation. All the jury knew was that

Thoren self-surrendered his license due to the investigation and therefore, he must be guilty.

II. The district court's admission of testimony from several past clients who reported sexual misconduct – some over ten years old - to the Iowa Department of Health was error. The prior bad act testimony was irrelevant and more prejudicial than probative.

Preservation of Error: Thoren filed a brief in support of his motion on September 10, 2019, in which he argued that testimony about complaints to the Iowa Board of Massage Therapy, against Thoren should be excluded as prior bad acts. (09/10/19 Other Event: In Support of Motion in Limine)(App. pp. 16-20). The State filed a resistance and an additional brief. (09/06/19 Resistance, 09/13/19 Brief)(App. pp. 10-15, 21-25). The court denied the motion and therefore error was preserved. (Other Order: Ruling on Motion)(App. pp. 26-31).

Standard of Review: This court reviews a district's court evidentiary rulings regarding prior bad acts for abuse of discretion. State v. Parker, 747 N.W.2d 196, 203 (Iowa 2008). An abuse of discretion occurs when the trial court exercises its

discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Rodriquez, 636 N.W.2d 234, 239 (Iowa 2001)(quoting State v. Maghee, 573 N.W.2d 1, 5 (Iowa 1997). If an abuse of discretion occurred, reversal will not be warranted if error was harmless. State v. Henderson, 696 N.W.2d 5, 10 (Iowa 2005).

Discussion: Iowa Rule of Evidence 5.404(b) establishes a specific rule governing the admissibility of a person's other crimes, wrongs, or acts. Rule 5.404(b) provides:

1. *Prohibited Use*: Evidence of a crime, wrong, or other act that is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

2. *Permitted Uses*: The evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, lack of accident.

Iowa R. Evid. 5.404(b).

Thus, such evidence is not admissible when used to demonstrate the defendant has a criminal disposition and was therefore more likely to have committed the crime in question.

State v. Castaneda, 621 N.W.2d 435, 439-440 (Iowa 2001).

> [T]he public policy for excluding the bad-acts evidence "is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds."

State v. Sullivan, 679 N.W.2d 19, 24 (Iowa 2004) (quoting United States v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985).

The Court must determine if the evidence is relevant and material to some legitimate issue other than general propensity to commit wrongful acts. State v. Plaster, 424 N.W.2d 226, 229 (Iowa 1988). If the court decides the evidence is relevant, the court must then decide if the evidence's probative value is more substantially outweighed by unfair prejudice. Id.

This court has set forth a three-part test for determining the admissibility of prior bad acts evidence. See State v. Putnam, 848 N.W.2d 1, 8-9 n.2 (Iowa 2014) (adopting clear proof as an independent prong of three-prong test in addition

to being a factor to be weighed in determining prejudice). First, the district court must determine whether the evidence is "relevant and material to a legitimate issue in the case other than a general propensity to commit wrongful acts." State v. Sullivan, 679 N.W.2d at 25. "The general test for relevancy is whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if [the person] knew of the proffered evidence.'" State v. Putnam, 848 N.W.2d 1, 8-9 (quoting State v. Plaster, 424 N.W.2d 226, 229 (Iowa 1988)); Castaneda, 621 N.W.2d at 440 ("Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence" (quoting Iowa R. Evid. 5.401). If the court determines the evidence is not relevant, then it is not admissible. Castaneda, 621 N.W.2d at 400; see Iowa R. Evid. 5.402.

Second, "[t]here also 'must be clear proof the individual

against whom the evidence is offered committed the bad act or crime,'" Putnam, 848 N.W.2d at 9 (citation omitted).

> In assessing whether clear proof of prior misconduct exists, the prior act need not be established beyond a reasonable doubt, and corroboration is not necessary. There simply needs to be sufficient proof to prevent the jury from engaging in speculation or drawing inferences based upon mere suspicion.

Id.

Third, if the district court finds the disputed evidence to be relevant and that the clear proof element is satisfied, then it must determine "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Castaneda, 621 N.W.2d at 440; see Putnam, 848 N.W.2d at 9; Iowa R. Evid. 5.401. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…"). Should the district court conclude the probative value of the disputed evidence is substantially outweighed by the danger of unfair prejudice, then it must be excluded the disputed evidence. State v. Mitchell, 633 N.W.2d 295, 298-99 (Iowa

2001); Castaneda, 621 N.W.2d at 440.

"Unfair prejudice" is defined as "an undue tendency to suggest decisions on an improper basis." Id. at 440 (citations omitted). Such evidence is that which: appeals the jury's sympathies, arouses its sense of horrors, provokes it instructs to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence. Id. at 440-41 (citations omitted); see State v. Taylor, 689 N.W.2d 116, 130 (Iowa 2004). ("The more pertinent question is whether the evidence will prompt the fact finder to make a decision based on an emotional response to the defendant."). This court considers a series of factors in determining prejudice: (1) the need for the evidence in light of

the issues or other evidence available, (2) whether there is clear proof the accused committed the prior bad acts. (3) the strength or weakness of the evidence on the relevant issue, and (4) the degree to which the fact finder will be prompted to decide on an improper basis. Putnam, 848 N.W.2d at 9-10. "If the danger of evidence's prejudicial effect substantially outweighs its probative value, the evidence must be excluded." Id. at 10.

In considering whether the probative value of the prior bad acts evidence was substantially outweighed by the danger of unfair prejudice, the court should have considered the following factor: the degree to which the jury "will be prompted to decide the case on an improper basis." State v. Taylor, 689 N.W.2d 116, 124 (Iowa 2004). "[T]he public policy for excluding bad-acts evidence 'is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on fundamental sense that no one should be convicted of a crime based on his or her

previous misdeeds." Sullivan, 679 N.W.2d at 24 (quoting United States v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir.1985)).

Evidence that is so remote in time could be so remote and the elapsed time could be so great as to negate all rational or logical connection between the fact sought to be proved and the remote evidence offered. State v. Kern, 392 N.W.2d 134, 136 (Iowa 1986)(citing State v. Maestas, 224 N.W.2d 248 (Iowa 1974).

The defendant respectfully submits, however, that evidence of Thoren's alleged prior bad acts failed to meet the more probative then prejudicial prong of the test. Any probative value from the evidence of the prior bad acts was substantially outweighed by the danger of unfair prejudice.

In this case, several of Thoren's former clients who testified about allegations against Thoren reported incidents that occurred over six to ten years prior to the reporting to the Iowa Massage Board and to any charges made against Thoren.

Amy Nelson's alleged incident occurred in 2009, Lisa Kamphuis incident in 2014, Jennie Jacob's allegation in 2008; Mary Lamair in 2012, and Susan Thoren's alleged incident in 2009. (Tr. Vol. II, p. 72, L22 – p. 73, L23; p. 96, L24-p. 97, L3; p. 107, L10-15, p. 119, L17-24, Vol. III, p. 1, L10-p.8, L15).

The concern here is that the jury concluded that six to ten years old allegations made against Thoren to the Department of Health in 2017 and 2018 means that Thoren committed a sexual abuse crime in 2018. Empirical studies have shown that juries treat evidence of prior bad acts as highly probative because their common sense tells them that a person who had acted criminally before probably will act the same way again. Henderson, 696 N.W.2d at 14. (Lavorato, J. specially concurring). The evidence of Thoren's alleged prior bad act distracted the jury from the issue at hand – whether he abused L.R.

Therefore, the district court erred in allowing evidence of

the Iowa Board of Massage investigation because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

CONCLUSION

For all the above reasons, the defendant requests this court vacate his conviction, sentence, and judgment and remand the case.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.95, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,820 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

_____ Dated: *4/2/21*

ASHLEY STEWART
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us