

IN THE COURT OF APPEALS OF IOWA

No. 7-466 / 06-0879
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VERLE EMMERT JENSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Audubon County, James M. Richardson, Judge.

Verle Jensen appeals from the judgment entered upon his convictions of two counts of sexual abuse in the second degree. **REVERSED AND REMANDED FOR NEW TRIAL.**

Christopher Clausen of Boliver Law Firm, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, and Francine O'Brien Andersen, County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Baker, JJ.

HUITINK, P.J.

Verle Jensen appeals from the judgment entered upon his convictions of two counts of sexual abuse in the second degree in violation of Iowa Code sections 709.1(1), 709.1(3), and 709.3(2) (2005).¹ Jensen contends he is entitled to a new trial, citing multiple errors by the trial judge, including admission of expert testimony concerning the credibility of the complaining witnesses. Because we conclude Jensen was prejudiced by the erroneous admission of the challenged expert testimony, we confine our opinion to that issue and reverse and remand for a new trial.

I. Background Facts and Proceedings.

Jensen was charged in a multi-count trial information with kidnapping in the first degree in violation of sections 710.1(3) and 710.2 and two counts of sexual abuse in the second degree in violation of sections 709.1(1), 709.1(3), and 709.3(2). These charges were based on allegations that Jensen sexually abused his great-granddaughters, C.J. and S.J. Jensen denied sexually abusing his great-granddaughters and entered a not-guilty plea to each count charged in the trial information.

Prior to trial, Jensen filed a motion in limine including the following request:

5. That [social worker] Angela Johnston or her designated [sic] need not be allowed to testify to the truth or veracity of a video tape statement [and] not be allowed to give opinions and conclusions as to the Defendant[']s statement

¹ Jensen was also convicted of possession of marijuana in violation of section 124.401(5) and failure to affix a drug tax stamp in violation of sections 453B.1(3)(b), 453B.1(3)(c), 453B.7(3), and 453B.12, which are not the subject of this appeal.

The trial court's ruling on Jensen's motion in limine states:

As to Paragraph 5, the witness, Angela Johnston, may testify as an expert witness upon proper foundation and may give opinions and conclusions in her area of expertise but is precluded from direct testimony on the truth or veracity as to the complainants.

At trial, the State called Johnston in its case-in-chief to testify concerning her investigation of the sexual abuse allegations made against Jensen by C.J. and S.J. At the conclusion of the State's direct examination, Johnston, without objection, testified:

Q. Based on your education, observations, and experience did you find the reports of the girls to be credible? A. Yes, I did.

On recross-examination, Jensen's attorney questioned Johnston concerning her assessment of the complainants' credibility. The record includes the following exchange:

Q. Ma'am, you stated that it was – you felt they were credible because of the specific items that they mentioned? A. I found them to be credible because they gave a detailed history of what had happened to them. They were able to document that by drawing pictures and then from those, items that they talked about were also found in the home.

Q. Okay. And that was important to you, wasn't it? A. Yes, it was.

Q. And did you view the videotapes yourself? A. Yes.

Q. Tell me how Carissa gave a detailed account of the handcuff incident. A. She talked about being handcuffed to posts of a bed.

Q. A lot more than that, wasn't it? A. There was more detail to it, yes.

Q. That Sammy was handcuffed to her? A. That's correct.

Q. And they were handcuffed to both corners of the bed? A. That's correct.

Q. And there were no specific handcuffs found, were there? A. That's correct.

Q. You know now that she lied about the handcuffs? A. Do I know that she lied about the handcuffs? No.

Q. We found that out today. Does that change your mind about it? A. No, it does not.

Q. So she can lie about one thing and she's credible. Is that your testimony? A. No.

Q. All right.

A. I find her to be credible.

Q. You know when she came in here the Judge swore her to tell the truth under oath and she lied under oath? A. (No response.)

Although Jensen was not charged with sexually abusing S.J. and C.J.'s friend, R.G., S.J. and C.J. claimed they saw Jensen sexually abuse R.G. and R.G. was present when Jensen sexually abused them. R.G. denied these claims, both during an investigative interview with Johnston and again at trial when called as a witness for the defense. The State called Johnston on rebuttal and questioned her concerning her investigation of Jensen's alleged sexual abuse of R.G. On direct examination Johnston, without objection, testified:

Q. Did you find her credible? A. No, I did not.

On cross-examination Jensen's attorney made the following inquiries:

Q. You consider yourself pretty good about credibility; right?

A. Yes, I do.

Q. Okay. And you felt that when you first talked to [C.J.] she was credible? A. That's correct.

Q. And when you talked to [S.J.], you thought that she was credible? A. That's correct.

....

Q. If the boathouse incident didn't happen, why would [S.J.] perpetuate it? A. I don't know that [S.J.] did perpetuate it.

Q. Well, you know now that [C.J.] perpetuated it; right?

A. [C.J.] reported it to me when I initially visited – or, when I observed the interview.

Q. And, of course, if we hadn't been here, you'd say she's credible, wouldn't you? A. I found her to be credible.

Q. And even though now you know she's not, you still say she's credible? A. Yes, I do.

At the close of the evidence, the trial judge directed a verdict of acquittal on the kidnapping count. The jury returned guilty verdicts on two counts of

second-degree sexual abuse. Jensen moved for a new trial citing, among other issues, the State's violations of the trial court's ruling on his motion in limine. The trial court's ruling denying the motion for new trial states:

The Court as to Number 1 of the motion, violation of the Motion in Limine, the Court incorporates by reference its previous rulings made at the time of trial. All objections were either addressed at trial or waived during the trial, and by said incorporation the Court thereby overrules the first leg of the motion for a new trial.

The trial court accordingly entered a judgment of conviction on two counts of second-degree sexual abuse, resulting in this appeal.

II. Standard of Review.

In general, a trial court's ruling on the admissibility of expert testimony at trial is discretionary. *State v. Buller*, 517 N.W.2d 711, 713 (Iowa 1994). On appeal, we will not disturb a trial court's ruling on the admissibility of expert testimony at trial unless it constitutes an abuse of discretion and prejudice has resulted. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 531 (Iowa 1999). "Abuse of discretion" means that the trial court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997) (quoting *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (citations omitted)). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on erroneous application of the law." *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001). "Unreasonable" means "not based on substantial evidence." *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001) (quoting *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993)).

III. Motion in Limine/Expert Testimony.

We initially consider the State's claim that Jensen either waived any objection to Johnston's testimony concerning the complainants' credibility or failed to preserve error for appellate review. The State cites Jensen's election to cross-examine Johnston concerning her opinion of the complainants' credibility and Jensen's failure to renew at trial the objections raised in his motion in limine.

The primary purpose of a motion in limine is to preclude reference to potentially prejudicial evidence prior to the trial court's definitive ruling on its admissibility. *State v. Davis*, 240 N.W.2d 662, 663 (Iowa 1976). Generally, any error based on the trial court's disposition of a motion in limine is not preserved unless the record includes a timely objection when the challenged evidence is offered at trial. *Id.* The resolution of a preservation of error issue is "not controlled by the title of the motion or its prayer." *State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979). Our concern is "what the ruling of the trial court does or purports to do." *Id.* A ruling limited to protection from prejudicial references must be distinguished from a ruling on the admissibility of the challenged evidence. *State v. Miller*, 229 N.W.2d 762, 768 (Iowa 1975). If the trial court's ruling is dispositive on the issue of admissibility, it is considered final for purposes of appeal and no further objection is necessary. *Id.*

Contrary to the State's argument, we find that the trial judge's ruling on Jensen's motion in limine did more than protect against prejudicial references. The court, without condition or admonition, expressly precluded Johnston's testimony on the truth or veracity of the complainants. No additional trial objections were necessary to preserve error on this issue.

In general, a defendant may not complain of a self-inflicted wound: “(A) party to a criminal proceeding will not be permitted to complain of error with respect to the admission or exclusion of evidence where . . . he himself has acquiesced in, committed, or invited the error.” *State v. Hinkle*, 229 N.W.2d 744, 750 (Iowa 1975) (quoting 24A C.J.S. *Criminal Law* § 1843, at 588). However, error is not waived when a defendant cross-examines on the subject of inadmissible evidence. *Kurtz v. Payne Inv. Co.*, 156 Iowa 376, 385, 135 N.W. 1075, 1079 (1912). In *Kurtz*, the supreme court said “[t]he evidence having been erroneously admitted, it [is] permissible to destroy its pernicious effect, if possible, by bringing out all the facts relating thereto.” *Id.* at 385-86; 135 N.W. at 1079; *cf. State v. Daily*, 623 N.W.2d 799, 801 (Iowa 2001) (stating that the rule of waiver is contrary to established precedent).

As we have already noted, the trial court’s ruling clearly excluded Johnston’s testimony concerning the complainants’ credibility. For reasons not apparent in the record or explained on appeal, the county attorney nevertheless elected to question Johnston concerning the complainants’ credibility. Under these circumstances, we are unable to say Jensen’s trial counsel acquiesced in, committed, or invited the error. Counsel was fairly entitled to address the pernicious effect of Johnston’s testimony by cross-examining her on the facts underlying her opinion. We accordingly reject the State’s claim that Jensen waived any error on this issue.

In *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986), the supreme court said

[e]xpert opinion testimony is admissible pursuant to Iowa Rule of Evidence [5.702] if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” The ultimate

determination of the credibility or truthfulness of a witness is not “a fact in issue,” but a matter to be generally determined solely by the jury. . . . Consequently, we conclude that expert opinions as to the truthfulness of a witness is [sic] not admissible pursuant to rule [5.702]. As we indicated, the effect of the expert opinions in this case was the same as directly opining on the truthfulness of the complaining witness.

The State concedes that “Johnston’s testimony on the subject of the victims’ credibility . . . should not have been admitted.” We agree. Like the supreme court in *Myers*, “[w]e believe the effect of the opinion testimony was to improperly suggest the complainant[s] [were] telling the truth and, consequently, [Jensen] was guilty.” *Myers*, 382 N.W.2d at 97-98. We also note that the State makes no claim that admission of the challenged testimony was harmless error. See Iowa R. Evid. 5.103(a) (stating that erroneous admission of evidence does not require reversal “unless a substantial right of the party is affected”). Even if the State were to claim otherwise, Jensen was prejudiced because Johnston’s status as an expert witness placed an “unwarranted ‘stamp of scientific legitimacy’” on the complainants’ allegations. *Myers*, 382 N.W.2d at 97 (quoting *State v. Myers*, 359 N.W.2d 604, 611 (Minn. 1984)). Moreover, the State’s case was substantially, if not entirely, dependent on the jury’s decision to believe either the complainants’ or Jensen’s version of the facts. As a result of the erroneous admission of the challenged testimony, there was a substantial likelihood that the jurors deferred to Johnston’s assessment of the complaining witnesses’ credibility rather than their own. See, e.g., *Mohammed v. Otoadese*, ___ N.W.2d ___, ___ (Iowa 2007) (stating that prejudice requires a finding that it is “probable a different result would have been reached but for’ the admission of

the evidence or testimony”) (quoting *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992)).

We accordingly reverse and remand for a new trial. This disposition makes it unnecessary to address the remaining issues Jensen raises on appeal.

REVERSED AND REMANDED FOR NEW TRIAL.