IN THE COURT OF APPEALS OF IOWA

No. 6-231 / 05-0630
Filed July 12, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER RYAN LEE ROBY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Christopher Roby appeals his convictions and sentence for second and third-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

HECHT, J.

Christopher Roby appeals his convictions and sentence for second and third-degree sexual abuse. We affirm.

I. Background Facts and Proceedings.

Christopher Roby, who was born in December of 1983, was a childhood friend of Nate Ebetino. When the two boys were still young, Roby became extremely close to the Ebetino family, and a room in the Ebetinos' home was eventually allocated to Roby's use.

S.M., Nate's step-sister, is approximately four and one-half years younger than Roby. She testified that she was awakened in May of 1998 at the age of nine when Roby touched her vagina beneath her underwear.[1] When S.M. informed her parents of the touching, her mother noticed S.M.'s underwear had been torn. Roby denied the alleged touching had occurred, and although law enforcement was not notified, S.M.'s parents decided to preclude Roby's contacts with the Ebetino family for several months.

Roby was eventually allowed to resume his access to the Ebetino family's home on the condition that he not be alone with S.M. The record suggests that this condition was not carefully enforced, however, and Roby soon resumed overnight stays at the home.

S.M. testified that throughout her eleventh year, Roby subjected her to multiple acts of sexual abuse. She testified the incidents were so numerous that she could not relate specific dates, but that each involved Roby touching her

[1] S.M.'s testimony concerning the May of 1998 touching was corroborated by both her parents' and Nate's testimony at trial.

breast or vagina, or forcing her to touch his penis until he ejaculated. S.M. testified that Roby continued such behavior during her twelfth and thirteenth years, noting that some form of abuse occurred virtually every time Roby spent the night at the Ebetinos' home. While she found the conduct disgusting, S.M. did not inform her parents or her step-brother about the resumption of the sexual abuse because she was frightened by Roby and believed she was at fault for failing to prevent it. S.M. also felt conflicted because she "loved [Roby] like a brother," and "didn't want his life to be ruined."

S.M. testified the regular episodes sexual abuse ended when Roby turned eighteen and joined the Navy. She claimed Roby perpetrated a final sex act against her when he forced her to touch his penis while he was on leave during the fall of 2002. Convinced that the abuse would stop only if she told someone, S.M. revealed some of the details of the ongoing sexual abuse to her step-brother's girlfriend in late September of 2002.

When a third-party informed her of the alleged abuse, S.M.'s mother inquired and S.M. disclosed the history of Roby's abusive conduct. When Roby was confronted with the accusations by S.M.'s mother, he refused to discuss them. S.M.'s mother then notified the police.

Roby was charged with four counts of sexual abuse.[2] At the subsequent jury trial in December of 2004, Roby did not present a defense, and was found

[2] Roby was charged with one count of Sexual Abuse in the Second Degree in violation of Iowa Code section 709.3(2) (2003) (sex act with a child who is under the age of twelve, a Class B felony); two counts of Sexual Abuse in the Third Degree in violation of section 709.4(2)(b) (sex acts with a person who was twelve or thirteen years of age, Class C felonies); and one count of Sexual Abuse in the Third Degree in violation of section 709.4(2)(b) (sex act with a person who was fourteen years of age and Defendant was four or more years older, a Class C felony).

guilty of count one, which alleged Roby had performed a sex act with S.M. between December 20, 1999 and July 17, 2000, while S.M. was under the age of twelve; and count two, which alleged Roby had performed a sex act with S.M. between July 18 and December 19, 2001, while S.M. was under the age of fourteen.[3] Roby's motion for new trial, which alleged the jury's verdict was contrary to the law and the evidence, was overruled by the district court.[4] The district court then sentenced Roby to concurrent terms of (1) twenty-five years in prison on count one, and (2) ten years in prison and a suspended fine of $1000 on count two. The district court also entered a no-contact order prohibiting Roby from any contact with S.M. or with the Ebetinos' family home.[5]

Roby appealed his convictions and sentence, alleging the district court erred as a matter of law in (1) applying the incorrect standard in its denial of his motion for new trial, and (2) imposing a no-contact order as part of his sentence. Roby also claimed his trial counsel provided ineffective assistance by failing to object to evidence of prior bad acts not alleged in the trial information.

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[3] The jury returned a verdict of not guilty on counts three and four, which alleged Roby had performed a sex act with S.M. between December 20, 2001, and July 17, 2002; and between July 18 and September 21, 2002 respectively.

[4] The ruling referred to the court's earlier ruling overruling Roby's motion for a directed verdict and motion for judgment of acquittal, in which the court concluded: "Taken in the light most favorable to the State, the court does believe a fact question has been generated for the jury and will overrule the motion for directed verdict." While that was the proper standard for adjudication of a motion for directed verdict, it was not appropriate for the assessment of a motion for new trial. *See State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003) (noting the court is not obliged to view the evidence in the light most favorable to the non-moving party when ruling on a motion for new trial).

[5] The no-contact order was first issued on September 30, 2002, but by its terms, that temporary order terminated at Roby's sentencing and was renewed by order of the district court.

Following oral argument, we concluded we were unable to determine whether the district court had applied the correct standard in overruling Roby's motion for new trial. We therefore remanded this case to the district court with instructions to reconsider the motion under the proper weight-of-the-evidence standard. On remand the district court concluded the weight of credible evidence was not contrary to the jury's verdict. Having retained jurisdiction over Roby's appeal, we now consider his remaining claims.

II. Scope and Standard of Review.

We review Roby's claim that the imposition of the no-contact order constitutes an illegal sentence for correction of errors at law. *State v. Morris*, 416 N.W.2d 688, 689 (Iowa 1987).

We review de novo claims asserting trial counsel's ineffective assistance. *Ledezma v. State,* 626 N.W.2d 134, 142 (Iowa 2001). Claims of ineffective assistance of counsel raised on direct appeal are generally preserved for postconviction relief proceedings so that a sufficient record can be developed, and so attorneys whose ineffectiveness is alleged may have an opportunity to defend their actions. *State v. Allen,* 348 N.W.2d 243, 248 (Iowa 1984). Claims of ineffective assistance of counsel need not be raised on direct appeal to preserve them for postconviction proceedings. Iowa Code § 814.7 (2005). But where such claims are advanced on direct appeal, and the record is adequate to permit our review of them, or where the record permits us to determine whether prejudice resulted from counsel's alleged unprofessional error, we may decide them on direct appeal. *Allen,* 348 N.W.2d at 248.

III. Discussion.

A. No-Contact Order.

Effective July 1, 2003, Iowa Code section 901.5(7A) (Supp. 2003) was amended to allow the imposition of up to a five-year no-contact order for a variety of offenses. If the sentencing court concludes a defendant poses a threat to either the victim, the victim's family, or a witness to the offense, the court may issue such an order whether or not the defendant is placed on probation. *Id*.; *see also* Iowa Code § 709.20(2) (authorizing issuance of no-contact order for violations of sections 709.3 and 709.4). Roby asserts the district court was without authority to issue a no-contact order as part of his sentence because his convictions were based on acts that occurred well before the effective date of the 2003 amendment. Roby contends that because the no-contact order at issue here was not made a condition of his probation, it must be specifically authorized by a statute in effect at the time of the conduct constituting the offense. *See State v. Manser*, 626 N.W.2d 872, 875 (Iowa Ct. App. 2001). We disagree.

Our courts have long held that the protection against ex post facto application of a criminal statute does not extend to civil regulations which are not designed to punish an offender, but rather to protect a vulnerable interest. *See e.g., State v. Seering*, 701 N.W.2d 655, 668 (Iowa 2005) (holding a statute that prohibited sex offenders from living within 2000 feet of an elementary or secondary school or child care facility did not impose criminal punishment for purposes of the ex post facto clauses of the state and federal constitutions); *Schreiber v. State*, 666 N.W.2d 127, 130 (Iowa 2003) (concluding retroactive application of mandatory DNA profiling statute was proper because it did not

constitute criminal punishment but was instead civil in nature). Here, while the fact that Roby is not permitted to have contact with S.M. or her family may present an affirmative burden on his freedom of movement, the no-contact order was clearly imposed to promote the health, safety, and emotional well-being of S.M. and her family. *Seering*, 701 N.W.2d at 668. As such, we conclude Iowa Code sections 709.20(2) and 901.5(7A) are civil in nature and therefore the imposition of a no-contact order alongside Roby's criminal sentence did not violate the ex post facto clauses of either the federal or state constitutions. *See id*. Further, because Roby was sentenced in December of 2004 – well after the amended no-contact statutes were effective – the district court had the necessary statutory authority to impose a no-contact order as part of Roby's sentence. *Manser*, 626 N.W.2d at 875.

B. Prior Bad Acts.

A defendant receives ineffective assistance of counsel when (1) trial counsel fails in an essential duty and (2) prejudice results. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant bears the burden of proving both prongs of the claim by a preponderance of the evidence. *Ledezma,* 626 N.W.2d at 142. To prove prejudice from his trial counsel's alleged breaches of duty, Roby must convince us "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "A reasonable probability is a probability sufficient to undermine [our] confidence in the outcome." *Id*. If Roby

fails to meet his burden with respect to either prong, his claim is without merit and will be dismissed. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Roby contends trial counsel was ineffective for failing to object to the admission of evidence of Roby's prior bad acts, namely the testimony of S.M. and her family concerning the May 1998 fondling incident. The State contends, however, that trial counsel was under no duty to object to this evidence because this court has long recognized a relevant exception to Iowa Rule of Evidence 5.404(*b*)'s general prohibition against the admission of prior bad acts as propensity evidence. We agree.

In *State v. Spaulding*, 313 N.W.2d 878, 880 (Iowa 1981), our supreme court held that "[t]he prior acts with the victim were admissible under a generally recognized exception to [Rule 5.404(*b*)] in order to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial." This exception to rule 5.404(*b*)'s exclusionary rule is applicable to sexual acts involving the same victim occurring both before and after the charged conduct. *State v. Tharp*, 372 N.W.2d 280, 281 (Iowa Ct. App. 1985).

Roby contends, however, that our supreme court signaled its abandonment of the same-victim exception in *State v. Sullivan*, 679 N.W.2d 19 (Iowa 2004). In that case, the State sought over Sullivan's objection to prove the intent to deliver drugs by introducing evidence of Sullivan's involvement in previous, unconnected, and uncharged drug dealing. *Id*. at 27. Cautioning against the unfettered use of "unconnected" but similar prior bad acts evidence to establish mens rea for subsequent conduct, our supreme court concluded the evidence of Sullivan's past drug dealing was inadmissible.

Unlike the uncharged prior bad acts evidence introduced in *Sullivan*, the prior bad acts evidence introduced against Roby was not wholly unconnected to the conduct charged in the trial information. Instead, we believe evidence of the May 1998 conduct described by S.M. and her family was relevant and admissible to prove a pattern of alleged illicit sexual contact between Roby and S.M. that continued unabated for more than four years. Although it is clearly propensity evidence, we believe the exception to 5.404(*b*)'s exclusionary rule announced in *Spaulding* suggests that where the prior bad acts involve the same victim, the danger of undue prejudice to which a criminal defendant is exposed by the admission of propensity evidence that so concerned the court in *Sullivan* is substantially reduced.[6]

As added support for our conclusion that the *Spaulding* exception to Rule 5.404(*b*) enjoys continued viability,[7] our supreme court in *State v. Taylor*, 689 N.W.2d 116, 125 (Iowa 2004), decided after *Sullivan*, found incidents of Taylor's prior physical abuse against his spouse admissible to prove the nature of their

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[6] This is not to say that in all cases prior bad acts evidence involving the same victim of sexual abuse will be admitted. As the court in *Sullivan* suggests, finding an exception to Rule 5.404(*b*) is but the first step in the admissibility analysis. *Sullivan*, 679 N.W.2d at 25. Upon finding the prior bad acts evidence relevant to the case, the district court is required to undertake the balancing test found in Rule 5.403, and should admit the evidence only if its probative value is not substantially outweighed by the danger of unfair prejudice to the defendant. *Id*. However, Roby does not challenge on appeal the district court's application of the Rule 5.403 balancing test, and we therefore do not address that issue.

[7] We also find support for the continued viability of the "same-victim" exception to Rule 5.404(*b*)'s exclusionary rule in the form of Iowa Code section 701.11 (Supp. 2003). The statute went into effect on July 1, 2003, well before Roby's jury trial in December of 2004, and it is therefore applicable. It states, in relevant part:

> 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.

relationship. While the court found such evidence was relevant to establish Taylor's specific intent in connection with a first-degree burglary charge, the court also countenanced admission of the evidence to prove domestic abuse assault, a general intent crime. *Id*. Just as the prior bad acts evidence in *Taylor* was admissible to establish the abusive nature of the Taylors' relationship, we conclude Roby's prior bad acts were admissible to establish his "passion or propensity for illicit sexual relations" with S.M. *Spaulding*, 313 N.W.2d at 880.

Because we conclude evidence of the May 1998 sexual contact between Roby and S.M. was admissible to establish the ongoing sexual relationship between Roby and S.M., we must also conclude Roby's trial counsel was under no duty to object to its admission. *Ledezma,* 626 N.W.2d at 142. Finding no merit in Roby's ineffective assistance claim, the convictions and sentence are hereby affirmed.

AFFIRMED.