IN THE COURT OF APPEALS OF IOWA

No. 7-948 / 07-0138
Filed February 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EARL DENSON MOSLEY, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

Earl D. Mosley, Jr., appeals following his conviction for two counts of second-degree sexual abuse and one count of third-degree sexual abuse. **REVERSED AND REMANDED FOR NEW TRIAL.**

Mark C. Smith, State Appellate Defender, and James G. Tomka, Assistant Appellate Defender, for appellant.

Earl D. Mosley, Jr., Oakdale, pro se.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

VOGEL, P.J.

Earl D. Mosley, Jr., appeals following his conviction for two counts of second-degree sexual abuse, in violation of Iowa Code section 709.3 (2001), for acts occurring between January 12, 1998, and January 11, 2002, and one count of third-degree sexual abuse, in violation of section 709.4 (2003), for acts occurring between January 12, 2002, and January 11, 2004. Because we conclude the court abused its discretion in admitting prior bad acts evidence, we reverse and remand for new trial.

I. Background Facts and Proceedings.

When the alleged victim, Alesha, was three years old, Mosley married Alesha's mother and became stepfather to Alesha and her sister Audrey. Alesha alleged that when she was nine, Mosley claimed he wanted to teach her how to have sex by showing her a pornographic video. Over approximately the next four years, Mosley proceeded to engage in repeated acts of oral, vaginal, and anal sex with Alesha. However, the abuse stopped when she was thirteen. When she was fourteen, Mosley wrote Alesha a handwritten note apologizing to her and promising not to hurt her again. Fearing that the abuse would start again, Alesha became upset and began to cry. Shortly thereafter, Audrey called and noticed that Alesha sounded upset. Alesha then confided to Audrey about the years of abuse by Mosley. Alesha later left the house with Audrey, and they subsequently contacted St. Luke's Hospital in Cedar Rapids and police.

Based on this alleged abuse, the State charged Mosley with two counts of second-degree sexual abuse and one count of third-degree sexual abuse. On October 4, 2006, a jury trial commenced. At trial, over Mosley's objections,

Audrey testified to certain prior bad acts by Mosley. Following trial, the jury found Mosley guilty on all three counts and the court sentenced him to three sentences totaling twenty-five years, to be served concurrently. On appeal, through counsel, Mosley claims the court abused its discretion in allowing the prior bad acts testimony from Audrey. He also claims the evidence was insufficient to support the convictions and that counsel was ineffective in failing to move to dismiss based on speedy trial grounds. Mosley also raises various claims in a pro se brief.

II. Prior Bad Acts.

At trial, the following exchange took place between Audrey and the prosecutor:

> Q. While living at Newell Street, 624, did [Mosley] ever in any way direct some attention to you that you interpreted to be inappropriate? A. Yes.
>
> Q. Was there ever any comments made to you while you were sitting in a chair in I believe the living room? A. Yes.
>
> . . . .
>
> Q. Can you tell us the circumstances surrounding the event when sitting in the chair? A. I would just be sitting there watching TV and you know, you lean back in the chair, you put one leg over the armrest or something. And he would walk by and tell me to put my leg down, I'm making his dick hard. Or I'm teasing him.
>
> Q. Were there occasions when he would touch you inappropriately on the butt? A. Yes, he would walk by and just clap me on the butt.
>
> Q. Did you ever have any discussions with him about touching you? A. I just told him, don't hit me on my butt, or leave me alone, something like that. He never really stopped doing that, the older I got. He just always tried to make it look like it was a playful slap on the butt.
>
> Q. Were there ever any comments or inappropriate comments about any of your body parts while living on Newell? A. Yes. He would—if I would come out of the shower, I would walk into my room. This is when we were living on Newell Street, and he was saying that, "I've seen it already anyway." Or, "I'll be in my room." He'll tell me—he told me that he would be looking through

> my peephole. Like the skeleton peephole in the door, he would tell me he would be looking through there and he had seen my hairy pussy or he seen how fat it is and stuff like that.
>
> Q. Any comments regarding your breasts? A. Yeah, that they're big.

Prior to this testimony, Mosley had moved in limine to exclude it. The State responded that it was admissible as evidence of Mosley's "modus operandi" or plan. Following an in camera hearing, the court rejected the objections, finding the testimony "does have some relevance and some probative value . . . in that it would show Mr. Mosley had other contact with a young step-daughter in the household of a sexual nature." Accordingly, the court concluded that it was particularly relevant to the issue of modus operandi.

Mosley now reasserts his argument that this evidence violated Iowa Rule of Evidence 5.404(*b*) in that its sole purpose was to portray him as a lewd person who has a propensity to commit acts of sexual abuse. We review the district court's decision on the admissibility of evidence for abuse of discretion. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). An abuse of discretion occurs when the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). Even when the district court errs on the admissibility of evidence, we will not reverse a defendant's convictions unless the defendant can prove he was prejudiced by the error. Iowa R. Evid. 5.103(*a*).

Generally, evidence of an accused's other "crimes, wrongs, or acts" is inadmissible to prove his propensity to behave in a certain manner. *See* Iowa R. Evid. 5.404(*b*) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in

conformity therewith."). However, such evidence is generally admissible for purposes other than proving propensity; for instance, such evidence may be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* In *State v. Sullivan*, 679 N.W.2d 19, 28 (Iowa 2004), our supreme court characterized rule 5.404(*b*) as one of exclusion rather than one of inclusion.

We follow a well-established test to determine whether the testimony was admissible. First, we must ascertain "whether the challenged evidence [was] relevant and material to some legitimate issue" other than a general propensity to commit wrongful acts. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). If this test is satisfied, the evidence was prima facie admissible, even though it illustrates the accused's bad character. *Id.* Second, we "must . . . decide whether the evidence's probative value [was] substantially outweighed by the danger of unfair prejudice." *Id.* (citing Iowa R. Evid. 5.403). If unfair prejudice resulting from admission of the evidence substantially outweighed its probative value, the evidence was inadmissible. *Id.*

A. Relevance.

In denying Mosley's objections to the testimony, the district court found Audrey's claims sufficiently similar to Alesha's allegations so as to establish Mosley's modus operandi. Modus operandi can be defined as "a distinct pattern or method of procedure thought to be characteristic of an individual criminally and habitually followed by him," *Plaster*, 424 N.W.2d at 231, and it is perhaps a synonym for "plan," one of the permissible purposes for prior bad acts evidence under rule 5.404(*b*). In support of this finding, the State at trial had argued that

the modus operandi was a "grooming" of Mosley's stepdaughters for the purpose of sexually abusing them.

We conclude the degree of relevance of Audrey's claims is greatly lessened by their factual dissimilarity to the claims of abuse leveled by her younger sister. Alesha's accusations obviously involved serious, forcible sexual assaults, including many years of serial abuse in the form of oral, vaginal, and anal penetration. The acts took place nearly every other day at times. Conversely, Audrey's claims include no sex acts and arguably only marginally involve any criminal acts. They involve suggestive remarks, slaps on the clothed buttocks, and a claim that Mosley saw Audrey naked through a keyhole. While there may be some similarities between the claims of the two girls, as each included actual or requested sex, the allegations are so dissimilar as to lessen their relevance in attempting to prove that Mosley perpetrated the claimed sexual abuse on Alesha.

Moreover, although Audrey and Alesha were sisters living in the same household as Mosley, they are nonetheless different victims. Therefore the testimony was not offered to show Mosley's "relationship and feelings toward a specific individual". *State v. Reyes*, __ N.W.2d __, __ (Iowa 2008).

We further find the overriding purpose and result of the admission of the testimony was two-fold; that is, to bolster Alesha's credibility and to paint Mosley as a lewd man with "a general propensity to commit wrongful acts." *State v. Barrett*, 401 N.W.2d 184, 187 (Iowa 1987). Both of these purposes are impermissible. As our supreme court has stated, "such testimony spoke to no legitimate fact besides [defendant's] propensity to abuse young girls." *State v.*

Mitchell, 633 N.W.2d 295, 300 (Iowa 2001). Accordingly, the evidence in question was not relevant and served merely to bolster Alesha's credibility and thereby establish Mosley's general propensity to commit wrongful acts. The court therefore should have excluded this evidence.

B. Unfair Prejudice.

Regardless, even if we had deemed the evidence relevant, evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001) (citing Iowa R. Evid. 403). In determining whether the probative value of the evidence is outweighed by its prejudicial impact we evaluate (1) the actual need for the evidence in light of the other issues and evidence at trial; (2) the strength of the evidence showing the accused committed the other crime; (3) the strength or weakness of the prior acts evidence in supporting the issue at trial; and (4) the degree to which the jury's hostility will be roused by the evidence. *State v. White*, 668 N.W.2d 850, 854-55 (Iowa 2003). The most pertinent evaluation we must make is the last: whether the evidence will cause the jury to make a decision based on an emotional response to the defendant. *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004).

We conclude this evidence served little more than to appeal to the jury's sympathies and provoke its instincts to punish. *Castaneda*, 621 N.W.2d at 440. A jury could have been tempted to find that because Mosley may have made sexually suggestive comments to one stepdaughter, he sexually abused a different stepdaughter. Like the court in *Castaneda*, we believe this is precisely the type of character inference that rule 5.404(*b*) was designed to prevent a jury

from drawing. *Id*. at 441. "[T]he potential of undue prejudice where prior sexual abuse evidence is admitted in cases involving the same alleged perpetrator and victim is far less than in cases where the prior bad acts involve other alleged victims." *Reyes*, __ N.W.2d at __. The evidence should have been excluded on the additional grounds of undue prejudice.

C. Iowa Code section 701.11.

The State counters that the challenged evidence was per se admissible under Iowa Code section 701.11(1), which provides:

> 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 . . . . This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

Both the statute and the case law require clear proof of the prior act. *See* Iowa Code § 701.11(1); *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). While this statute was not relied upon or argued at trial, that does not prevent us from addressing it on appeal. *Reyes*, __ N.W.2d at __; *DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002).

Initially, we have reservations about whether Audrey's allegations constituted "sexual abuse." Regardless, section 701.11(1) still requires the same prejudice-probative balancing that rule 5.404(*b*) requires. As we have already concluded that the prejudicial value of this evidence warranted its exclusion under rule 5.404(*b*), we must also conclude it requires exclusion of the evidence under section 701.11(1).

III. Speedy Trial.

Despite our conclusion Mosley should receive a new trial due to the admission of irrelevant and unduly prejudicial evidence, we must still address Mosley's claim that his trial counsel provided ineffective assistance by failing to move for a dismissal based on the violation of his one-year speedy trial rights. We review ineffective-assistance-of-counsel claims de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prove a claim of ineffective assistance of counsel, Mosley must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted. *Id.* at 669. We find the record adequate to address the claim here. *See State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997).

Iowa Rule of Criminal Procedure 2.33(2)(*c*) provides: "All criminal cases must be brought to trial within one year after the defendant's initial arraignment . . . unless an extension is granted by the court, upon a showing of good cause." This rule establishes an "outer-limit" for trial, similar to a statute of limitations. *State v. Mary*, 401 N.W.2d 239, 241 (Iowa Ct. App. 1999). "Once the one-year period has expired the State must show either a waiver on the part of the defendant or good cause for the delay." *Id.* While waiver is not specifically mentioned in the rule, because the right to a speedy trial is personal, it is a right a defendant can waive. *State v. Rodriguez*, 511 N.W.2d 382, 383 (Iowa 1994). Under our rule, good cause focuses on only one factor, the reason for the delay. *State v. Nelson*, 600 N.W.2d 598, 601 (Iowa 1999).

Mosley was arraigned on December 2, 2004. Trial was initially scheduled for January 25, 2005, but at his January 3, 2005, pretrial conference, Mosley

waived his right to be tried within ninety days, and trial was continued until March 1, 2005. After that date, Mosley requested, and was granted, twelve different continuances for a variety of reasons. At a September 15, 2005, pretrial conference hearing, Mosley expressly waived his one-year speedy trial right. Also, on September 23, he filed a written waiver of his right to be tried within one year. In a final pretrial conference held on July 14, 2006, and after the many continuances granted to Mosley, he demanded that "trial be held as scheduled," on July 18, 2006. The district court, on July 18, rescheduled the trial until August 1, as "the case was unable to be reached."

We conclude trial counsel was not ineffective in failing to move to dismiss based on the violation of Mosley's one-year speedy trial rights. Mosley never withdrew his oral and written waivers. Furthermore, because Mosley requested some twelve separate continuances before trial was finally held, much of the delay in starting trial was self-inflicted.

Conclusion.

Because the probative value of Audrey's testimony was not relevant to any legitimate issue and was substantially outweighed by the danger of unfair prejudice, we reverse Mosley's conviction and remand for new trial. Due to our holding and resulting remand for new trial on this issue, we need not address the additional claims asserted in Mosley's pro se brief. We further conclude counsel was not ineffective in failing to move to dismiss the charges as Mosley's one-year speedy trial rights were not violated.

REVERSED AND REMANDED FOR NEW TRIAL.