

IN THE COURT OF APPEALS OF IOWA

No. 7-399 / 06-0779
Filed February 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSHUA RAY PUFFINBARGER,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Joshua Puffinbarger appeals from the district court's judgment and sentence for third-degree sexual abuse. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Janet Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

E.A. claimed her friend's father, Joshua Puffinbarger, sexually abused her when she was eleven or twelve years old. A jury found Puffinbarger guilty of one count of third-degree sexual abuse. Iowa Code §§ 709.1(3), 709.4(2)(b) and 702.7 (2001). At trial, a key issue was whether the district court should have admitted evidence of subsequent bad acts by Puffinbarger against E.A. The same issue is before us on appeal, but we have the benefit of a recent Iowa Supreme Court opinion on the subject. See *State v. Reyes*, ___ N.W.2d ___ (Iowa 2008).

The issue in *Reyes* was "whether a defendant accused of sexual abuse of his minor niece is entitled to a new trial where the trial court admitted evidence of a prior sexual assault involving the same victim." *Id.* at *1. The supreme court affirmed the district court's admission of the evidence under Iowa Code § 701.11(1) (2005). That provision states:

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.

Although the statute was enacted after the incident giving rise to the charge, the court concluded it was "fully applicable at Reyes' trial in 2005." *Reyes*, ___ N.W.2d at *3. The court further concluded the provision was applicable even though the State did not rely on it at trial because, under *DeVoss v. State*, 648

N.W.2d 56, 62 (Iowa 2002), “general error preservation requirements do not foreclose this court’s consideration of alternate grounds for the admission of evidence on appeal.” *Id.* After overcoming these procedural hurdles, the court held the evidence admissible under section 701.11(1). *Id.* at *4. The court stated “the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury.” *Id.* at *7. The court explained the evidence was “offered in a direct, concise, and noninflammatory fashion and was similar to the underlying charge against Reyes.” *Id.*

Here, the State sought the admission of three acts of a sexual nature that occurred after the act with which Puffinbarger was charged: (1) inappropriate touching of E.A. while Puffinbarger was giving her a ride in his truck, (2) touching of E.A.’s breasts, and (3) rubbing of E.A.’s thigh. Puffinbarger filed motions in limine to have this evidence excluded under Iowa Rules of Evidence 5.401, .402, .403, and .404(b). The district court overruled the motions. During trial, Puffinbarger’s attorney objected to some, but not all, of this evidence. The objections that were made were overruled. After trial, the court overruled Puffinbarger’s motion for new trial grounded on the admission of this evidence. As in *Reyes*, no one raised the applicability of section 701.11(1).

We find it unnecessary to address the error preservation concerns raised by the State with respect to the cited evidentiary rules because those rules are not the basis of our decision. The basis of our decision is Iowa Code section 701.11(1) and, as *Reyes* makes clear, the failure to raise that provision in district court does not foreclose reliance on it. *Id.* at *3-4.

Applying section 701.11(1), the first question is whether the evidence was relevant. In *Reyes*, the court stated “[t]he existence of prior sexual abuse involving the same alleged perpetrator and victim . . . has relevance on the underlying criminal charge because it shows the nature of the relationship between the alleged perpetrator and the victim.” *Id.* at *6. Here, the challenged evidence involved acts by Puffinbarger with E.A. Under *Reyes*, the evidence was relevant. In our view, the fact that the acts occurred after the charged act rather than before does not render the evidence less probative because it still bore on the nature of the relationship between Puffinbarger and E.A. See *State v. Munz*, 355 N.W.2d 576, 581 (Iowa 1984) (“subsequent acts are as probative as those prior to the date of the charged offense”).

The next question is whether the evidence, albeit relevant, should nonetheless have been excluded for other reasons. We find no reasoned basis for distinguishing the type of evidence at issue here from the type of evidence deemed admissible in *Reyes*. E.A. briefly testified to the three incidents described above and the evidence was similar to the evidence that formed the basis of the charge. Two of the incidents occurred during the same summer as the act that was the basis of the charge. Although the third act occurred two or three years later, the act was similar to one of the other subsequent acts and no more inflammatory than the act that was the basis of the charge. For these reasons, we conclude the challenged evidence was admissible under Iowa Code section 701.11(1). We discern no abuse of discretion in the district court’s decision to admit the evidence.

We affirm Puffinbarger's judgment and sentence for third-degree sexual abuse.

AFFIRMED.