IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-2239

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN CHARLES DONAHUE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR AUDUBON COUNTY
THE HONORABLE JEFFREY L. LARSON, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Defendant-appellant John Charles Donahue (hereafter the defendant) appeals from a conviction by a jury for the crime of sexual abuse in the third degree. The Honorable Jeffrey L. Larson presided at the jury trial ending in the defendant's conviction and also later at the sentencing proceeding.

The defendant argues on appeal he should receive a new trial because of restrictions on defense cross-examination of the complainant and because of an alleged erroneous jury instruction. He also argues he was not proved guilty beyond a reasonable doubt of the crime of third-degree sexual abuse.

Course of Proceedings

The State filed a criminal complaint and affidavit on April 26, 2017, charging the defendant with lascivious acts with a child, a class "C" felony, in violation of Iowa Code section 709.8 (1) (a) (2013). The complaint alleged that the defendant had fondled the genitals of a child when she was 10 or 11 years old. Complaint and Affidavit filed 4/26/17; App. 4. The initials of the female child in this case are T.G.

Subsequently, a criminal complaint was filed on May 23, 2017, for the purpose of changing the charge of lascivious acts to the charge of second-degree sexual abuse of a child under the age of 12, a class "B" felony, in violation of Iowa Code sections 709.1 (3), 709.3 (1) (b), and 702.17 (3) (2013). Complaint and Affidavit filed 5/23/17. On May 30, 2017, the State filed a trial information reiterating this charge, asserting the sexual abuse had occurred during a period of time from October 2012 through October 2014. Trial Information filed 5/30/17: App. 5. The defendant filed a written arraignment and plea of not guilty on June 23, 2017. Written Arraignment and Plea of Not Guilty filed 6/23/17; App. 7-8.

An amended trial information was later filed on May 22, 2018. It asserted the defendant had committed the crime of sexual abuse in

the third degree, a class “C" felony, in violation of Iowa Code sections 709.1 (1), 709.4 (1) (a), and 702.17 (3) (2014). The charge stated as follows: “The Defendant, during the time of July 31, 2014 through August 26, 2016, in Audubon County, Iowa, did commit sexual abuse by performing a sex act by force or against the will of a person." Trial Information Amended filed 5/22/18; App. 9.

The defendant filed a motion in limine on May 3, 2018. Although a number of requests were lodged, the one relevant to this appeal was contained in Paragraph Number 2. It sought a court order prohibiting the State from presenting evidence of any alleged prior bad acts of the defendant. Motion in Limine filed 5/3/18; App. 11-12. The State filed a resistance to this motion, resisting some defense requests but lodging no objection to others. The State resisted Paragraph Number 2, asserting evidence of the defendant’s prior acts with the victim was admissible. State’s Resistance to Defendant’s Motion in Limine filed 5/7/18; App. 13-14. The State also filed a motion in limine. State’s Motion in Limine filed 5/7/18; App. 15-16.

The motions in limine and resistance were considered by the trial court on May 14, 2018. Pretrial and Motion in Limine Tr. (hereafter Mot. in Limine Tr.) p. 3, lines 2 – 5. Regarding the State’s

resistance to Paragraph Number 2 of the defense in limine motion, defense counsel conceded the State might be correct that prior bad acts evidence concerning the defendant and the complainant in this case, T.G., would be admissible. However, the defense reiterated its objection to any other prior bad acts evidence. Mot. in Limine Tr. p. 3, lines 10 – 17.

At the in limine hearing the trial court overruled Paragraph Number 2 regarding acts between T.G. and the defendant. It was sustained as to other instances of bad acts. Mot. in Limine Tr. p. 5, lines 19 – 23.

As it turned out, the defendant was twice brought to trial. The first trial commenced on June 26, 2018. Before the presentation of evidence that day, the trial court judge – who was different from the judge who considered the in limine motions – considered the in limine motions anew. Trial Tr. Volume I (contains pretrial hearing and June 2018 trial – hereafter Trial Tr. Vol. I) p. 1, lines 3 – 12; p. 3, lines 1-11; p.7, line 25 – p. 9, line 1; p. 11, line 11 – p. 17, line 22. Except for Paragraph Number 7 of the defense motion in limine, all requests were sustained – including Paragraph Number 2, which

sought exclusion of any and all evidence of prior bad acts by the defendant. Trial Tr. Vol. I p. 14, line 25 – p. 15, line 2.

The first jury trial ended in a mistrial on June 28, 2018, after the jury became deadlocked during deliberations. Order filed 6/28/18; App. 17.

A second jury trial began on October 30, 2018. Before the start of evidence, the trial court ruled that the defendant's motion in limine was granted. Order filed 10/31/18. Following the presentation of evidence by the State and defense, the jury convicted the defendant of sexual abuse in the third degree. Verdict of the Jury; App. 34.

On December 13, 2018, the defendant was sentenced to 10 years in prison, find $1,000 and found to be subject to registration as a sex offender. He was also ordered to pay victim restitution, as substantiated by later statement by the county attorney. Sentencing Order; App. 35-36.

The defendant filed a timely notice of appeal. Notice of Appeal; App. 38.

Facts

Prior to the trials in this case, the defendant‘s pretrial motion in limine and related matters were considered on several occasions.

Initially, the defendant filed a motion in limine on May 3, 2018. In Paragraph Number 2 of that motion the defense sought a court order "[t]hat the jury not be told at any time by the State or the State's witnesses about any alleged prior bad acts by the Defendant." Motion in Limine filed 5/3/18; App. 11. The State filed a resistance to this motion. Citing *State v. Spaulding*, 313 N.W.2d 878, 880 (Iowa 1981), the State resisted Paragraph Number 2 as follows: "The prior acts with the victim are admissible in order 'to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial'." State's Resistance to Defendant's Motion in limine filed 5/7/18; App. 13. The State also filed a pretrial motion in limine. State's Motion in limine filed 5/7/18; App. 15.

Before the first (and unsuccessful) jury trial in this case, the motions in limine and the State's resistance were considered at a hearing on May 14, 2018. At that hearing defense counsel stated as to Paragraph Number 2 in his motion: "As far as 2 is concerned, Your Honor, I think the State may be right as far as that the State's allowed to bring up allegations that include this certain victim and this certain Defendant. Otherwise, it's the defense position that the jury not be told at any time about any alleged prior bad acts of the Defendant."

Mot. in Limine Tr. p.3, lines 10 – 17. The State apparently did not resist barring evidence of prior bad acts which did not involve T. G. Mot. in Limine Tr. p.4, lines 8 – 20. The trial court overruled Paragraph Number 2 “as to the propensity of any acts between the alleged victim and the Defendant." It was sustained as to other cases of bad acts. Mot. in Limine Tr. p.5, line 19 – 23.

At that pretrial proceeding, the defense never discussed, or even suggested, that it might wish to present evidence of any alleged prior acts involving the defendant and T.G., but except in the context of an alleged false claim of abuse. No mention was made of any alleged incident occurring in Carroll, Iowa.

The first trial commenced on June 26, 2018. But before the presentation of evidence that day, the presiding district court judge – who was different from the judge who earlier had considered the motions in limine – considered these matters anew. Trial Tr. Vol. I p. 1, lines 3 – 12; p. 3, lines 1 – 11; p. 7, line 25 – p. 9, line 1; p. 11, line 11 – p. 17, line 22. At that proceeding, the State advised the court of T. G.’s assertion that a “prior incident” involving her and the defendant had occurred in Carroll, Iowa, whereas the crime in this case was alleged to have occurred in Audubon, Iowa. The State asserted that

while evidence of the Carroll incident would be admissible under *State v. Spaulding* because it involved the same parties, it had chosen to not present that evidence. Trial Tr. Vol. I p. 7, line 25 – p. 8, line 13. When the court asked the defense if it intended to develop evidence regarding that incident, the defense stated it did not intend to do so. Trial Tr. Vol. I p. 8, line – p. 9, line 1.

After further argument was made regarding aspects of the motions in limine, the court ruled on them. Except for Paragraph Number 7 of the defense motion, all defense requests were sustained – including Paragraph Number 2, which sought exclusion of any and all evidence of prior bad acts by the defendant. Trial Tr. Vol. I p. 14, line 1 – p. 15, line 2.

Neither the State, nor the defense, presented or attempted to present at the first trial evidence of any incident having occurred in Carroll, Iowa. However, that trial ended in a mistrial when the jury became deadlocked and could not reach a verdict. Order filed 6/28/17; App.17.

The second jury trial began on October 30, 2018. Before the start of evidence, the trial court ruled that the defendant's motion in limine was granted. Order filed 10/31/18.

As its first witness, the State called T. G., the minor female the defendant was charged with having sexually abused. At the time of the second trial she was 15 years old, was in eighth grade, and was living with her biological mother in Estherville, Iowa. Trial Tr. Volume II (contains pretrial hearing, October 30-31, 2018 trial, and sentencing hearing – hereafter Trial Tr. Vol. II) p. 202, line 16 – p.203, line 20. However, in July of 2014 T.G. began living in Audubon, Iowa, with her father's girlfriend Kimberly (they later married).[1] T.G. was 10 years old at that time and she began fifth grade the fall of 2014. Trial Tr. Vol. II p. 204, line 3 – p. 206, line 13; p. 210, lines 2 – 9. Other children lived in the home T. G. shared with her father and Kimberly, consisting of other siblings of T. G., a child her father and Kimberly had together, as well as Kimberly's children from an earlier relationship. Trial Tr. Vol. II, p. 206, line 11 – p. 207, line 23.

The defendant is Kimberly's grandfather, but he became a surrogate father for her. The two had a close relationship. At the time of the charged crime, the defendant's house was two blocks down, on

[1] This witnesses is referred to by her first name Kimberly because her married surname is the same as T.G.'s.

the same street, from the house where T. G., her father, Kimberly and the other children lived. Trial Tr. Vol. II p. 288, lines 3 – 4; p. 290, line 10 – p. 291, line 19. The defendant was 72 years old at the time of the second trial in October 2018 and would have been 68 years old in 2014 when T.G. began living in Audubon. Trial Tr. Vol. II p. 343, lines 4 – 7.

T. G. testified she often visited the nearby home where the defendant and his wife, Ruby, lived. Sometimes she walked there, and sometimes Kimberly dropped her off. The defendant would help her with her homework and she would help Ruby bake. Despite the absence of any actual familial relationship, T.G. came to call the defendant “Poppa" and to call Ruby “Grandma Ruby." Trial Tr. Vol. II p. 210, lines 18 – 22; p. 211, line 9 –p. 212, line 25; p. 299, 8 – 12. Apparently, sometimes she would visit the defendant and his wife alone, while other times other kids in the family would accompany her to the home. Trial Tr. Vol. II p. 213, lines 4 – 18.

Although the record indicates the defendant bought gifts for other children in the family, he bought T.G. more gifts, and bought her items not purchased for any of the others. She did not ask for the gifts. Trial Tr. Vol. II p. 218, line 20 – p. 221, line 11; p. 241, lines 5 –

9; p. 299, lines 13 – 18. He only bought gifts for the other children "[o]nce in awhile." Trial Tr. Vol. II p. 303, lines 1 – 3.

T. G. testified that the defendant would, at times, hug and kiss her. This made her uncomfortable because he would kiss her "[o]n the lips." Trial Tr. Vol. II p. 222, line 18 – p. 223, line 16.

T. G. lived in Audubon, Iowa, from July 2014 until late August 2016. Trial Tr. Vol. II p. 293, lines 20-25; p. 294, line 18 – p. 296, line 12. She testified about one specific incident of sexual abuse which occurred during that period of time. She had gone to the defendant's home one day to bake with Ruby. Defendant was in the living room. Trial Tr. Vol. II p. 224, line 2 – p. 225, line 12. After the baking was finished, Ruby went to a bedroom and T.G. went to the living room, where the defendant was sitting in a recliner chair. Trial Tr. Vol. II p. 225, lines 17 – 23; p. 226, lines 18 – 22: p. 228, lines 11 –12. One of the other children, who was four years younger than T.G., was also present in the home. For awhile, T. G. and this child took turns playing games apparently on a computer tablet, as T. G. sat on the couch and the other child sat on the floor. Trial Tr. Vol. II p. 206, line 22 – p. 207, line 4; p. 208, lines 1 – 4; p. 227, lines 2 – 22. When not

playing on the tablet, T. G. watched television. Trial Tr. Vol. II p. 227, lines 22 – 25.

At some point, the defendant changed positions, leaving his recliner to sit next to T.G. on the couch. Trial Tr. Vol. II p. 228, lines 8 – 19. T.G. testified as to what happened next: "Mr. Donohue put his hand down my pants." Trial Tr. Vol. II p. 229, line 20 – 21. The witness then described how the defendant's hand went underneath her underwear, touching what she referred to as her "naughty zone"; by that, she meant the area in front of her body where she goes to the bathroom. T.G. then felt the defendant penetrate her with his finger, and further felt his finger moving "in and out." Trial Tr. Vol. II p. 229, line 25 – p. 230, line 22. T.G. said nothing at the time because she was scared. At one point the defendant "just stopped." T.G. then left. She testified that defendant's act of penetrating her was against her will. Trial Tr. Vol. II p. 232, lines 22 – 25. At that time, she never told anyone about what the defendant had done to her, and she kept it a secret for a period of time. Trial Tr. Vol. II p. 231, line 16 – p. 232, line 21.

Either Kimberly or T.G.'s father called police on August 19, 2016, because they had learned of an incident involving one of the

other female children living in the home, and not T. G. Trial Tr. Vol. II p. 206, line 22 – p. 207, line 16; p. 294, lines 18 – 24. Audubon Police Officer Coby Gust visited the home that same day in response to the call. He spoke with Kimberly and the child at issue – he did not speak with T. G. on that occasion. Trial Tr. Vol. II p. 311, line 1 – p. 312, line 10. The officer returned six days later on August 25 to speak with siblings of the girl at issue, and at that time spoke with T.G. Trial Tr. Vol. II p. 295, lines 6 – 11. Kimberly was sitting next to T. G. on the living room couch when the officer spoke with her. At that time the officer asked T.G. if the defendant had ever done anything to her which made her uncomfortable. Except for telling him that the defendant had kissed her, the girl failed to report any improper conduct. As she testified at trial, she failed to report the sexual abuse because Kimberly was present, the defendant was her grandfather, and the two of them had a close relationship. As a result, T.G. feared Kimberly would not believe her. Trial Tr. Vol. II p. 233, line 14 – p. 234, line 8; p. 281, lines 14 – 16; p. 295, lines 12 – 18; p. 312, lines 15 – p. 313, line 3.

The police investigation initially launched to investigate an incident involving one of the other children, and not T.G.,

nevertheless resulted in her being interviewed by Amy Scarmon of the Mercy Child Advocacy Center in Sioux City, Iowa. Trial Tr. Vol. II p. 235, lines 11 – 23; p. 317, line 25 – p. 318, line 2. Scarmon's testimony at trial reflected she was an experienced forensic interviewer of child sexual abuse victims, having received training in that field and having conducted approximately 3,000 interviews of alleged sexual abuse victims. Trial Tr. Vol. II p. 318, line 17 – p. 321, line 1. Ms. Scarmon interviewed T.G. on August 30, 2016. At that time T. G. advised her she had been sexually abused by the defendant. This was the first time the girl had told anyone. Trial Tr. Vol. II p. 235, line 24 – p. 236, line 13; p. 324, lines 6 – 8.

The defense had deposed T. G. in November of 2017. Trial Tr. Vol. II p. 242, lines 1 – 3. During cross-examination at trial, the defense attempted to ask T. G. whether she recalled discussing during her deposition an incident that had happened in Carroll, Iowa. After she replied, "Yes," the State objected. Trial Tr. Vol. II p. 256, line 17 – 25.

A hearing outside the jury's presence then took place. Trial Tr. Vol. II p. 257, lines 19 – 20. Defense counsel stated that in her deposition T. G. "spoke at length about an incident in Carroll, Iowa of

the defendant inappropriately touching her there, and we were attempting to explore that here today, Your Honor." Trial Tr. Vol. II p. 258, lines 3 – 8.

In resistance, the prosecutor stated that at the first trial it been agreed that evidence of the Carroll incident would not be presented. Counsel believed there had been an agreement by the parties at the first trial to not develop this evidence, which he had also believed carried over to the second trial. As a result, the prosecutor did not ask T.G. about this matter during direct examination. Trial Tr. Vol. II p. 258, lines 9 – 20; p. 259, lines 2 – 18. Nor did the prosecutor believe the State's questioning of T. G. had opened the door to this evidence. While the prosecutor agreed he had asked her if abuse by the defendant had occurred more than once, that question was limited to events at the defendant's home in Audubon, Iowa. Trial Tr. Vol II p.258, line 21 – p.259, line 1.

Furthermore, the prosecutor argued that evidence of an incident in Carroll was not relevant to prove the charge on trial, as it occurred in a different county. While case law would allow the State to present the Carroll matter as prior bad acts evidence, the State chose not to do so. Trial Tr. Vol. II p. 259, line 19 – p. 260, line 6.

Nor, according to the prosecutor, would such evidence constitute proper impeachment. Trial Tr. Vol. II p. 260, lines 6-11.

In reply, defense counsel urged the State had opened the door to this evidence. Defense counsel also asserted that despite both parties having decided to not introduce the evidence at the first trial, there was no similar agreement for the second trial. Counsel further stated: "There is no motion in limine regarding this matter as far as – we're not trying to hide the ball." Trial Tr. Vol. II p. 260, line 17 – p. 261, line 5.

The court then took the matter under advisement, but also told the parties further record could be made the next day on the question. Trial Tr. Vol. II p. 261, lines 12 – 18. At that hearing the next morning, again outside the jury's presence, the State asserted that the defense inquiry into the Carroll incident was barred by the court's ruling on June 26, 2018, which granted the defendant's motion in limine as to such evidence. Trial Tr. Vol. II p. 262, lines 19 – 25; p. 263, line 10 – p. 264, line 23; p. 265, lines 2 – 8. The prosecutor also asserted the rape-shield law barred such evidence from the defense because no issue of consent was present in this case. Trial Tr. Vol. II p. 264, line 24 – p. 265, line 25. Furthermore, the prosecutor indicated there was

no compliance with the notice provision of the rape-shield law. Trial Tr. Vol. II p. 265, lines 20 – 23.

In response, the defense urged that the ruling on the defense motion in limine only covered “prior bad acts" and the Carroll incident occurred after the alleged crime in this case. The defense again argued the State had opened the door to the evidence. Trial Tr. Vol. II p. 266, line 2 – p. 267, line 2.

The court sustained prosecution objections to the evidence. First, the court ruled that an inquiry into the Carroll incident would violate the rape - shield law. Second, the order granting the defense motion in limine did apply – the other bad act need not occur before the charged crime, but just must be “in the past.” The court also ruled the State had not opened the door to the evidence. Trial Tr. p. 268, lines 1 – 19.

The defense made no representation at that time that its purpose in questioning the girl about the Carroll incident was to support a claim that T.G. had made a false claim of sexual abuse. Nor did the defense make an offer of proof, such as by introducing portions of the deposition relevant to the Carroll incident.

The defense did cross-examine T.G. about her lack of recall regarding when the sexual abuse at the defendant's home occurred. She could not recall if it occurred on a school night, could not recall what time of year it was, and could not recall what grade she was in at school. Trial Tr. Vol. II p. 241, lines 14 – 25. However, child sex abuse expert Amy Scarmon testified about "the dynamics of sexual abuse involving children." Her testimony was general in nature and she stated to the jury she was not offering an opinion on whether T. G.'s account was truthful. Trial Tr. Vol. II p. 324, lines 1 – 5; p. 327, lines 1 – 5. She testified that child sex abuse victims often do not recall details of the attack. They may remember some details, but not others. Furthermore, the witness agreed with the prosecutor that children "struggle with time, sequence and dates." Children are less concerned with such matters. Trial Tr. Vol. II p. 328, line 23 – p. 329, line22; p. 336, line 18 – p. 337, line2.

Witness Scarmon also testified about why children often fail to timely report acts of sexual abuse. Reasons for delayed reporting by children include fear others may not believe them, concern there may be adverse consequences for them or their family, and because "[t]hey don't know what to expect by telling." Trial Tr. Vol. II p. 330, line 20

– p. 331, line 4. Delay in reporting is "typically the norm." Trial Tr. Vol. II p. 330, lines 8 - 11.

The witness also described for the jury the concept of grooming of intended child victims by perpetrators. It involves the buying of gifts and extending special privileges, as a means of building trust. Trial Tr. Vol. II p. 333, lines 6 – 23.

After the State rested its case, the defense moved for judgment of acquittal. Defense counsel argued there was no evidence the defendant had performed a sex act, or that any act was perpetrated by force or against the will of T.G. Trial Tr. Vol. II p. 339, line 24 – p.340, line 15. After this motion was denied, the defense put on its case, calling the defendant to the stand. He denied the crime. Trial Tr. Vol. II p. 354, lines 10 – 20. Following the defendant's testimony, the defense generally renewed its motion for judgment of acquittal, without further elaboration. The motion was denied. Trial Tr. Vol. II p. 364, lines 14 – 22.

The court then conducted a jury instruction conference. The defense objected to Instruction Number 20. The objection was not specific, apparently only urging the court to solely rely on "the model jury instructions." Trial Tr. Vol. II p. 366, line 6 – p. 367, line 5. The

court denied this objection, finding the instruction to be proper based on the recent decision in *State v. Barnhardt*. Trial Tr. Vol. II p. 367, lines 6 – 10.

Further facts will be discussed below when relevant to the State's arguments.

ARGUMENT

I. The District Court Acted within Its Discretion when it Prohibited the Defense from Cross-Examining T.G About a Claimed Separate Incident of Sexual Abuse by the Defendant.

Preservation of Error

T.G. was deposed before the trials in this case. During cross-examination of the complainant at the second trial, the defense asked her whether she recalled discussing during her deposition an incident that happened in Carroll, Iowa. After she replied," Yes," the State objected. Trial Tr. Vol. II p. 242, lines 1 – 3; p. 256, lines 17 – 25. Outside the presence of the jury, defense counsel stated the following: "Your Honor, in the deposition that [T.G.] had given November 2017, she spoke at length about an incident in Carroll, Iowa of the defendant inappropriately touching her there, and we were attempting to explore that here today, Your Honor." Trial Tr. Vol. II p. 258, lines 3 – 8. The defense made no attempt to further develop

what such evidence might be, and neither T.G.'s deposition nor any portion of it was made part of the record in this case.

After argument of the parties, the court ruled the defense could not question T. G. about any incident occurring in Carroll. The court ruled that the questioning was barred by the defendant's motion in limine, which had been granted before trial. The court also determined that the evidence was barred by Iowa Rule of Evidence 5.412, the rape-shield law. Finally, the court rejected the defense argument the State had opened the door to the evidence. Trial Tr. Vol. II p. 268, lines 1 – 19.

The defendant now challenges the court's ruling on several grounds. As argued below, his claims have been waived. His assertion that his claims were preserved by filing a timely notice of appeal is incorrect. *Friedrich v. State*, No. 10-1250, 2011 WL 2112783, at *2 (Iowa Ct. App. May 25, 2011).

First, the defendant argues the defense motion in limine did not preclude cross-examination of the complainant in this case about the incident in Carroll. Defendant's Brief at 13 – 14. Prior to the presentation of evidence in the second trial, the district court granted all paragraphs of the defendant's earlier motion in limine, including

Paragraph 2 which sought exclusion of any evidence of the defendant's prior bad acts. Motion in Limine filed 5/3/18; App. 11. Order filed 10/31/18. At that time the defendant did not resist barring evidence of any other bad acts or crimes, and never asserted the defense wished to question T.G. about the Carroll incident. Trial Tr. Vol. II p. 192, lines 9 – 22. While later during the second trial defendant did challenge application of the motion in limine, he did not do so on the ground here asserted. The defendant appears to argue on appeal this evidence was admissible under *State v. Spaulding*, 313 N.W. 2d 878, 880 (Iowa 1981), allowing evidence of an uncharged sexual crime when it involves the same victim. He claims he had a right to present evidence of his own prior act, as the State had no standing to object. Defendant's Brief at 13 – 14.

However, the defendant failed to make that argument in the trial court, neither raising it when the court granted the motion in limine, nor doing so later when the defense sought to cross examine T.G. At that time the defendant only asserted the motion in limine ruling had no application because the Carroll incident was not a true "prior bad act," as it occurred after the crime on trial. Trial Tr. Vol. II p. 266, lines 2 – 9. Therefore, the argument on appeal has been

waived. *See State v. Taylor*, 310 N.W. 2d 174, 178 (Iowa 1981) (claim not raised in the district court was waived on appeal.). Furthermore, his failure before the presentation of evidence to partially withdraw or contest granting the motion in limine as it related to bad acts evidence precludes his later attempt to escape the consequences. *See Jasper v. State*, 477 N.W. 2d 852, 856 (Iowa 1991) ("Applicant cannot deliberately act so as invite error and then object because the court has accepted the invitation.").

Finally, the State believes the defendant has waived this claim, as well as his other claims, for failure to make a sufficient offer of proof. Counsel merely advised the court that the defense wished to question the complainant about the Carroll incident, without any specific development as to what that would involve. Trial Tr. Vol. II p. 258, lines 3 – 4. An offer of proof may be made through a professional statement of counsel. *See State v. Brewer*, 247 N.W. 2d 205, 212 (Iowa 1976) (a professional statement is allowed "to establish a record of matters peculiarly within the knowledge of an attorney"). However, it must be sufficient to support a claim. One of the purposes for an offer proof is "to provide a meaningful record for appellate review." Thus, a sufficient offer is necessary to preserve error. *State v.*

Buchanan, 800 N.W. 2d 743, 753 (Iowa Ct. App. 2011). Here, defense counsel's terse statement merely identified the claimed incident he wished to question the complainant about, without any additional, more specific information regarding her deposition testimony. This was insufficient to preserve error. *State v. Taylor*, 310 N.W. 2d at 177 – 78 (where defendant was tried for murder of his wife, his claim he should have been allowed to present evidence of her extramarital affair as supporting provocation was waived, as offer of proof failed to establish he was aware of the affair when he shot her).

Iowa Rule of Evidence 5.412 – commonly referred to as Iowa's rape-shield law – is an exception to the usual rule that relevant evidence is admissible. Thus, evidence of a complaining witness's past sexual behavior is generally barred. *State v. Clarke*, 243 N.W. 2d 158, 160-61 (Iowa 1984); *State v. DeLong*, 2019 WL 2144638, at *3 (Iowa Ct. App. May 15, 2018). The defendant asserts on appeal the trial court erred when it found the evidence at issue was barred by the rape-shield law. He contends this law is inapplicable because he intended to develop evidence that T.G.'s report of an incident in Carroll was false. Defendant's Brief at 12 – 14. The State agrees the rape-shield law does not apply to false claims of sexual crimes. *See*

State v. Baker, 679 N.W. 2d 7, 12 (Iowa 2004). However, while the defense argued generally in the district court, without elaboration, that the rape- shield law did not apply, it did not state it wished to develop the evidence to support a claim of a false report. Trial Tr. Vol. II p. 266, lines 10 – 14. Consequently, this argument has been waived. *State v. Taylor*, 310 N.W. 2d at 178. The defendant also argues that even if the rape-shield law generally applies, preclusion of evidence must give way when it would violate a defendant's constitutional rights. He now asserts he was denied his state and federal constitutional rights to confrontation. Defendant's Brief at 15. Again, this claim was not made in the district court and is waived. *Taylor*, 310 N.W. 2d at 178.

Finally, the defendant argues the State opened the door to the evidence the defense sought to develop about the Carroll report. Defendant's Brief at 15. The defendant did assert that claim in the district court. Trial Tr. Vol. II p. 260, line 17 – p. 261, line 5; p. 266, lines 15 – 22. However, the claim is waived for failure to make a sufficient offer proof, as previously argued.

Standard of Review

Rulings on admissibility of evidence, including under the rape-shield law, are reviewed for an abuse of discretion. *State v. Alberts*, 722 N.W. 2d 402, 408 (Iowa 2006); *State v. Glessner*, 572 N.W. 2d 562, 563 (Iowa 1997). The district court will be affirmed unless the "court exercise[d] its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Mitchell*, 568 N.W. 2d 493, 497 (Iowa 1997). To the extent a constitutional question is presented, review is de novo. *Id.* at 499.

Merits

Even if the merits of the defendant's claims are reached, they should be rejected because he has failed to show any denial of his rights. His conviction should be affirmed.

A. Motion in Limine Ruling

Paragraph 2 of the defendant's motion in limine asked the court to bar the State from presenting evidence of any alleged prior bad acts of the defendant. Motion in Limine filed 5/3/18; App. 11. That motion was considered by a judge more than once, being heard at a pretrial hearing by one judge, and then considered anew by another judge before the first trial, and then before the second trial which ended in conviction. Both before the first, and also before the second trial, the

court granted the defendant's request to bar evidence of other bad acts. Mot. in Limine Tr. p. 5, lines 19 – 23. Order filed 6/26/18; App. 19. Order filed 10/31/18. During the later hearing on the defense request to cross – examine T.G. about the Carroll incident, the defense asserted the in limine order did not apply because that alleged incident occurred after the crime charged in this case; so, it was not really evidence of a "prior bad act." Trial Tr. Vol. II p. 266, lines 2 – 9. The district court found this argument unpersuasive and barred the questioning. Trial Tr. Vol. II p. 268, lines 1 – 19. This matter is now waived, as the defendant's failure to urge it on appeal constitutes abandonment. *See State v. Rosewall*, 239 N.W. 2d 171, 173 (Iowa 1976). However, if it is now considered, this Court should conclude the district court was correct. *See State v. Munz*, 355 N.W. 2d 576, 583 (Iowa 1984) (evidence of other crime was admissible even though it occurred after the crime on trial); *Sams v. State*, 201 Ga. App. 109, 410 S.E. 2d 330, 331 (Ga. App. 1991) ("Independent crimes do not have to occur prior to the offense(s) of which appellant is being tried to be admissible as other crimes or similar transactions."). And, as for the claim unpreserved in the district court that the State lacked standing to object, it had every right to seek compliance with the in

limine ruling the defendant sought, especially in light of Iowa's rape-shield law, as next discussed.

B. Rape-shield Law

Iowa's rape-shield law bars reputation or opinion evidence of the complaining witness's "past sexual behavior" and also "substantially limits admissibility of evidence of specific instances of a complainant's past sexual behavior." *State v. Alberts*, 722 N.W. 2d at 408. Limited exceptions exist when the evidence is relevant to show the source of semen or other physical evidence, to support a consent defense, or because preclusion would violate the defendant's constitutional rights. Iowa R. Evid. 5.412 (b) (A), (B) and (C). Neither the source of semen or other evidence, nor a defense of consent, are questions in this case. As for the issue of constitutional rights, the defendant made no showing below, nor makes one now, as to how his constitutional right of confrontation required the evidence he sought. His unpreserved constitutional claim, if considered, is insufficient for relief. *See State v. Clarke*, 343 N.W. 2d at 161 (rejecting defendant's claim his constitutional right of confrontation required admission of evidence covered by rape-shield law, where the proffered evidence

was not “sufficiently relevant to overcome the policies favoring its exclusion").

As previously noted, the State agrees the rape-shield law does not apply to false reports of sexual abuse. *See State v. Baker*, 679 N.W. 2d at 12. However, even if the defendant’s unpreserved claim in this regard is considered, it should be rejected. The rape-shield law provides a particular procedure, requiring a proponent of an exception to file a motion at least 14 days before trial (unless questions of newly discovered evidence or a “newly arisen” issue are present in the case). The proponent of the evidence must “[f]ile with the motion an offer of proof that specifically describes the evidence and states the purpose for which the evidence is to be offered." Rule 5.412 (c) (1) (A) and (C). This procedure was not followed in this case, as the prosecutor noted to the court before it found the evidence barred by the rape-shield law. Trial Tr. Vol. II p. 265, lines 20 – 23; p. 268, lines 1 – 19. These requirements apparently apply even when the defendant wishes to develop evidence of a false report. *State v. Alberts*, 722 N.W. 2d at 412, n.3. The defendant’s failure to make a record showing that T.G. had in fact made a false complaint defeats this claim, if now considered. *See Id.* at 409.

The defendant's failure to give notice before trial of his desire to seek an exception to the rape-shield law is especially egregious because the parties had agreed before the first trial that no evidence of an incident in Carroll would be presented, and the defendant waited until cross-examination of T.G. to surprise the State. Trial Tr. Vol. II p. 258, lines 9 – 20; p. 259, lines 2 – 18.

C. Opening the Door Rule

Finally, if defendant's claim that the State opened the door to this evidence is considered, that argument should be rejected. The defendant argues the State opened the door to evidence of the Carroll incident by virtue of a statement made during opening statement, as well as by brief testimony during direct examination of T. G. Defendant's Brief at 15. Of course, a party's conduct at trial, such as questions it poses to a witness, may open the door to responsive evidence sought by the other side. *See Stringer v. State*, 522 N.W. 2d 797, 800 (Iowa 1994). However, as correctly found by the district court, the prosecutor's opening statement and the direct testimony of T.G. briefly referencing more than one act of abuse, were nevertheless confined to events occurring at the defendant's house in Audubon. Thus, the door was not opened to any other incident, such as one in

Carroll. Trial Tr. Vol. II p. 196, lines 12 – 22; p. 223, line 17 – p. 224, line 1; p. 268, lines 10-- 19.

For all the above reasons, this Court should reject defendant's claim that the trial court erred in barring him from cross-examining the complaining witness about an incident in Carroll.

II. The District Court did not Err in Submitting Jury Instruction Number 20, but even if the Instruction was Improper the Defendant was not Prejudiced.

Preservation of Error

The district court submitted Jury Instruction Number 20, which advised the jury as follows: "There is no requirement that the testimony of a victim of sexual offenses be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." Inst. No. 20; App.29. The court modeled this instruction on the instruction recently approved in *State v. Barnhardt*, No. 17 – 0496, 2018 WL 2230938 (Iowa Ct. App. May 16, 2018). Trial Tr. Vol. II p. 367, line 6 – 10. The instruction at issue in *Barnhardt*, also a prosecution for child sex abuse, provided: "The law does not require that the testimony of the alleged victim be corroborated." 2018 WL 3230938, at* 1, 4.

The defendant argues that the instruction in this case is erroneous for two reasons. First, he appears to argue it is erroneous because, essentially, the instruction varies from the instruction in *Barnhardt*. Unlike this case, in *Barnhardt* the instruction is silent on the identity of the crime which need not be corroborated. Defendant's Brief at 18 – 19. Second, the defendant urges the instruction is improper because it refers to the plural "sexual offenses," whereas only one offense was charged in this case; he believes the prejudice was exacerbated because the complainant briefly testified she had been abused more than once. Defendant's Brief at 19 – 20.

The defendant has waived his claims. The State agrees he did lodge an objection at trial to the instruction he now challenges. Although not entirely clear, the defense at the instruction conference appears to have objected to Instruction Number 20 merely on the ground it is not included in "the model jury instructions." Trial Tr. Vol. II p. 366, line 22 – p. 267, line 5. Neither the instruction in this case, nor the instruction in *Barnhardt*, is included in the model Iowa Criminal Jury Instructions. The defendant failed at the instructional conference to object that the instruction erroneously identified the charge in this case, or that it erred in using the plural word "offenses"

and not the singular. Thus, these claims have been waived. *See State v. Morrison*, 368 N.W 2d 173 (Iowa 1985) (claim the court erred in issuing an instruction at all was waived where defendant at trial really objected to its wording, and not its submission).

The defendant also urges error was preserved by his filing a timely notice of appeal. Defendant's Brief at 17. Although timely, the notice of appeal did not preserve error in this case. *Friedrich v. State*, No. 10–1250, 2011 WL 2112783, at* 2 (Iowa Ct. App. May 25, 2011).

Standard of Review

Challenges to instructions submitted to the jury are reviewed for correction of errors of law. Even if an instruction was erroneously submitted, prejudice must exist for reversal of the case. Prejudice is present "when jury instructions mislead the jury or materially misstate the law." *State v. Benson*, 919 N.W. 2d 237, 241 – 42 (Iowa 2018). The Court has also indicated that when a jury instruction is erroneous, prejudice will be presumed unless the record affirmatively establishes its absence. *State v. Ambrose*, 861 N.W. 2d 550, 554 (Iowa 2015). In evaluating these matters, the Court must consider "the jury instructions as a whole rather than in isolation to determine whether they correctly state the law." *Benson*, 919 N.W. 2d at 242.

Merits

An instruction which advises the jury that the testimony of sexual abuse victims need not be corroborated is an accurate statement of the law. *State v. Knox*, 536 N.W. 2d 735, 742 (Iowa 1995). Thus, Instruction Number 20 is an accurate statement of the law, and merely because it is not included in the model Iowa Criminal Jury Instructions does not affect its propriety. *State v. Lindsey*, 302 N.W. 2d 98, 104 (Iowa 1981) ("Whether a trial court uses its own language or a uniform instruction, the instruction must adequately cover the legal principles involved, as raised by the particular facts of the case."); *State v. Tensley*, 249 N.W. 2d 659, 662 (Iowa 1977) ("However the rule is clear the trial court is not bound to any model or form in wording instructions.").

Nor does the instruction improperly give undue prominence to certain evidence, to the detriment of consideration of other evidence. When considering whether instructions which singled out evidence relevant to the question of intoxication were improper, the Court in *State v. Milliken* quoted the following:

> "Examination of our prior decisions involving instructions containing recitations of facts or circumstances which have probative force upon issues tendered, reveals that instructions

> reciting facts militating against one party, without a recitation of facts favorable to his contention, are improper and erroneous; and likewise reveals that instructions which gives undue prominence to evidentiary facts to be determined by the jury is erroneous, as it thereby unduly magnifies the importance of the particular testimony thus selected for specific mention."

204 N.W. 2d 594, 596 (Iowa 1970) (quoting *State v. Proost*, 225 Iowa 628, 635– 6, 281 N.W. 167, 70 (1938)). The instruction here does not offend these principles, but merely correctly advised the jury that T. G.'s testimony need not be corroborated and may alone be the basis for a finding of guilt. *See State v. Knox*, N.W. 2d at 742. The instruction was proper.

Although the defendant's complaints on appeal need not be addressed due to waiver, it is all too clear they are insufficient for relief. The defendant's complaint that Instruction Number 20 refers to "sexual offenses," while the *Barnhardt* instruction is silent on the type of crime at issue, does not make a persuasive claim for reversal. The jury in this case knew that the crime at issue was sexual abuse and knew that T.G.'s testimony concerned that crime. Merely putting a label on the obvious can be neither error nor prejudicial. *See Miller v. State,* 828 So. 2d 445, 447 (Fla. 4th Dist. App. 2002) (in case where

a portion of a jury instruction concerned a matter not in dispute, Court noted "[g]iving an instruction on a matter which is not in material dispute is properly viewed as mere surplusage and not a matter of fundamental error").

Nor is there a basis for reversal because the instruction referred to “sexual offenses" and not the singular "sexual offense.” The defendant apparently fears use of the plural misled the jury into the concluding he had committed multiple acts of sexual abuse. Defendant’s Brief at 19 – 20. For instance, the defendant notes the prosecutor asserted in opening statement that the defendant had repeatedly abused T.G., but that only a few incidents stood out in her mind. Also, during the State’s examination of the complainant, right before the prosecutor asked her about the specific incident of sexual abuse in this case, he elicited from her brief testimony that it had happened more than once. Trial Tr. Vol. II p. 196, lines 12-22; p. 223, line 17 – p. 224, line 4.

However, the court had admonished the jury before opening statements that statements of counsel did not constitute evidence and should not be considered as such. Trial Tr. Vol. II p. 194, lines 9 – 17. Moreover, any potential for confusion from the prosecutor’s opening

statement was undercut by the State's later closing argument, as the prosecutor made statements emphasizing that *one* act of sexual abuse had been proved. Trial Tr. Vol. II p. 371, line 21 – p. 373, line 14; p. 375, line 10 – p. 376, line 13; p. 377, line 16 – p. 378, line 23; p.380, lines 12 – 15; p. 385, lines 5 – 7. Any possible risk of jury confusion was thus eliminated. *See State v. Williams*, 315 N.W. 2d 45, 55-56 (Iowa 1982) (Court finds prejudicial effect of prosecutor's improper statement during witness questioning was eliminated by the trial court's admonition to disregard it); *State v. Poppe*, 499 N.W. 2d 315, 317 – 18 (Iowa Ct. App. 1993) (rejecting claim counsel was ineffective for not objecting to prosecutor's assertions in opening statement of personal opinion of guilt, where prosecutor also made a later statement which moderated the earlier statements).

Furthermore, with only a few inconsequential exceptions, the instructions as a whole – especially the marshaling instruction – made clear to the jury it was to consider the defendant's guilt of only one criminal act, regardless of the statement of the prosecutor and T.G.'s answer on direct examination that she had been abused more than once. Jury Instructions: Introductory Instruction No.1; Nos. 14 – 15, 17 – 18; App. 21, 26-28. In view of this, the defendant's claim on

appeal is unpersuasive. *See State v. Martin*, 383 N.W. 2d 556, 560 – 61 (Iowa 1986) (mere mention of alternative dismissed charge in one of jury instructions was not prejudicial, where instructions as a whole made clear to the jury what offense it actually was to consider).

For these reasons, even if the defendant's claims are reached, they must be rejected and the defendant's conviction be affirmed.

III. The District Court Correctly Overruled the Defendant's Motion for Judgment of Acquittal Because the State Presented Substantial Evidence that he had Sexually Abused a Young Girl.

Preservation of Error

In his motion for judgment of acquittal, the defense specifically asserted the State had failed to prove the defendant had performed a sex act and failed to prove he had done so against T.G.'s will or by force. Trial Tr. Vol. II p. 340, lines 3-15. This motion preserved the present claim on appeal that the State failed to prove both elements of the crime. *State v. Crone*, 545 N.W. 2d 267, 270 (Iowa 1996) (to preserve error for appeal motion for judgment of acquittal must identify specific elements of the crime which are challenged on appeal).

Standard of Review

"Challenges to the sufficiency of the evidence are reviewed for correction of errors of law." *State v. Hansen,* 750 N.W. 2d 111, 112 (Iowa 2008). In applying that standard, the appellate court considers the sufficiency of the evidence to support the verdict. *State v. Gay*, 526 N.W. 2d 294, 295 (Iowa 1995). “Sufficient or substantial evidence is such evidence as could convince a rational trier of fact that defendant is guilty beyond a reasonable doubt." *Id.*

Merits

When reviewing a sufficiency claim, the appellate court considers all the evidence and not just the evidence supporting guilt. *State v. Sutton*, 636 N.W. 2d 107, 110 (Iowa 2001). Nevertheless, the reviewing court views “the evidence in the light most favorable to the verdict." *State v. Gay*, 526 N.W. 2d at 295. "Direct and circumstantial evidence are equally probative." Iowa R. App. P. 6.904 (3) (p). Further, the appellate court will “accept as established all reasonable inferences tending to support [the verdict]." *Gay*, 526 N.W. 2d at 295. When reviewing the evidence, the appellate court normally defers to the fact finder’s assessment of witness credibility unless the testimony is sufficiently undermined by inconsistency, self-contradiction and

absurdity. *State v. Smith*, 508 N.W. 2d 101, 102-103 (Iowa Ct. App. 1993).

In arguing the evidence of guilt was insufficient, the defendant complains there is “no physical evidence of any act" committed by him. He remonstrates that the only evidence to support the conviction is T.G.’s testimony. Defendant’s Brief at 22. Of course, corroborating evidence is unneeded and a defendant’s sexual abuse conviction may rest solely on testimony of the victim. *State v. Hildreth*, 582 N.W. 2d 167, 170 (Iowa 1990). While the defendant alleges the victim’s account is vague and imprecise because she was unsure exactly when the crime occurred (defendant’s brief at 22), such matters are insufficient for reversal. *Id.* As the State’s expert in this case testified, child victims often do not recall some details of the attack, including time and date. Trial Tr. Vol. II p. 328, line 23 – p.329, line 22; p.336, line 18 – p.337, line 2. And, the fact T.G. did not readily report the crime, or denied anything improper had occurred when a police officer first spoke with her, is understandable. The State’s expert testified generally that child sex abuse victims typically fail to timely report such crimes. Trial Tr. Vol. II p. 330, line 8 – p. 321, line 1. Furthermore, T.G. testified she was reluctant to

report the crime to the police officer who came to her home because her father's girlfriend, Kimberly, was present, and the defendant is her grandfather. T.G. feared she would not be believed. Trial Tr. Vol. II p. 233, line 14 – p.234, line 8; p. 281, lines 14-16; p. 295, lines 12-18; p. 312, line 15- p. 313, line3. While the State does not believe the failure to earlier report the crime undermines the evidence to any degree, any arguable question thereby raised was for the jury to resolve and not this Court. *See State v. Smith*, 508 N.W. 2d at 102 – 103 (appellate court normally defers to fact finder's assessment of witness credibility unless the testimony is sufficiently undermined by inconsistency, self-contradiction and absurdity).

Defendant also complains evidence was insufficient to show that any improper act was done by force or against the victim's will. In doing so, he notes there is no evidence that T.G. "told Donahue to stop, said no, pushed his hand away, or otherwise provided any indication that the alleged interaction was against the will of T.G." Defendant's Brief at 23. This point is not well taken. A sexual abuse victim is not required to physically resist a sexual assault, nor is the victim required to verbally protest an assault. All that is required is evidence that otherwise supports finding the act was against the will

of the victim. Evidence of fear is sufficient. *State v. Bauer*, 324 N.W. 2d 320, 322 (Iowa 1982). T.G. provided clear and unequivocal testimony that the defendant inserted his hand beneath her underwear and then digitally penetrated her vagina. He moved his finger in and out. The girl did not protest because she was scared. She was 11 or 12 years old at the time. Trial Tr. Vol. II p. 203, lines 10-13; p. 204, line 3 – p. 206, line 13; p. 225, line 3 – p. 231, line 1;

Substantial evidence supports the guilty verdict.

CONCLUSION

The defendant's conviction for sexual abuse should be affirmed.

REQUEST FOR NONORAL SUBMISSION

The State disagrees with the defendant's request for oral argument. The State believes that oral argument is unnecessary, as the issues are fully addressed in the briefs and can be decided without elaboration. In the event the court grants the defendant argument, however, the State asks to be heard as well.

Respectfully submitted,

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