IN THE COURT OF APPEALS OF IOWA

No. 0-312 / 09-1175
Filed June 30, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY ORLIN RUMELHART,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Jeffrey Rumelhart appeals his convictions for second- and third-degree sexual abuse. **AFFIRMED.**

Christopher Kragnes of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, Steve Foritano and Andrea Vitzthum, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

PER CURIAM.

Jeffrey Rumelhart appeals his convictions for one count of sexual abuse in the second degree in violation of Iowa Code section 709.1 and 709.3(2) (2008) and four counts of sexual abuse in the third degree in violation of Iowa Code section 709.1 and 709.4(1). On appeal, Rumelhart claims the district court erred (1) in failing to give a specific jury instruction on "genitalia," (2) in failing to give an appropriate response to a jury question, (3) in failing to admonish the jury as to inadmissible witness testimony, and (4) in failing to give his proposed jury instruction on "reasonable doubt." Rumelhart further asserts (5) insufficient evidence was presented to convict him of sexual abuse in the second degree, (6) his constitutional rights to a fair trial were violated, and (7) the cumulative effects of the court's rulings denied him a fair trial. We affirm.

I. Background Facts and Proceedings

Rumelhart is the adoptive father of the victim, A.L.R. He began living with A.L.R., her mother, June, and A.L.R.'s brother, when A.L.R. was approximately two years old. A.L.R. testified that when she was eleven years old, Rumelhart began rubbing lotion on her back, which within a few months progressed to rubbing her chest and thighs. A few months after that, A.L.R. testified that Rumelhart began to "put his fingers inside [her] vaginal area." She confirmed in her testimony that this activity occurred when "she was still 11 going on 12." There were also incidences when Rumelhart masturbated in front of A.L.R. and instructed her to watch. At age twelve, these interactions led to Rumelhart forcing A.L.R. to perform oral sex on him. She testified she did not want to do it, but she "thought she had to" as he often used her cooperation in his sexual

desires as a prerequisite for allowing A.L.R. to participate in her normal school or social activities. At age twelve, Rumelhart started having vaginal intercourse with A.L.R.

At age fourteen, A.L.R. disclosed to her mother what Rumelhart was forcing her to do. Her mother in turn, told A.L.R.'s biological father, Rick Erickson, who contacted the police. When the police interviewed A.L.R., she denied any abuse, later testifying that she did not want to break up her family nor have Rumelhart carry out his threat to commit suicide, should the "family secret" be revealed. June remained silent. The abuse continued for the next three years. On Rumelhart's direction, A.L.R. began taking birth control pills in July 2007, following a pregnancy scare. Not long afterward, A.L.R. discontinued taking the pills and Rumelhart started using condoms.

Initially, when A.L.R. started telling a few friends at church that she was being sexually abused, she accused Erickson of the abuse, because "[Rumelhart] attended church there, and I didn't want any problems caused there." Eventually, in 2008, A.L.R. confided in friends about the sexual abuse, and admitted Rumelhart was the perpetrator; her friends eventually told the police. A.L.R. explained to the police that about a month prior, Rumelhart had discarded a condom on the side of the road after engaging her in intercourse. The police were able to locate a condom, the contents of which matched Rumelhart's DNA.

Trial was held in February 2009. After the close of the evidence, Rumelhart moved for a judgment of acquittal, which the district court denied. The jury found him guilty of one count of sexual abuse in the second degree and four

counts of sexual abuse in the third degree. The district court denied his motion for new trial. Rumelhart appeals.

II. Motion for Judgment of Acquittal

At the close of evidence, Rumelhart made a motion for judgment of acquittal as follows:

> I would like to make a motion for directed verdict or judgment of acquittal, and this motion—the Court has permitted us to belatedly make this motion as though it were made at the close of the State's case.
>
> The reason why I'm asking for a motion for judgment of acquittal or directed verdict, Your Honor, is because I believe that the evidence so far even in the light most favorable to the State does not generate a jury question whatsoever. It's for those reasons I respectfully ask for a directed verdict of not guilty. And I also by this reference incorporate the same motion at the close as if the defense—as if all the evidence has been closed.

The motion was denied, but Rumelhart asserts it was sufficient to preserve error for several specific issues now raised in this appeal. We disagree, and will discuss each claim in turn.

A. Excluded Evidence

Testimony at trial included that A.L.R. had suffered extreme hair loss, brought on by the stress she suffered while enduring Rumelhart's sexual abuse. Rumelhart asserts the district court erred in excluding evidence concerning A.L.R.'s knowledge of Erickson's sexual orientation, which he asserts was so unsettling to A.L.R. that it could have led to the hair loss. He also claims evidence of Erickson's sexual abuse of A.L.R.'s brother should have been admitted. By suppressing this evidence, Rumelhart asserts a due process violation, claiming he was denied a fair trial.

Rumelhart claims he preserved error by his offers of proof and his motion for judgment of acquittal, arguing he need not specifically refer to the Due Process Clause in order to preserve a constitutional issue for appeal. However, even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal. *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003); *see also In re Detention of Hodges*, 689 N.W.2d 467 (Iowa 2004) ("[A]n appellate court will consider grounds not precisely raised in a motion for directed verdict where the record indicates the trial court, counsel, and both parties had no doubt what the grounds for the motion were and these grounds were obvious and discussed thoroughly in the court below."). There is no record that the parties argued and the court considered a due process violation, nor that it was obvious from the in-chambers discussions. Therefore, with no record or ruling on any such claim, Rumelhart has waived this constitutional claim, and has preserved only an evidentiary challenge as to the court's exclusion of evidence.

Where a party challenges the district court's exclusion of evidence, appellate review is for an abuse of discretion. *State v. Tejeda*, 677 N.W.2d 744, 753 (Iowa 2004). Rumelhart asserts A.L.R.'s knowledge of Erickson's sexual orientation caused her to become "depressed and stressed out," which caused her to suffer hair loss, and affected her overall feelings toward sexual relations. Rumelhart argues this evidence was relevant and should not have been excluded. Evidence is "relevant" if it makes "the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Relevancy refers to its probative value in

relation to the purpose for which it is offered. *State v. Clay*, 213 N.W.2d 473, 477 (Iowa 1973).

Social worker, Susan Gauger, diagnosed A.L.R. with severe posttraumatic stress disorder. Rumelhart argues testimony from Gauger as well as various witnesses, including dermatologist, Dr. Steven Harlan, who discussed A.L.R.'s severe hair loss, linked A.L.R.'s stress to Erickson.[1] The court allowed Rumelhart to introduce only evidence of "the general and family situation she was not happy with," but not Erickson's homosexuality. Rumelhart was allowed to pursue questioning as to A.L.R.'s initial accusation that it was Erickson, not Rumelhart, who had sexually abused her. He was also allowed to admit testimony from A.L.R.'s brother as to Erickson physically assaulting him with a metal spatula. The district court determined Erickson's sexual orientation was not relevant. We find no abuse of discretion in the district court's refusal to allow this testimony and agree it was not relevant to the issue of whether Rumelhart had sexually abused A.L.R.

B. Sufficiency of the Evidence

Rumelhart next asserts insufficient evidence was presented to convict him of sexual abuse in the second degree. He specifically asserts a lack of proof that A.L.R. was under the age of twelve when the alleged "sex act" occurred under section 709.3(2). To preserve error for appellate review on a claim of insufficient evidence, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal. *State v. Greene*, 592 N.W.2d

[1] During the testimony of Dr. Harlan, Rumelhart made no offer of proof with reference to the cause of the stress and A.L.R.'s hair loss.

24, 29 (Iowa 1999); *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). However, "we recognize an exception to the general error-preservation rule when the record indicates that the grounds for a motion were obvious and understood by the trial court and counsel." *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). We have reviewed the record relevant to the motion for judgment of acquittal, (as set forth above) and conclude Rumelhart's counsel did not state the specific grounds for error that he now claims, nor distinguish between the five separate counts. The record does not allow us to infer that the grounds for the motion were clearly understood by the trial court and all counsel; therefore, error was not preserved on this issue.

Regardless of error preservation, we would find there was sufficient evidence that A.L.R. was under the age of twelve when the alleged "sex act" occurred. A.L.R. testified to the following:

> Q: I think you already testified that he started with his hands underneath your shirt. Was that one occasion? A: Yes.
>
> Q: What would happen in the next occasion? A: Eventually it led to him from just touching my back to my chest and then my vaginal area.
>
> Q: Did he say anything while he was touching you? A: Just that I was pretty.
>
> Q: When he touched your vaginal area, and I have to ask this, I guess, but what did he do with his fingers? A: He just rubbed it at first.
>
> Q: So he would put his fingers on your vaginal area? A: Yes.
>
> Q: Did these activities progress? A: Yes, it did.
>
> Q: What would happen next? A: The next instance or next thing he did?
>
> Q: The next thing he did. A: It eventually went to where he put his fingers inside my vaginal area.
>
> Q: And how long was it from when he first started to lift up your shirt that he—to where he put his fingers inside you? A: I don't know exactly the exact time, but probably over a couple of months possibly.

> Q: Okay. All right. This would have been activity that occurred while you were still 11 going into 12? A: Yes.

C. Witness Testimony

Rumelhart next argues the district court erred in failing to admonish the jury as to inadmissible witness testimony. He again asserts that by making the general motion for directed verdict and judgment of acquittal, he preserved this issue for appeal. We disagree. Rumelhart neither requested the jury be admonished as to testimony he asserts was inadmissible, nor made a motion for mistrial based upon any such improper suggestion to the jury. *See State v. Griffin*, 386 N.W.2d 529, 535 (Iowa Ct. App. 1986) (explaining that when defense counsel fails to request that the jury be admonished, or make a motion for mistrial based upon such improper suggestion to the jury, defendant waives argument of being denied a fair trial). We find Rumelhart waived this issue for our review.

III. Jury Instructions

Rumelhart next asserts the court erred in three respects regarding its instructions to the jury and how the court responded to a specific question from the jury. Error preservation again plagues two of the issues now raised.

A. Proposed Jury Instruction

Rumelhart submitted a proposed jury instruction, which the district court chose not to use; he asserts this caused him prejudice.[2] A district court's refusal

[2] The jury instruction given at the time of trial was then uniform instruction 100.10, and excluded the below third paragraph.

> The burden is on the State to prove (name of defendant) guilty beyond a reasonable doubt.

to submit a jury instruction is reviewed for correction of errors of law. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). The standard of review for jury instructions is whether prejudicial error by the trial court has occurred. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999). When examining whether a failure to provide a single jury instruction is prejudicial, a single jury instruction "will not be judged in isolation but rather in context with other instructions relating to the criminal charge." *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). Rumelhart sought to have a "beyond a reasonable doubt" model jury instruction submitted to the jury rather than the uniform instruction proposed by the State. The court responded, "If I'm understanding correctly, the Supreme Court has not yet reviewed the proposed model instruction now offered by the Bar Association in the language you have." The court went on to decide:

> [B]ased upon my reading of the law, number one, that the model instruction as proposed by the Iowa State Bar Association, number one, is not binding upon this Court. The Court does not have to—of course, that is not precedent to this Court . . . the proposed

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> A reasonable doubt is one that fairly and naturally arises from the evidence in the case, or from the lack or failure of evidence produced by the State.
>
> *A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.*
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
>
> But if, after a full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.
>
> (Emphasis added).

> instruction by the State is the instruction that has been approved and used by this state for quite some time. *State v. McFarland*, and Iowa Supreme Court case, approved the instruction. That case has not been reversed or modified in any way, shape or form. So it's my intent to use the instruction that has been in use since *McFarland* and before.

We are reluctant to disapprove uniform instructions and generally prefer they be followed by trial courts. *State v. Holtz*, 548 N.W.2d 162, 164 (Iowa Ct. App. 1996); *see State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). Rumelhart was seeking an instruction not yet approved by the Iowa Supreme Court, and the district court used the uniform criminal jury instruction approved at the time of trial. Rumelhart argues the instruction given, "does not state that the standard is greater than the civil standard, or 'a real possibility that he is not guilty.'" Beyond this assertion, he did not demonstrate how the instruction given caused him prejudice. With no further analysis as to why we should reverse Rumelhart's convictions based upon giving an instruction then approved by our supreme court, we find the instruction given was not only adequate but also a proper statement of the burden of proof as of the time of trial.

B. Jury Instruction Definition

As discussed below, during deliberations, the jury sent a note to the court, expressing some confusion in their distinguishing between second- and third-degree sexual abuse. In both instruction twenty,[3] setting forth the elements of

[3] The elements of sexual abuse in the second degree, as defined in instruction twenty are:

> 1. On or about December, 2002-September 12, 2003, the defendant performed a sex act with A.L.R.
> 2. The defendant performed the sex act while A.L.R. was under the age of 12.

second-degree sexual abuse, and instruction twenty-one,[4] setting forth the elements of third-degree sexual abuse, the court used the phrase "defendant performed a sex act."[5] Rumelhart now asserts the district court erred in failing to instruct the jury on the definition of "genitalia,"[6] so that "the jury would have had thorough and accurate instructions of which to base its decision." The State again argues Rumelhart's failure to object did not preserve error for our review. Generally, error in jury instructions is waived if the error is not presented to the district court, "specifying the matter objected to and on what grounds" followed by a ruling. Iowa R. Civ. P. 1.924; *State v. Maghee*, 573 N.W.2d 1, 8 (Iowa 1997). A timely objection to jury instructions in criminal prosecutions specifically alerting the trial court to the basis of the complaint is necessary in order to preserve any error thereon for appellate review. *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988). When the court gave the State and defense counsel an opportunity to discuss the proposed instructions, Rumelhart failed to object to the jury

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[4] The elements of sexual abuse in the third degree, as defined in instruction twenty-one are:

> 1. On or about December, 2002-September 12, 2003, the defendant performed a sex act with A.L.R.
> 2. The defendant performed the sex act by force or against the will of A.L.R.

[5] "Sex act" was defined to the jury in instruction sixteen:

> The term "sex act" as used in these instructions means any sexual contact :
> 1. By penetration of the penis into the vagina or anus.
> 2. Between the mouth of one person and the genitals of another.
> 3. Between the genitals of one person and the genitals or anus of another.
> 4. Between the finger or hand of one person and the genitals or anus of another person.
> 5. By a person's use of an artificial sex organ or a substitute for a sexual organ in contact with the genitals or anus of another.

[6] On appeal, Rumelhart seeks the definition of "genitalia" according to *State v. Martens*, 569 N.W.2d 482, 485-86 (Iowa 1997), as referring "only to the reproductive organs," not the human breast.

instructions' use of the term "sex act" or request the district court include a definition of "genitalia." With no objection lodged before the district court or securing an attendant ruling, we find this issue waived.

C. Jury Question

During deliberations, the jury sought clarification from the court regarding its members' apparent confusion between the second- and third-degree offenses. The court responded that the jury needed to review and reread the instructions. Rumelhart argues the court breached its duty in its answer to the jury by failing to provide additional instructions, again, specifically defining "genitalia."

The parties were summoned upon receipt of the question from the jury. The court stated:

> The note states the following: 'To the court: In count I, we are confused about the difference between second-degree and third-degree offenses. Can we please get clarification? Thank. Not "thanks," but "thank." Then it's signed by the jury foreman and dated the time.
>
> State of Iowa, do you have any response?
>
> MR. FORITANO [prosecutor]: No, Your Honor.
>
> THE COURT: Mr. Kutmus [defense]?
>
> MR. KUTMUS: My suggestion is, Your Honor, that you advise the jury that the records—or the instructions themselves answer this question, and encourage them to review the instructions and that's it.

The court responded to the jury inquiry, "Members of the jury: Please review and reread the instructions." Because Rumelhart suggested and agreed to the very response the court gave, he cannot on appeal complain the court erred. We find Rumelhart waived this issue for appellate review. *See, e.g.*, *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) ("Our preservation rule

requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.").

IV. Cumulative Error

Finally, Rumelhart contends that even if no error standing alone is sufficient to require reversal, the cumulative effects of the district court's rulings denied him a fair trial. *See State v. Carey*, 165 N.W.2d 27, 36 (Iowa 1969). A defendant is not denied a fair trial through the cumulative effect of individual instances of claimed errors by the trial court, where the defendant failed to demonstrate any prejudice from any particular asserted error during the trial. *State v. Hardy*, 492 N.W.2d 230, 238 (Iowa Ct. App. 1992). We conclude that Rumelhart has failed both to cite to error and to demonstrate prejudice such that any cumulative effect denied him a fair trial.

AFFIRMED.