

**IN THE COURT OF APPEALS OF IOWA**

No. 1-412 / 09-1861  
Filed October 19, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JERRY WILSON MOORE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Dickinson County, Nancy L. Whittenburg, Judge.

The defendant appeals his convictions and sentences for second-degree sexual abuse, indecent contact with a child, and child endangerment.

**REVERSED AND REMANDED.**

Edward W. Bjornstad of Bjornstad Law Office, Spirit Lake, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Jason Carlstrom, County Attorney, and Rosalise Olson, Assistant County Attorney, for appellee.

Heard by Eisenhauer, P.J., and Doyle and Mullins, JJ.

**DOYLE, J.**

Jerry Moore appeals his convictions and sentences for two counts of second-degree sexual abuse, one count of indecent contact with a child, and four counts of child endangerment. He challenges certain testimony and evidence admitted by the district court at trial. We reverse and remand for a new trial.

***I. Background Facts and Proceedings.***

In March 2004, Jerry Moore's four young granddaughters, W.M., P.M., A.M., and T.M., came to live with him and his wife, Betty. The children were removed from their mother's care because of her substance abuse problems. Their father, Moore's son Chad, was in prison for sexually abusing the girls' older half-brother. The Moores adopted the girls after their parents' rights were terminated in juvenile court proceedings.

Betty passed away in January 2009. Some paperwork that had been in Betty's possession was given to the Moores' grandson, David. That paperwork documented abnormal sexual behavior by David when he was nine to eleven years old.

David's wife, Kandice, discovered the paperwork and spoke with him about it on February 7, 2009. She "felt there was something that had happened to him by an adult, otherwise he wouldn't have had knowledge of behaviors like that . . . as a child." David admitted he had been sexually abused by Moore when he was a young child.

The couple invited Moore's granddaughters to their house the following week. The girls spent the night and told David and Kandice they were being sexually and physically abused by their grandfather. Kandice called the Iowa

Department of Human Services (Department) the next morning, on February 14, and reported the abuse. A child protective worker with the Department and a police officer arrived at David and Kandice's house later that afternoon. All of the children, except A.M., reported that Moore had touched them inappropriately and hit them. They also said Moore showed them pictures of naked women and people having sex on the computer and in magazines.

A search warrant was executed on Moore's residence that night. Police seized a book with pornographic pictures, multiple pornographic videos, five bottles of sexual enhancement pills, an erection device, two containers of lubricant, and two computers from the residence. Pornographic images were later recovered from the computers.

Moore was arrested and charged with two counts of second-degree sexual abuse for acts performed with W.M., three counts of second-degree sexual abuse for acts performed with P.M., one count of indecent contact with P.M., and one count of child endangerment for each of the four children.

A jury trial began in July 2009. Each of the children testified. Twelve-year-old W.M. testified that when she was nine or ten years old, Moore began touching her "pee-pee" with his fingers and tongue. She stated Moore would sometimes hit her and her sisters with his hands or a fly swatter, occasionally leaving marks. Finally, she testified Moore showed her videos of people having sex on his computer. She said that she often saw P.M. sitting on her grandfather's lap at the computer.

Ten-year-old P.M. testified next. She stated Moore touched her "pee-pee" with his mouth, hands, and "wiener." He would also kiss or suck on her "boobs."

P.M. said Moore occasionally made her touch his “wiener” with her hands. This happened once or twice a week beginning when she was eight or nine years old. P.M. testified that Moore had her look at pictures of naked people on the computer and in magazines while she sat on his lap. He would say things like, “Don’t they look hot?” or ask her if she felt “horny.” He occasionally touched her over her clothes while they looked at the pictures. Like W.M., P.M. testified Moore hit her and her sisters with his hands or a fly swatter.

Eight-year-old A.M. testified after P.M. She said they stopped living with Moore because he did “bad stuff,” like touching her “private area” and hitting her. She said Moore had her look at pictures of people “wearing swimsuits, bra and underwear or bikinis” on his computer.

Seven-year-old T.M. did not testify about any sexual abuse, but she did state Moore showed her pictures of naked people on the computer while she was sitting on his lap.

Each of the girls was interviewed by a forensic interviewer at a child advocacy center. Over defense counsel’s hearsay objections, the interviewer was allowed to testify about statements the children made to her during the interviews, as were the child protective worker and police officer that interviewed the children at the beginning of the case. An advanced registered nurse practitioner who examined the girls in March 2009 also testified. She stated none of the children had physical signs of sexual abuse, with the exception of W.M., who suffered from bacterial vaginosis, a common infection sometimes associated with oral sex. She testified that after the exam, W.M. told her, “Grandpa licked me there, and he touched me there.”

The district court allowed the State to admit into evidence the pornographic book and videos, sexual enhancement pills, lubricant, and erection device found in Moore's home, as well as a video displaying the pornographic images found on his computers. Finally, the court overruled defense counsel's objections to the deposition testimony of David and Kandice Moore, who were unable to be present at trial. That testimony was read in a redacted form to the jury and included evidence that David was sexually abused by Moore when he was a young child.

Following the seven-day trial, the jury returned a verdict finding Moore guilty of two counts of second-degree sexual abuse of P.M., one count of indecent contact with P.M., and four counts of child endangerment. He was found not guilty of the remaining charges.

Moore appeals. He claims the district court erred in (1) allowing David and Kandice Moore's testimony about the prior sexual abuse of David pursuant to Iowa Code section 701.11 (2009), (2) allowing witnesses to testify about statements made by the victims to them during their investigation of the case, and (3) admitting the pornographic pictures and videos, sexual enhancement pills, lubricant, and erection device found in Moore's home.

## ***II. Scope and Standards of Review.***

"A district court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion." *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009); see also *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010) (reviewing district court's ruling regarding admission of prior bad acts evidence for abuse of discretion). Hearsay claims, however, are reviewed for correction of errors at

law. *Paredes*, 775 N.W.2d at 560. Constitutional claims are reviewed de novo. *Cox*, 781 N.W.2d at 760.

### ***III. Discussion.***

#### ***A. Prior Bad Acts Evidence.***

Moore claims the district court erred in admitting evidence of his prior sexual abuse of his grandson, David, under Iowa Code section 701.11(1).<sup>1</sup> That evidence came in through the deposition testimony of David and his wife, Kandice.

David testified that when the children were at his house on February 13 and 14, 2009, he told them about his “sexual abuse when I was a child with my grandfather.” He testified he began living with his grandparents after his father’s death. When he was nine or ten years old, Moore began sexually abusing him. He testified Moore would show him pornographic magazines and masturbate in front of him. He said Moore also taught him “how to play with myself” and then “he gave me oral sex.” Kandice testified she became concerned for the welfare of Moore’s granddaughters after David informed her he had been sexually abused by Moore.

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<sup>1</sup> This section provides:

In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant’s commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

Iowa Code § 701.11(1).

Defense counsel objected to David's and Kandice's testimony, arguing it was irrelevant and constituted inadmissible prior bad acts and hearsay evidence. Counsel also argued admission of the evidence violated Moore's state and federal due process rights. The State responded the testimony was admissible under section 701.11 to show Moore's "modus operandi and pattern of behavior," as well as to explain why David and Kandice "approached the situation in this case the way that they did." The State additionally asserted the evidence was more probative than prejudicial because the sexual abuse described by David "is almost the same, showing them pornography, touched them, made them touch him, had oral sex with them. It's the same—same situation."

The district court agreed with the State and overruled defense counsel's objection to the evidence. The court found as follows:

David's experience mirrors that described by the complaining witnesses and tends to make it more probable that Jerry had a plan for grooming children for sexual activities. David's testimony concerning his prior abuse is relevant.

The court must now consider whether David's testimony, although relevant, is more probative than prejudicial. . . .

. . . Where there are so many similarities between David's experience and the experiences of the complaining witnesses, where the familial relationship between Jerry and David is the same as it is between Jerry and the complaining witnesses, where a similar plan appears for preparation of the child for sexual activity with an adult appears and where similar sexual activity, oral sex, appears between David and Jerry and the complaining witnesses and Jerry, the probative value outweighs any prejudicial effect.

After Moore's trial, the constitutionality of section 701.11 with respect to the admissibility of other sexual abuse involving different victims was addressed

by the Iowa Supreme Court in *Cox*.<sup>2</sup> That case holds “the Iowa Constitution prohibits admission of prior bad acts evidence involving a different victim when admitted solely for the purpose of demonstrating propensity. Instead, the evidence must be relevant to a ‘legitimate issue.’” *Cox*, 781 N.W.2d at 762. Legitimate issues for which prior bad acts are relevant and necessary include those listed in Iowa Rule of Evidence 5.404(b), as well as those developed through Iowa case law. *Id.* at 768.

The State concedes, and it is apparent from the district court’s ruling, that the testimony about Moore’s prior sexual abuse of David was admitted based solely on general propensity. The State’s claims at trial that the evidence was offered to show Moore’s “modus operandi” or “pattern of behavior” do not, in this case, constitute legitimate issues for which prior bad acts are relevant and necessary. See *id.* at 769-70 (rejecting similar claims by the State where evidence demonstrated crimes against different victims were not related but were instead simply “crimes of availability” and where neither identity nor consent was contested). We must accordingly determine whether the error in admitting David’s and Kandice’s testimony at trial was harmless.

***B. Harmless Error.***

“To establish harmless error when a defendant’s constitutional rights have been violated, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* at 771. The State argues the erroneously admitted evidence of Moore’s past sexual abuse of David

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<sup>2</sup> The State agrees *Cox* is applicable because it was decided while this case was pending on appeal.

did not contribute to the jury's guilty verdicts because (1) all four sisters "accused their grandfather of sexual abuse and the counts were being tried together"; (2) the testimony "about the prior abuse itself was brief"; (3) the "jury's ability to parse the evidence was well-documented," as Moore was "acquitted of all sexual abuse counts relating to W.M. and one count involving P.M."; and (4) the jury received a limiting instruction regarding the use it could make of the testimony.

In assessing whether a constitutional error is harmless, we must employ the following two-step analysis:

We first consider all of the evidence the jury actually considered, and then we weigh the probative force of that evidence against the erroneously admitted evidence. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually* rendered in this *trial* was surely unattributable to the error.

*State v. Simmons*, 714 N.W.2d 264, 275 (Iowa 2006) (citation omitted).

Before undertaking this analysis, we observe that in past cases considering the erroneous admission of prior bad acts evidence under the less stringent non-constitutional harmless error analysis, our supreme court has stated:

When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. . . . When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered . . . to suggest that the defendant is a bad person . . . and that if he "did it before he probably did it again."

*State v. Castaneda*, 621 N.W.2d 435, 441-42 (Iowa 2001) (citation omitted)

(reversing sexual abuse and indecent contact convictions where trial court improperly admitted evidence of defendant's prior sexual acts with person other

than the victim). “Empirical studies have confirmed the courts’ fears that juries treat bad-acts evidence as highly probative.” *State v. Sullivan*, 679 N.W.2d 19, 24 (Iowa 2004).

When the prior bad act is similar to the one at issue, as in this case, it is “extremely difficult for jurors to put out of their minds knowledge that the defendant had assaulted the victim in the past and not allow this information to consciously or subconsciously influence their decision.” *State v. Reynolds*, 765 N.W.2d 283, 293 (Iowa 2009) (citation omitted). This is particularly true in settings involving prior sexual abuse with persons other than the alleged victim, where our supreme court has acknowledged “there is a substantial risk that ‘a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment.’” *State v. Reyes*, 744 N.W.2d 95, 102 n.1 (Iowa 2008) (citation omitted). Consequently, even if the trial court gives an instruction limiting the significance of such evidence, “prejudice to the defendant is ‘well-nigh inescapable.’” *Sullivan*, 679 N.W.2d at 24 (citation omitted).

Given the inherently high prejudicial nature of the erroneously admitted testimony in this case, we cannot say it was “so unimportant in relation to everything else the jury considered that there is *no reasonable possibility*” the testimony contributed to Moore’s convictions. *State v. Peterson*, 663 N.W.2d 417, 434 (Iowa 2003) (identifying the foregoing as the key question in the constitutional-harmless error analysis).

Like many sexual abuse prosecutions, the State’s case “boiled down to ‘he-said’ versus ‘she-said.’” *State v. Mitchell*, 633 N.W.2d 295, 299 (Iowa 2001)

(reversing sexual abuse convictions where testimony of other victims regarding prior sexual abuse “spoke to no legitimate fact” besides defendant’s propensity to abuse young girls); see *also Cox*, 781 N.W.2d at 765 (noting that courts have long approved admission of prior bad acts in sexual abuse cases involving children “for at least three reasons, all of which tend toward the same conclusion: that proof of the crime’s occurrence is exceedingly difficult to muster” (citation omitted)). Moore’s primary defense at trial was that his granddaughters fabricated the abuse charges because they did not want to live with him after their grandmother died. The victims’ credibility was accordingly crucial to the State’s case, especially because there was no physical evidence of abuse aside from W.M.’s bacterial vaginosis diagnosis—a common infection sometimes associated with oral sex. David’s and Kandice Moore’s statements regarding Moore’s sexual abuse of David while he was a child were therefore an important piece of evidence for the State, as it bolstered the victims’ testimony.

Furthermore, although all four children testified at trial, the details of Moore’s abuse remained murky. The children’s testimony mostly came in yes or no responses to leading questions from the prosecutor. They were, at times, non-responsive, with the youngest child unable to testify about any abuse at all and the second youngest able to testify only that Moore touched her “private area” and hit her. The State’s evidence was thus geared towards shoring up the children’s testimony, which it attempted to do through the erroneously admitted prior bad acts evidence, as well as through testimony from officials investigating the case regarding out-of-court statements the children made to them. The State also admitted a sizeable amount of pornographic material seized from Moore’s

home. The admission of this evidence heightened the importance of the erroneously admitted testimony as David, like P.M., testified Moore made him look at pornography before touching him inappropriately.

Based on our review of the record, we cannot conclude the force of the other untainted evidence in the record “is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the incorrectly admitted evidence.” *State v. Hensley*, 534 N.W.2d 379, 383 (Iowa 1995) (citation omitted). Nor can we say “the effect of the erroneously admitted statements is so comparatively weak that it can be said that there is no reasonable possibility that such statements might have contributed to the conviction.” *Peterson*, 663 N.W.2d at 435. Our conclusion is reinforced by the fact the jury acquitted Moore of some charges, suggesting the jury had doubts regarding the strength of the evidence against him and thus increasing the importance of the improperly admitted and inherently prejudicial evidence.

We accordingly determine the erroneous admission of David and Kandice Moore’s testimony regarding Moore’s past sexual abuse of David was not harmless beyond a reasonable doubt. We do not express an opinion as to whether the evidence may become relevant to a legitimate issue and be admissible on retrial. See *Cox*, 781 N.W.2d at 771-72. For the same reason, we refrain from expressing an opinion as to the admissibility of the other evidence challenged by Moore on appeal but feel some brief comments are necessary should the issues arise on retrial. See *State v. Hanes*, 790 N.W.2d 545, 552-553 (Iowa 2010).

**C. Additional Issues.**

With respect to the challenged hearsay testimony from the forensic interviewer, child protective worker, nurse, and officer, we observe the State concedes on appeal the district court erred in admitting that evidence under the prior consistent statement exception to the hearsay rule. See Iowa R. Evid. 5.801(d)(1)(B); *State v. Johnson*, 539 N.W.2d 160, 165 (Iowa 1995). It nevertheless urges admission of the first three witnesses' testimony was proper under the medical diagnosis exception. See Iowa R. Evid. 5.803(4). We question this premise, especially with respect to the forensic interviewer and the child protective worker, as there was minimal evidence showing the children's statements to these witnesses satisfied the two-part test for admissibility detailed in *State v. Tracy*, 482 N.W.2d 675, 681 (Iowa 1992).

Finally, while the pornographic material may have been marginally relevant to the State's case against Moore, the large amount of that evidence admitted at trial, including multiple photographs showing where the material was found in the home, may have been unfairly prejudicial to Moore. See *State v. Plaster*, 424 N.W.2d 226, 232 (Iowa 1988) (stating an appellate court "may conclude that unfair prejudice occurred because an insufficient effort was made below to avoid the dangers of prejudice" (citation omitted)). This is particularly true with respect to the numerous pornographic videos, none of which were alleged to have been shown to any of the children. We do, however, agree with the State the sexual enhancement pills, lubricant, and erection device were relevant to refute Moore's defense at trial that he suffered from low testosterone levels and had no libido.

***IV. Conclusion.***

Because we find the erroneously admitted evidence of Moore's past sexual abuse of a different victim was not harmless error, we reverse his convictions for second-degree sexual abuse, indecent contact with a child, and child endangerment and remand for a new trial.

**REVERSED AND REMANDED.**