IN THE COURT OF APPEALS OF IOWA

No. 2-386 / 11-0270
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRENT MICHAEL ROMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Adams County, David L. Christensen, Judge.

Defendant appeals from his conviction and sentences of sexual exploitation of a minor and sexual exploitation by a school employee. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin Parrott and Denise Timmins, Assistant Attorney Generals, Jeffrey Millhollin, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

After trial by jury, Brent Romer appeals his conviction and sentences on five counts of sexual exploitation of a minor and three counts of sexual exploitation by a school employee. He contends the evidence was insufficient to support a finding of guilt on the charges of sexual exploitation by a school employee due to the lack of a teacher-student relationship between him and the three female victims, and because there was no evidence of sexual conduct with L.A. or K.G. as defined in Iowa Code sections 709.3(b) and 702.17.[1] He further argues that the district court erred in denying his motions to sever. Because the evidence was sufficient to support the convictions and the district court did not abuse its discretion in refusing to sever the charges, we affirm.

I. Background Facts and Proceedings

From the evidence presented at trial, a reasonable juror could find the following.

Brent Romer taught elementary school for Cumberland & Masena Community Schools as a substitute, beginning in October 2000, and as a full-time teacher from June 2004 through July 2009. Romer lived in nearby Corning during this time.

In 2005, using the social networking website MySpace, Romer contacted fourteen-year-old R.A., who had previously met Romer when he was a substitute teacher for her elementary school class. Communications took place between Romer and R.A. through the website, and the conversation eventually turned to

[1] All citations are to the current 2011 Iowa Code, as the code in force at the time of the incidents have not been modified in significant way, unless otherwise noted.

sexual topics. Romer obtained R.A.'s cellular telephone number and the two exchanged text messages multiple times per day, some of which were sexual in nature.

While R.A. was visiting a friend of hers who was babysitting at Romer's house, Romer suggested via a text message to R.A.'s friend that the girls use disposable and video cameras in the house to photograph themselves nude. The girls responded by joking that Romer could take pictures of himself. Romer later gave R.A. a photograph of his genitals.

Romer met R.A. in person in February 2006. Romer bought beer, which R.A. drank, and the two kissed. Romer continued to contact R.A. via telephone until they met again in person in July. At that meeting Romer invited R.A. to his house and the two had vaginal intercourse. The two arranged a schedule thereafter that allowed Romer to have secret meetings with R.A. several times per week. The two would meet at a local quarry or at R.A.'s house after her parents were asleep. Romer would provide alcohol to R.A., and would have sex with her on most occasions. Their telephone communications continued on a daily basis. Romer asked R.A. to take nude pictures, though she did not comply.

In early 2008, when she was eighteen years old, R.A. broke off the relationship with Romer, having realized "that [she] didn't need him and [she] didn't have to listen to what he said." She decided to stop seeing Romer, who responded by writing her a letter in which he expressed his desire to continue the relationship. The two continued to communicate but no longer had a sexual relationship. Soon thereafter, R.A.'s mother discovered calendar entries, phone calls, and text messages that evidenced R.A.'s relationship with Romer. She

then confronted R.A. about the relationship. After confirming Romer's identity, she also confronted him.

Romer admitted his intimate relationship with R.A. to her mother, who reported the discovery to her superior at the school where she taught. Because of her emotional state, R.A. underwent counseling, but was not emotionally prepared to go to the police. R.A. reported the relationship to the police in November 2009 after speaking with K.G., another student who described similar encounters with Romer.

In November 2007, fourteen-year-old K.G.visited a friend, fifteen-year-old L.A., who was babysitting at Romer's house. Like R.A., Romer had previously been a substitute teacher for K.G.'s elementary school class. Romer exchanged text messages with L.A. while the girls were babysitting, and suggested they take nude photographs. K.G. began taking photographs of L.A. Romer then returned home and began taking pictures of the girls in poses he suggested. These photos depict L.A. nude from the waist up and K.G. touching L.A.'s breasts with her hand and mouth. Romer left the house about thirty minutes later. From November 2007 until the summer of 2009, K.G. and Romer regularly exchanged text messages, many of which were sexual in nature.

On July 4, 2008, N.S. and L.A., both of whom were fifteen at the time, attended a party at Romer's house along with Z.G., a seventeen-year-old male. The minors consumed alcohol and became intoxicated at the party, and the three went inside Romer's house. Once inside, Romer photographed the teenagers kissing, taking off their clothes, and embracing in sexually explicit ways. Eventually, N.S. and L.A. were wearing only underwear. Some photos depict

Z.G. touching L.A.'s genital area. One other adult was present and is pictured touching N.S.'s breast.

Romer resigned his teaching position and surrendered his teaching license on June 17, 2008. Romer's resignation was accepted and acted upon by the school board at the end of July 2008.

In November 2009, after speaking to K.G. and learning of K.G.'s contact with Romer, R.A. reported Romer's conduct to law enforcement. In March 2010, Romer was charged with five counts of sexual exploitation of a minor and three counts of sexual exploitation by a school employee. A jury trial was held on December 14, 2010, and Romer was convicted on all eight counts.

II. Sexual Exploitation by a School Employee

Romer contends there was insufficient evidence to support a finding of guilt on charges of sexual exploitation by a school employee because (1) there was no school-type relationship between himself and the three female victims, and (2) there was no evidence of sexual conduct with L.A. or K.G. as defined in the relevant statutory provisions.

We review a challenge to the sufficiency of the evidence for errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

A. Sufficiency of evidence—necessity of school relationship.

Iowa Code section 709.15(3) provides that sexual exploitation by a school employee occurs when a pattern or practice or scheme of conduct to engage in any of the conduct described below is found:

> Any sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the school employee or the student. Sexual conduct includes but is not limited to the following: kissing;

> touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act as defined in section 702.17. Sexual exploitation by a school employee does not include touching that is necessary in the performance of the school employee's duties while acting within the scope of employment.

A student is defined as "a person who is currently enrolled in or attending a public or nonpublic elementary or secondary school, or who was a student enrolled in or who attended a public or nonpublic elementary or secondary school within thirty days of any violation of subsection 3." Iowa Code § 709.15(1)(g).

A school employee is "an administrator, teacher, or other licensed professional, including an individual who holds a statement of professional recognition, who provides educational assistance to students."[2] Romer argues that he does not qualify as a "school employee" because no teacher-student or education-based relationship existed between himself and the victims. Due to this lack of a teacher-student relationship, Romer argues that no violation of a protected fiduciary relationship occurred.

To resolve Romer's claim, we must interpret Iowa Code section 709.15(3). We review questions of statutory interpretation for errors at law. *State v. Hearn*, 797 N.W.2d 577, 580 (Iowa 2011). We affirm if the court's fact findings are supported by substantial evidence and the law was correctly applied. *Id.* at 587-88. When confronted with the task of statutory interpretation, our supreme court has stated:

> [O]ur primary goal is to give effect to the intent of the legislature. That intent is evidenced by the words used in the statute. When a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms. In the absence of

[2] Iowa Code section 709.15(1)(f) defines a school employee as "a practitioner as defined in section 272.1(7).

> legislative definition, we give words their ordinary meaning. In interpreting criminal statutes, however, we have repeatedly stated that provisions establishing the scope of criminal liability are to be strictly construed with doubts resolved therein in favor of the accused.

Hearn, 797 N.W.2d at 583 (citations and internal quotation marks omitted).

The interpretation of a statute requires an assessment of the statute in its entirety, not just isolated words or phrases. *State v. Young*, 686 N.W.2d 182, 184-85 (Iowa 2004). Indeed, "we avoid interpreting a statute in such a way that portions of it become redundant or irrelevant." *T & K Roofing Co. v. Iowa Dep't of Educ.*, 593 N.W.2d 159, 162 (Iowa 1999). We look for a reasonable interpretation that best achieves the statute's purpose and avoids absurd results. *Harden v. State*, 434 N.W.2d 881, 884 (Iowa 1989). We strictly construe criminal statutes with doubts resolved in the accused's favor. *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999).

As an individual who held a position of professional recognition and provided educational assistance to students, Romer fell within the statutory definition of school employee at all relevant times. R.A., K.G., and L.A. also satisfy the statutory definition of "student" in section 709.15(1)(g) at all relevant times. However, Romer contends an existing, direct teacher-student relationship is required.

Section 709.15(3) criminalizes "a pattern or practice or scheme of conduct to engage" in "[a]ny sexual conduct with a student." Nothing in the statute requires the student be a current or past student of the school employee or attend school in the same facility as the school employee. By contrast, sexual exploitation by a counselor or therapist defines the "patient or client," i.e., the

protected person, as "a person who receives mental health services *from the counselor or therapist*." Iowa Code § 709.15(1)(e) (emphasis added); *see State v. Gonzalez*, 718 N.W.2d 304, 308-09 (Iowa 2006) (finding a psychiatric nursing assistant to fall within statutory definition of counselor or therapist). However, section 709.15(3) makes no reference to particular teachers or students in relation to one another. Our legislature could well have concluded that a school employee has a higher calling or duty than an ordinary citizen to protect school-age children. Accordingly, we decline to search for a meaning beyond the express terms of the statute to require the alleged victim to be a current or recent student of the school employee.

B. Sufficiency of evidence—sexual conduct.

Romer further argues that no "sexual conduct" took place to satisfy counts seven and eight with respect to K.G. or L.A. *See* Iowa Code § 709.15(3). Romer argues that "sexual conduct" requires some type of physical contact that is sexual in nature. In respect to K.G., there was no evidence of any physical contact by Romer. The only evidence of physical contact with L.A. was the testimony of Z.G. Romer claims Z.G.'s testimony lacked credibility.

The marshalling instructions for counts VII and VIII, instruction numbers 25 and 27, required the State to prove beyond a reasonable doubt that Romer engaged in sexual conduct with K.G. and L.A., respectively. The jury was also instructed, consistent with section 709.15(3)(b), that sexual conduct includes, but is not limited to, the following: kissing, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals or a sex act.

The State alleges Romer engaged in sexual conduct by prompting K.G. and L.A. into various suggestive poses while they were in a state of undress and photographing the girls' poses. The State contends no physical contact is required to establish sexual conduct. Alternatively, if physical contact is required, the State relies upon the testimony of Z.G. who testified that he observed Romer touch L.A.'s breast, on July 4, 2008.

We note that section 709.15(3) does not expressly require physical contact to constitute sexual conduct, though all examples provided in the statute involve some aspect of touching or physical contact. Further, the question of whether physical contact is required to establish sexual conduct as defined in section 709.15(3)(b) has not yet been addressed by our supreme court. However, our supreme court has interpreted the term "sexual conduct" as it applies to sexual exploitation of a dependent adult set forth in Iowa Code section 235B.2(5)(a)(3)(b), which defines sexual exploitation of a dependent adult as "any consensual or nonconsensual sexual conduct with a dependent adult which includes but is not limited to kissing; touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act, as defined in section 702.17." In *Smith v. Iowa Department of Human Services*, 755 N.W.2d 135,138 (Iowa 2008), our supreme court concluded:

> Additionally, there is nothing in the statute that requires a caretaker to affirmatively touch a dependent adult in a sexual manner to commit sexual exploitation. The statutory definition of sexual exploitation hinges on "sexual conduct," and there is no language in the statute that confines the phrase to require the caretaker to affirmatively touch the dependent adult in a sexual manner.

> Instead, "sexual conduct" has a much broader meaning under the statute and requires the actions of the caretaker to be examined in light of all of the circumstances to determine if the conduct at issue was sexual and done for the purpose of arousing or satisfying the sexual desires of the caretaker or the dependent adult.

Because the terminology in section 235B(5)(a)(3)(b) is identical to the language found in section 709.15(3)(b), we conclude our supreme court would similarly interpret section 709.15(3)(b). Consequently, we conclude that "sexual conduct" as it is used in section 709.15(3)(b) does not require physical contact.

Under these facts and discounting the testimony of Z.G., whose recall was called into question, we conclude substantial evidence supports the convictions. A reasonable factfinder could find that in November 2007, K.G. went to Romer's house to help L.G. babysit. Upon Romer's return home, the girls posed in different sexual positions for Romer while he photographed them. Romer suggested various poses by telling them where to stand or how to hold each other. The photographs depict the two girls kissing, embracing, or touching the other's genitals all while in various stages of undress. The act of observing and photographing the girls, while also promoting or encouraging them to pose in sexually suggestive poses with the specific intent to arouse or satisfy the sexual desire of Romer or the girls, provides sufficient evidence of sexual conduct.

IV. Severance or Joinder of Charges.

On April 14, 2010, trial counsel filed a motion to sever counts I through III (which were alleged to have occurred at same time and place, and in the same circumstances) from all others; as well as count IV (different time, place, and circumstance) from the others; counts V and VI (different time) from all others; count VII (different time , place, and victim) from all others; and finally, count VIII

(different time) from all other counts. The district court denied the motion finding that the alleged acts, if proved, were part of a common scheme or plan. At the hearing on the motion to bifurcate, the following colloquy took place:

> STATE: The witnesses in Counts II, III, and VII are all witnesses who would be called to prove up Counts I and IV. And, also, Count IX is the same victim that's the sexual exploitation by a school employee. Count IX, that charge is based on the conduct that occurred previously in Counts I and IV as well as Counts V and VI. And I've laid all this out in my brief, so it does get a bit confusing, but basically, all these witnesses are witnesses in the other crimes.
>
> Furthermore, if you look at the case law, which you'll find in my brief, the State has to prove the defendant's intent on several of these counts. Most of this information would come in anyway. It's not to show prior bad acts, but when we have to show a course of conduct as him being a teacher and exploiting students, all of the information in these counts is going to come in to show that.
>
> So for the reasons based on—found within the State's brief, for purposes of judicial economy—and, also, so we're not having to have victims come in three, four different times to testify at a trial about the same thing—we would ask that these counts all be kept together.

On appeal, Romer argues the district court erred in denying his motions to sever the counts, and that failure to grant these motions was unfairly prejudicial to him. Our review of a refusal to sever multiple charges against a single defendant is for abuse of discretion. *See State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007).

Iowa Rule of Criminal Procedure 2.6(1) permits multiple charges arising from the same or multiple occurrences constituting parts of a "common scheme or plan" to be prosecuted in a single trial, unless the trial court determines otherwise, for good cause shown. "A 'common scheme or plan' requires more than the commission of two similar crimes by a single person." *State v. Delaney*, 526 N.W.2d 170, 174 (Iowa Ct. App. 1994). In short, the offenses must be the

products of a single or continuing motive. *State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000). Factors indicating a common scheme or continuing motive include intent, modus operandi, and temporal and geographic proximity of the crimes. *Id.*

In *Elston*, the supreme court concluded that where "[a]ll of the crimes . . . could be found to have been motivated by [the defendant's] desire to satisfy sexual desires through the victimization of children" and "[a]ll of the transactions allegedly occurred in close geographic proximity" joinder was appropriate because "all charges were part of a common scheme or plan." *State v. Elston,* 735 N.W.2d 196, 199 (Iowa 2007). Here, similar circumstances permit joinder, as each count was part of a larger scheme or plan for fulfillment and sexual gratification of Romer. There was also geographic proximity as many of the offenses occurred at Romer's house or a local quarry.

To prove the district court abused its discretion in refusing to sever charges, Romer bears the burden of showing prejudice resulting from joinder outweighed the State's interest in judicial economy. *Id.* at 199. Iowa Rule of Criminal Procedure 2.6(1) provides for the joinder of counts which constitute parts of a common scheme or plan, stating in part:

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

Our supreme court has held that transactions or occurrences are part of a "common scheme or plan" under Iowa Rule of Criminal Procedure 2.6(1) when they are the "products of a single or continuing motive." *See Oetken,* 613

N.W.2d at 688. In ascertaining whether a "common scheme or plan" exists, "we have found it helpful to consider factors such as intent, modus operandi, and the temporal and geographic proximity of the crimes." *Id.*

The events forming the basis for each of the eight counts against Romer in this case were part of a "common scheme or plan." Iowa R. Crim. P. 2.6(1). Each of the crimes alleged in this case can be found to have been motivated by the satisfaction of Romer's sexual desires through the victimization of minors and students. All of the events occurred in close geographic proximity to Romer's home, and in relatively close temporal proximity. The modus operandi allegedly employed by Romer was similar across each situation. We find no abuse of discretion in the district court's determination that the alleged offenses were part of a common scheme or plan.

V. Conclusion

Romer's conduct in this case constitutes part of a common scheme or plan. The close proximity of these crimes in time and location, involving multiple victims in several counts, constitutes a pattern of behavior and a single continuing motive, permitting all counts to be prosecuted in a single trial. Romer's participation in the events which transpired involving R.A., K.G., and L.A. illustrates the common scheme or plan which he engaged in for his own sexual gratification, fulfilling the requirements of Iowa Code section 709.15(3). Photographing K.G. and L.A. in sexual conduct and sending sexual text messages to each of the three girls constituted a pattern or practice or scheme to engage in sexual conduct. Because substantial evidence supports the

convictions, and the district court did not abuse its discretion in refusing to sever the charges, we affirm.

AFFIRMED.