IN THE COURT OF APPEALS OF IOWA

No. 6-213 / 04-1958
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDALL LEE LAMOREUX,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Stephen P. Carroll, Judge.

Randall Lamoreux appeals from his convictions of third-degree kidnapping and assault with intent to commit sexual abuse. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, and Paul L. Martin, County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

ZIMMER, P.J.

Randall Lamoreux appeals from the judgment and sentence entered by the district court after a jury returned verdicts finding him guilty of third-degree kidnapping and assault with intent to commit sexual abuse in violation of Iowa Code sections 710.4 and 709.11 (2003). He contends the district court erred in excluding evidence at his trial. He also contends the court erred by imposing a fee not authorized by statute at his sentencing. We reverse Lamoreux's convictions and remand for a new trial.

I. Background Facts & Proceedings

Lamoreux and Sharon Bakkum met in early 2003. At that time, they were both residing at the BeJe Clark Residential Facility as a condition of prior criminal sentences. On August 30, 2003, after their respective releases from the facility, Lamoreux invited Bakkum to go drinking and to "the fights." Lamoreux picked up Bakkum at approximately 8:30 p.m., and they drove to the Other Place, a bar and restaurant in Mason City, to meet a third friend, Jason Hoff. Hoff did not show up at the Other Place, so they called Hoff and arranged to meet him at Rookie's bar in Clear Lake. When Hoff did not show up at Rookie's, Lamoreux and Bakkum drove to the "Ultimate Fights" on the outskirts of Mason City at approximately 11 p.m. and stayed until about 1 a.m. Lamoreux then suggested they visit the trailer park home of his friend, Roger Boehmer.

Lamoreux and Bakkum arrived at Boehmer's trailer at approximately 1:30 a.m. Boehmer was at home with Rose Higbee.[1] Lamoreux and Bakkum dispute what occurred in the trailer. Bakkum testified she and Lamoreux kissed

[1] Boehmer and Higbee were friends and coworkers of Lamoreux.

for awhile on the couch, but she pushed him off when he got "rough" in a sexual manner. According to Bakkum, she then refused Lamoreux's demand for oral sex and left the trailer. She claimed Lamoreux asked, "Why wouldn't you let me finish?" Bakkum testified that instead of taking her home, Lamoreux drove her to a gravel road outside the city limits of Mason City. Bakkum stated she fought with Lamoreux while they rode in his truck, and she waved her hand out the window and honked the horn in an attempt to draw the attention of other motorists. She claimed she attempted to grab the steering wheel to force Lamoreux to pull over and let her out. Bakkum remembered feeling a sharp object, possibly a knife, being poked at her side while she rode in the truck. Bakkum stated that Lamoreux stopped the truck, threw her out, pinned her to the ground, and pulled off her clothing.

Bakkum claimed Lamoreux ripped both sides of her underpants when he tore them off her body. She also claimed he shoved a handful of gravel in her mouth when she screamed. According to Bakkum, Lamoreux took off his belt and wrapped it around her neck, attempting to strangle her. Bakkum testified Lamoreux forcibly inserted his fingers into her vagina. She scratched, bit, and hit Lamoreux until she was finally able to escape. Bakkum ran to the truck, where she used Lamoreux's cell phone to call 911.[2] She then picked up her jeans and sweatshirt and ran to the nearest house for help while Lamoreux drove off. She stated she left her underpants at the scene and never saw them again.

[2] The record reveals Bakkum called 911 using Lamoreux's cell phone at 6:16 a.m. She had used the same phone to call her mother-in-law, Kim Rutta, for help at 4:03 a.m. Rutta testified she heard Bakkum crying for help on the line, and then the phone went dead.

Cynthia Shackleton testified that Bakkum pounded on her door at about 6:30 a.m. Bakkum told Shackleton she was hurt and asked for help. Bakkum said she had been in a fight with a friend. Shackleton had Bakkum wait outside while she called the police. When she returned to the door, Bakkum had disappeared.

Bakkum testified she walked back to Mason City by following railroad tracks to avoid Lamoreux. When a deputy sheriff eventually located her, she was filthy and covered with dust, stains, and blood, and she had gravel in her hair. The deputy convinced her to go to the hospital. Medical staff examined her and photographed bruises, scrapes, and other injuries to her knees, elbows, back, buttocks, abdomen, and thighs. Her neck showed bruising consistent with strangulation. DNA testing revealed Lamoreux's blood on Bakkum's jeans, sweatshirt, and bra. Lamoreux's DNA was also found under Bakkum's fingernails.

Lamoreux offered a much different version of the events that transpired. He claimed he and Bakkum had consensual sexual intercourse at Boehmer's trailer. He claimed that after they left the trailer park in his truck, Bakkum's mood suddenly changed and her behavior became erratic. He contended she was argumentative and physically combative with him while they were riding in the truck. He testified he stopped the truck on a gravel road, asked Bakkum to get out, and threw her out of the passenger seat onto her side and back on the gravel when she refused to leave the truck. Lamoreux claimed he left Bakkum on the gravel road. He denied kidnapping or sexually assaulting her.

The State filed a trial information charging Lamoreux with first-degree sexual abuse, first-degree kidnapping, and assault with intent to commit sexual abuse causing serious injury. The case proceeded to jury trial on August 19, 2004, in Cerro Gordo County but ended in a mistrial when Bakkum mentioned Lamoreux's prior criminal record in her testimony. The district court granted defense counsel's request for change of venue, and the trial was moved to Wright County.

Following a second trial, a Wright County jury found Lamoreux guilty of the lesser-included offenses of third-degree kidnapping and assault with intent to commit sexual abuse. The district court sentenced Lamoreux to a ten-year term of imprisonment for the kidnapping conviction, imposed a $1000 fine plus a thirty percent surcharge, and ordered a ten-dollar D.A.R.E. surcharge. On the assault with intent to commit sexual abuse conviction, the court imposed a five-year term of imprisonment, a $750 fine plus a thirty percent surcharge, and a ten-dollar D.A.R.E. surcharge. The sentences were ordered to run consecutively. Lamoreux now appeals.

II. Exclusion of Evidence

Lamoreux complains of three rulings by the district court that resulted in the exclusion of evidence at his trial. He contends the court erred when it refused to admit as evidence a pair of female underpants discovered through independent investigation by the defense. He also asserts the court erred in excluding evidence Bakkum had made prior false accusations of sexual abuse. Finally, Lamoruex claims the court erred in excluding evidence regarding

Bakkum's drug use around the time of the incident as well as testimony from a drug counselor about the general behavior of a methamphetamine addict.

We review evidentiary rulings for the correction of errors at law. Iowa R. App. P. 6.4. Trial courts are granted broad discretion concerning the admissibility of evidence. *Horak v. Argosy Gaming Co*., 648 N.W.2d 137, 149 (Iowa 2002). Discretion is abused when the court exercises discretion on grounds or for reasons that are clearly untenable. *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997). We only reverse a trial court's evidentiary rulings if it abused its discretion in balancing the probative force of the challenged evidence against the danger of undue prejudice or influence. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). With these principles in mind, we address each of Lamoreux's arguments in turn.

A. Underpants

Six days before Lamoreux's second jury trial commenced, the defendant's private investigator walked the route along the railroad tracks that Bakkum had taken after the incident. In an offer of proof made outside the jury's presence, the investigator testified he discovered a pair of Victoria's Secret, size L, women's bikini underpants in the dirt near the tracks. During the offer of proof, the investigator testified he had previously walked the same route without finding any underwear.

In a separate offer of proof, Bakkum testified she wore size "small" underwear. She stated the underpants she wore at the time of the incident were size eight, came from Dollar General, and were yellow with blue flowers all over

them.[3] Bakkum viewed the underpants recovered by the private investigator and stated they did not belong to her.

The State objected to the admission of the underpants and the testimony of the private investigator on grounds of relevance. The district court excluded the underpants as evidence because of their lack of connection to Bakkum. The court found admission of the underpants was a "foundation authentication/ identification problem" under Iowa Rule of Evidence 5.901.[4] The court did not believe "the proper predicate ha[d] been made for admissibility" because "[i]t would allow the jury to totally speculate."

Lamoreux contends the proffered evidence was relevant because the underpants were similar to the ones worn by the victim and contradicted the victim's account that he had ripped off her underpants.[5] Upon review of the record, we find no reason to disagree with the trial court's ruling. The underpants excluded from evidence by the court were discovered by the private investigator near railroad tracks more than a year after Bakkum alleged she was assaulted. The investigator did not notice any underpants when he investigated the same area on a prior occasion. In addition, although the defendant suggests otherwise, the underpants do not match the description of the underpants

[3] When Bakkum gave this description, she was unaware the investigator had found underwear.

[4] Iowa Rule of Evidence 5.901(*a*) states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

[5] The seams of the underpants recovered by the investigator were not ripped.

Bakkum was wearing when she was assaulted.[6] We conclude the district court acted within its discretion in excluding this evidence.

B. Prior Allegations of Sexual Abuse

Lamoreux next contends the court erred in excluding evidence Bakkum had made false accusations of sexual abuse in the past. In order to bolster his claim that Bakkum fabricated the kidnapping and assault, he sought to introduce evidence she had falsely accused her stepfather of inappropriately touching her when she was thirteen years old and that she sued a former employer for sexual harassment in a lawsuit that was later dismissed.

In an offer of proof, Lucille and Edward Henning, Bakkum's mother and stepfather, testified Bakkum accused Edward of sexually abusing her in 1987. The allegation against Edward involved inappropriate touching. When the Iowa Department of Human Services investigated, it concluded the allegation was unfounded. In another offer of proof, Bakkum's former employer, Gary May, testified he fired Bakkum when he discovered she had stolen and forged checks. May testified Bakkum then accused him of sexual harassment in an action apparently brought in small claims court. He could not recall the specific accusations Bakkum had presented at trial and indicated the suit had been dismissed.

The district court excluded testimony from the Hennings and May at Lamoreux's trial. The court concluded false allegations of sexual abuse do not fall under the rape shield law in Iowa Rule of Evidence 5.412. *See State v.*

[6] The underpants found by the investigator are a size large and bear a Victoria's Secret label. Although they are faded by weather, it appears that their original color was white. They have a pink waistband and have pink, green, blue and orange flowers on them.

Baker, 679 N.W.2d 7, 12 (Iowa 2004) (holding that in an appeal from a conviction for third-degree sexual abuse, a trial court abused its discretion in excluding evidence the victim had made a false claim of a sexual encounter with a neighbor). Nevertheless, the court excluded the proffered testimony. The court found the evidence had "minimal, if any, relevance" and "[m]inimal, if any, probative value." The court found the evidence presented by the Hennings was too remote in time to the current incident and described May's testimony as "quite poor" because he was unable to recall much about the sexual harassment lawsuit.

In his brief on appeal, Lamoreux claims the probative value of the prior allegations of sexual abuse outweigh the danger of unfair prejudice because "[t]he verdicts in this case rested largely on the credibility of the victim," and if "the victim was untruthful about earlier incidents, a fact finder may well conclude she was untruthful in accusing this defendant as well."

Upon our review of the record, we find no reason to disagree with the district court's conclusion that the allegation of sexual abuse made by Bakkum against Edward Henning was not relevant to the current sexual assault case. The allegation of inappropriate touching by Bakkum's stepfather does not resemble Bakkum's testimony at trial recounting an allegation of forcible kidnapping and attempted sexual assault. Furthermore, the prior allegation occurred seventeen years prior to trial when Bakkum was just thirteen years old. We conclude the district court acted within its discretion in concluding the Hennings' testimony should not be admitted because it was too remote to meet the threshold of relevance and probative value.

We also agree with the district court's conclusion that May's testimony regarding a dismissed sexual harassment lawsuit had minimal relevance and probative value. In Lamoreux's offer of proof, May testified on direct examination he was unsure whether Bakkum's allegations even involved a sexual attack, and he was unable to recall many relevant details about the sexual harassment lawsuit. Furthermore, Lamoreux offered no evidence to buttress May's testimony, such as the final court order dismissing the lawsuit. We find the court acted within its discretion in excluding May's testimony because the testimony had only minimal relevance and probative value.

C. *Victim's Drug Usage*

Lamoreux sought to introduce evidence Bakkum was a methamphetamine addict and had used methamphetamine the day before the crime. The State moved in limine to exclude this evidence. The defendant made several offers of proof outside the jury's presence regarding the issue of Bakkum's drug use. In an offer of proof, Jason Hoff, an acquaintance of Bakkum, testified he and Bakkum used methamphetamine together in the early morning hours of August 30, 2004.[7] Another offer of proof presented testimony by Jason Robison[8] that Bakkum was a methamphetamine addict and used methamphetamine regularly. Robison claimed he witnessed Bakkum using regularly from the summer of 2002 until he was incarcerated in the spring of 2003. Robison also

[7] At the time Hoff testified, he was incarcerated for forgery, possession of marijuana with intent to deliver, and a drug tax stamp violation.

[8] Jason Robison is Bakkum's ex-husband.

testified Bakkum was short-fused, edgy, and sometimes physically violent when she came down from a drug high.[9]

Lamoreux also made an offer of proof of testimony by Charles Sweetman, a chemical dependency counselor at Prairie Ridge Addiction Treatment Services in Mason City, describing the general behavior of methamphetamine addicts. Sweetman testified a drug user's high from smoking methamphetamine generally lasts eight to twelve hours. Sweetman also testified that when a drug user comes down from a high, he or she may experience mood swings, paranoia, hallucinations, and irritability.

The trial court initially ruled it would allow Lamoreux to offer evidence of drug use by Bakkum. After this ruling, the prosecutor asked Bakkum about her drug use on direct examination at Lamoreux's trial. Bakkum testified she did not use any drugs the night of the assault, and she stated she had last used methamphetamine in November 2002. After the State rested its case, the trial court revisited its prior ruling and excluded evidence of Bakkum's prior drug usage. The court concluded "there was nothing in Mr. Sweetman's deposition to provide a nexus between the drug usage and the event, namely her ability to observe, recall, relate for impeachment purposes." The court also found no nexus between Bakkum's alleged use of methamphetamine twenty-four hours before the assault and her sincerity and ability to observe, recall, and communicate. The court concluded the jury would have the full opportunity to

[9] At the time Robison testified, he was incarcerated for second-degree possession of stolen property.

assess Bakkum's credibility, and it excluded evidence of her drug use under Iowa Rule of Evidence 5.403.[10]

Lamoreux contends the trial court erred in excluding the drug use evidence. He claims the probative value of the drug use evidence far outweighed the prejudicial effect. He asserts the purpose of introducing the evidence was not to "sully the victim's character," but to "show that her recollection and perception of the events may have been tainted by drug use, both short-term and long-term." For the reasons which follow, we believe Lamoreux's argument has merit.

Bakkum was the most critical witness for the State in this case, and her credibility was clearly not beyond question.[11] During her testimony, Bakkum admitted she lied to a state trooper when she was being questioned immediately following the assault. Although she had been drinking earlier in the evening, she told the trooper she had not had any alcohol to drink because she was afraid of getting in trouble while on probation. The record reveals Bakkum testified she could not remember some of the events the night of the assault, and she indicated she might have "blacked out" at one point.

During the State's case, Bakkum admitted she had previously used methamphetamine; however, she stated she last used methamphetamine in

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[10] Iowa Rule of Evidence 5.403 states:

> Although relevant, evidence may be excluded if its probative value 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.

[11] Lamoreux presented several potential motives for the victim to fabricate, including her fear of losing her children because she left them at home alone while she was out with the defendant. The record reveals the victim had been investigated by the Iowa Department of Human Services in the past for leaving her children unsupervised.

November 2002. This testimony certainly implied that her past use of methamphetamine would not have affected her ability to perceive and recall the events which occurred on August 30 and 31, 2003. As we have mentioned, Lamoreux was prepared to offer evidence that Bakkum had regularly used methamphetamine subsequent to November 2002, and that she had used methamphetamine with a friend during the early morning hours of August 30, 2003. Lamoreux also sought to present expert testimony that when a methamphetamine user comes down from a high, he or she may experience mood swings, paranoia, hallucinations, and irritability.[12]

Under the circumstances presented here, we conclude the district court should have permitted the defendant to offer evidence regarding the victim's drug use. This evidence was responsive to the testimony Bakkum offered during the State's case, and it was relevant to the issue of Bakkum's ability to accurately perceive, recall, and relate the events which occurred at the time of the crime charged. We conclude the restrictions which the district court placed on the defendant's presentation of evidence produced a sufficiently high potentional for prejudice that the defendant should be granted a new trial.

III. D.A.R.E. Surcharge

Lamoreux's final contention is the district court did not have authority to order D.A.R.E. fees on both of his convictions because the fees were not

[12] Sweetman testified a methamphetamine user's high only lasts between eight and twelve hours. Even though Lamoreux's other witness claimed the alleged drug use occurred twenty-four hours before the assault, Sweetman testified when a drug user comes down from a high, he or she may experience mood swings, paranoia, hallucinations, and irritability.

authorized by statute. Because we reverse Lamoreux's convictions and remand for new trial, we need not address the court's alleged sentencing errors.

IV. Conclusion

We conclude the district court did not abuse its discretion by excluding the underwear recovered by the defendant's private investigator from evidence. We also conclude the court acted properly in excluding evidence of allegedly false accusations of sexual abuse made by Bakkum against other people. We conclude the court erred by excluding evidence regarding Bakkum's drug use. The defendant should have been allowed to impeach the victim's credibility with respect to her perception and memory of the events at issue. We reverse Lamoreux's convictions of third-degree kidnapping and assault with intent to commit sexual abuse and remand for new trial.

REVERSED AND REMANDED.