IN THE COURT OF APPEALS OF IOWA

No. 2-598 / 11-1088
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HEATHER DEANNE MAYFIELD,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Heather Mayfield appeals her judgment and sentence for child endangerment causing bodily injury. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Michael J. Walton, County Attorney, and Melissa Zaehringer, Kimberly Shepherd, and Julie Walton, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

Heather Mayfield's eight-year-old son asserted that his mother kicked him in his face, causing two teeth to pop out. The State charged Mayfield with child endangerment resulting in serious injury. Following trial, a jury found her guilty of the lesser-included offense of child endangerment resulting in bodily injury.

On appeal, Mayfield raises several evidentiary issues, one of which we find dispositive: the exclusion of opinion testimony relating to the child's character for untruthfulness. Our review of the court's ruling is for an abuse of discretion. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999).

I. The Evidentiary Issue

Iowa Rule of Evidence 5.608(a)(1) states in pertinent part: "*a. Opinion and reputation evidence of character*. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness."

Pursuant to this rule, Mayfield's attorney called Mayfield's mother to the witness stand and asked her, "Do you have an opinion as to whether [the child] is someone who sometimes lies?" The prosecutor immediately objected on the ground that the question called for "inappropriate opinion testimony." The district court sustained the objection. Mayfield's attorney then made the following offer of proof outside the presence of the jury:

> Q. . . . [B]ased on your observations of [the child], do you have an opinion as to whether he is someone who sometimes lies? A. He's a little boy. They tell stories from time to time, yes.
>
> Q. Is it your opinion, then, that [the child] is someone who sometimes lies? A. Yes.

> Q. And do you believe [the child's] story that Heather deliberately kicked him in the mouth and knocked out his teeth? A. No.

The district court reaffirmed its prior ruling excluding the evidence. The court reasoned the proffered testimony was not admissible under rule 5.608(a)(1) because "all [the witness] testified . . . is he has told stories on occasion. That has nothing to do with whether or not he has a character or reputation for being untruthful."

Through offers of proof, Mayfield's attorney attempted to elicit similar testimony from three additional witnesses: Mayfield's ex-boyfriend, Mayfield's friend, and Mayfield herself.

Mayfield's ex-boyfriend was asked:

> Q. . . . Based on your experience with [the child], the time you spent with him, do you have an opinion as to whether he is someone who sometimes lies? A. Oh, I know for a fact he lies.
>
> Q. And it would be your opinion that he isn't always truthful? A. Yes.
>
> Q. Do you believe [the child's] story that Heather deliberately kicked him in the face— A. No, I don't.
>
> . . . .
>
> Q. Why don't you believe [the child's] story? A. Because, honestly, I've seen the kid lie about numerous things, up to as simple as putting stuff away and as for getting into trouble for other things.
>
> Q. So you believe the defendant's version of the events? A. Yes, I do.
>
> Q. And how do you believe [the child] got his teeth knocked out? A. Honestly, I think with what happened, I think he fell and smacked his mouth on something.

Mayfield's friend was asked whether she believed the child's story that Mayfield had kicked him in the mouth. She stated, "No, I do not. . . . I just cannot wrap my mind around the fact that somebody that is so loving and caring could even do such a thing. I just don't believe it."

Finally, Mayfield testified the child "quite often tells stories" that are not true.

Mayfield asserts that all this testimony was admissible under rule 5.608(a)(1), as it related to the child's "general character for truthfulness." The State initially responds with an argument not urged before the district court, that the evidence was inadmissible because it was lacking in foundation. *See DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002) (noting evidentiary rulings may be upheld if the evidence could be held inadmissible on any theory, even though not urged in the objections).

We begin with the State's foundational argument. The State contends the proffered testimony did not include certain facts which, in its view, were a prerequisite to admission of the evidence. The State hangs its hat on *State v. Caldwell*, 529 N.W.2d 282, 285 (Iowa 1995), a decision that considered the admissibility of reputation rather than opinion evidence under rule 5.608(a)(1). *See* Iowa R. Evid. 5.608(a)(1) (referring to "[o]pinion *and* reputation evidence of character" (emphasis added)). There, the court set forth a list of "evidentiary facts" that were necessary to admit reputation evidence, including whether the reputation comments came from "a limited group or class as opposed to a general cross-section of the community." *Caldwell*, 529 N.W.2d at 286 (citation omitted) (emphasis removed). The State assumes these facts also are a prerequisite to admission of opinion testimony under rule 5.608(a)(1).

We find no Iowa authority requiring these facts as a foundation for admission of opinion testimony on a witness's character for truthfulness or untruthfulness. And, jurisdictions interpreting language in the comparable federal

rule have declined to extend the foundational requirements for admission of reputation evidence to the admission of opinion evidence. *See State v. Harrington*, 800 N.W.2d 46, 49 n.1 (Iowa 2011) (noting that when our rule of evidence is identical in all relevant respects to its federal counterpart, interpretations of the federal rule are often persuasive authority for interpretations of our state rule).

In *United States v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982), the Eleventh Circuit Court of Appeals categorically stated that "opinion testimony does not require the foundation of reputation testimony." The court explained that reputation witnesses require "sufficient acquaintance with the principal witness and his community in order to ensure that the testimony adequately reflects the community's assessment," whereas opinion testimony "is a personal assessment of character" rather than "community feelings." *Watson*, 669 F.2d at 1382. The court stated opinion testimony was admissible if based on personal knowledge and, because the appellant's witnesses testified from personal knowledge, the district court erred in excluding their testimony for failure to meet the foundational requirement of familiarity with the community. *Id.*; *see also United States v. McMurray*, 20 F.3d 831, 834 (8th Cir. 1994) (affirming admission of witness testimony about defendant's character for truthfulness based simply on foundational showing that witness had "sufficient dealings to provide a rational basis for her opinion"); *United States v. Lollar*, 606 F.2d 567, 589 (5th Cir. 1979) (concluding Rule 608(a) imposed no prerequisite to admission of opinion testimony based on long acquaintance or recent information about witness, two other prerequisites for admission of reputation testimony); *accord State v.*

Morrison, 351 S.E.2d 810, 815 (N.C. Ct. App. 1987) (concluding opinion based on personal knowledge was all that was needed to admit testimony about witness's character for truth); *State v. Dutton*, 896 S.W.2d 114, 118 (Tenn. 1995) (concluding sufficient foundation was established for admission of witness's opinion testimony about character for truthfulness but not for admission of his reputation testimony).

Based on this case law, which we find persuasive, we conclude Mayfield was not obligated to establish the foundational requirements applicable to reputation testimony, including whether the child's stories generated any comments in a general cross-section of the community. Mayfield was simply required to establish that the statements were based on personal knowledge. Mayfield made this showing. *See United States v. Turning Bear*, 357 F.3d 730, 734 (8th Cir. 2004) (noting opinion testimony based on witness's personal knowledge "quite clearly complied with the requirements" of rule 608). Accordingly, we conclude the proffered testimony met the foundational requirements of rule 5.608(a)(1) for admission of opinion testimony concerning a witness's character for untruthfulness.

As a fallback position, the State argues the substance of the proffered testimony was not tied to this particular child as opposed to "any other little boy." To the contrary, the first three character witnesses were specifically asked whether this child lied and they specifically answered yes to the question. Mayfield's testimony was somewhat broader, but she also stated her son often told untrue stories. Because the witnesses spoke directly to this child's character for untruthfulness, the evidence should not have been excluded.

Our analysis cannot end here, as only evidentiary errors affecting a party's substantial rights require reversal. *See State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004). This harmless error standard requires us to presume prejudice and reverse unless the record affirmatively establishes otherwise. *Id.* at 30. The record may affirmatively establish otherwise where there is overwhelming evidence of guilt or where the same evidence is otherwise clear in the record. *See State v. Parker*, 747 N.W.2d 196, 210 (Iowa 2008); *Sullivan*, 679 N.W.2d at 29. Neither circumstance is present here.

After a few hours of deliberating, jurors sent the judge a note stating they were deadlocked. *See State v. Collins*, 69 N.W.2d 31, 35 (Iowa 1955) (stating that "errors which might otherwise be regarded as harmless and unimportant may not be so considered in close cases" (citation omitted)). The court instructed them to continue deliberating. The jurors heeded this instruction but remained conflicted. After some time, they transmitted another note with a question about the marshaling instruction. The court answered the question and again sent them back to deliberate. While the jurors found Mayfield guilty shortly thereafter, their actions confirm this was far from an "overwhelming" case.

Nor was the evidence cumulative. Even though some witnesses corroborated details of the child's testimony, such as the fact that two teeth were found in the bedroom and there was blood in the bathroom, the case hinged on credibility—the child testified to one version of events, while his mother testified to another. *See State v. Elliott*, 806 N.W.2d 660, 670 (Iowa 2011) (stating prejudice can exist even where hearsay evidence was corroborated by other properly admitted evidence). Our supreme court has found prejudice in similar

situations, as have federal courts. *See*, *e.g.*, *Turning Bear*, 357 F.3d at 734–35 (finding exclusion of character evidence prejudicial where "defense focused largely on the lack of believability and reliability of the alleged victims"); *Watson*, 669 F.2d at 1383 (determining excluded character evidence was prejudicial where witness's "credibility was critical to the government's case"); *Elliott*, 806 N.W.2d at 673 (finding improperly admitted hearsay evidence prejudicial because the State's "entire case turned on the credibility" of its witnesses); *State v. Redmond*, 803 N.W.2d 112, 127 (Iowa 2011) (holding trial court's admission of defendant's prior conviction prejudicial because the complaining witness testified to one version of events and the defendant to another).

We conclude the exclusion of the proffered testimony concerning the child's character for untruthfulness was prejudicial and requires reversal.

II. Disposition

We reverse the district court's exclusion of the proffered evidence concerning the child's character for untruthfulness and remand for a new trial.[1]

REVERSED AND REMANDED.

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[1] Mayfield also claims her trial attorney was ineffective in failing to object to testimony that this incident resulted in a founded child abuse report issued by the Iowa Department of Human Services and that she did not participate in the subsequent, mandatory services offered by the department. She contends the evidence is irrelevant. In light of our reversal, we need not address this issue. We simply note this issue may arise again on remand and may necessitate the development of a record.