IN THE COURT OF APPEALS OF IOWA

No. 9-1035 / 08-1125
Filed March 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MANFRED LEROY LITTLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Manfred Little appeals his convictions for first-degree kidnapping and willful injury causing serious injury. **AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.**

Gary Dickey Jr. and Angela Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano and Michael Salvner, Assistant County Attorneys, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

Manfred (Fred) Little appeals from the judgment and sentence entered upon jury verdicts finding him guilty of kidnapping in the first degree in violation of Iowa Code sections 710.1 and 710.2 (2005) and willful injury causing serious injury in violation of section 708.4(1). On appeal, Fred[1] claims the district court erred by: (1) admitting testimony of his ex-wife and two daughters pertaining to prior incidents of domestic abuse in the forty years of his previous marriage; (2) admitting testimony of an expert on domestic violence for the purposes of profiling him and bolstering the credibility of his alleged victim; (3) denying his motion for a bill of particulars; and (4) denying his motion for new trial on the grounds of prosecutorial misconduct. Fred further claims the evidence was insufficient to sustain the conviction for first-degree kidnapping.

We reject Fred's contention that the evidence was insufficient to sustain his kidnapping conviction. However, because we conclude the admission of the prior bad acts evidence was improper, and prejudiced the jury's determination of the kidnapping charge, we reverse that conviction and remand for a new trial. We affirm the jury's verdict finding Fred guilty of willful injury causing serious injury.

I. Background Facts and Proceedings.

This case concerns very serious charges of abusive conduct by Fred toward his second wife, Jane Little. According to Jane, from the date of their marriage on May 9, 2006, until August 13, 2006, she was subjected to systematic physical, emotional, and sexual abuse by Fred.

[1] We refer to Fred Little and Jane Little by their first names to avoid confusion.

Fred and Jane met in 2004 while they both worked at Jester Park Golf Course. Both were in their sixties. Fred was a manager at the golf course, and Jane worked as a starter as a way of getting free golfing privileges. Although they were both married to others, they soon began having a romantic affair. Fred had recently been through a bankruptcy, whereas Jane was a former school teacher who had accumulated substantial savings before retiring. In January 2005, the couple continued the affair by renting a condo together. By mid-2005, Fred and Jane both had obtained divorces, and bought a house together in Granger with Jane's money. Jane also liquidated investments and allowed Fred to have the money. In retrospect, Jane testified that Fred "always felt like he was in charge," but at the time she did not notice any significant problems.

Jane testified that the first signs of problems within their relationship began during a golf vacation to Oklahoma in March 2006. On this trip, Fred repeatedly got mad at her, lectured her, refused to leave the hotel room, and would keep her in the hotel room "till [she] behaved." Sex was "the main issue." Jane also stated that Fred would hit her if she was not "at attention at all times in [her] listening ability." Fred told Jane "he was going to keep me there until such time as he wanted to go home." Fred said, "we would stay there as long as needed to until [she] changed [her] attitude." After four days mostly spent in the hotel room, Fred and Jane drove back towards Iowa. While driving, the couple decided to stop and spend a couple of nights in Branson, Missouri. In Branson, Jane stated that Fred "had a lot to drink." Then Fred, apparently upset about the lack of sex they were having, decided it was time to go home. When Jane

refused to go, Fred left Jane behind, forcing Jane to buy a plane ticket and fly home.

When Jane returned home, she filed for and received a no-contact order. In her application, Jane described the trip to Oklahoma as being "held hostage." She also wrote about an incident where Fred threw her head against the bed and its headboard.

Over the next month, Jane testified that Fred bought her roses, apologized, and asked her to go to couples counseling. As a result, in early April 2006, Jane decided to rescind the no-contact order and resume her relationship with Fred. After Jane returned to the relationship, Fred directed her to write a letter to her close friend who had assisted her with the no-contact order. Jane told her friend "that we should not be so involved" and they should no longer be in touch with each other. Jane also stated that Fred "encourag[ed]" her to write letters to several other friends ending their relationships. Jane also stated that in late April 2006, Fred convinced her to write an email to her two children and her brother stating that what she wrote in the request for the restraining order was not true.

On May 9, 2006, Fred and Jane were married. Jane testified that she wore a high-necked shirt due to bruises on her chest from where Fred had previously struck her.

The following day, Fred had Jane get in their truck and said, "I want to know all about your past, and we're going to drive up and down the interstate until you've told me all your past . . . . We're going to do this even if we have to get to Kansas City." Fred began to drive up and down the highway interrogating

her about her sexual history and past relationships. According to Jane, Fred was drinking beer, and "he would throw it in my face and pull my hair out and put his hands on my chest, and this went on and on and on for hours and hours." Jane stated that she believed the only way the interrogation would end was if she agreed with Fred's accusations and made up stories. Jane testified that throughout the marriage she had to placate Fred by making up stories. These stories were almost always sexual in nature and included a life of prostitution, incest, bestiality, lesbianism, and a fixation on black men.

Immediately following their marriage, Jane testified that Fred began to throw away or destroy anything that was a part of her past. These items included her scrapbooks, pictures of her children and family, her furniture, paintings, and several other personal items. Jane further stated that Fred began to cut her off from the outside world. Fred destroyed her cell phone, computer, PDA, and bicycle. He broke the side mirrors on Jane's car.[2] He also would unplug and take the landline telephone with him whenever he left the home. Fred also told Jane that "he did not want [her] communicating with the neighbors" and that she could no longer play in her golf league.

Jane also testified that Fred became increasingly upset about the clothes she wore and that they were not "feminine enough looking." Jane stated that "whenever [Fred] got mad at me, he'd take a knife and slit down the front of my shirts and pajamas," destroying her clothes. Jane testified that Fred kept a knife right next to his bed.

[2] In July 2006, Fred sold Jane's car and put the proceeds in his own bank account.

Jane testified to constant physical abuse. She stated that Fred would consistently and repeatedly hit her head against the spindles on the headboard of their bed, hit her head against the nightstand located next to their bed, pull on her ears until they bled, pull her hair out, and hit her causing swelling and bruising to her head, arms, and chest. As Jane put it, "Nearly every time he became abusive with me, he pulled my hair out."[3]

Jane also testified that Fred would sexually abuse her. According to Jane, Fred often accused Jane of having engaged in various sexual acts. If she denied his accusations, he would beat her. Eventually, Jane would agree with the accusations just so the abuse would stop. Jane also testified that "the only way I could get him to stop abusing me was to suggest sex." During this time, Jane stated that Fred made her watch pornography, perform oral sex, and have anal sex. Further, Jane stated that if she refused any sexual demands, Fred would kick her out of the bedroom and make her sleep in another room. The bed in this room was without sheets or a blanket. In addition, on one occasion when Fred saw her reading while sitting in this room, he took her reading glasses and broke them in half. Fred frequently took away her reading glasses so she could not read.

Jane also testified to several specific incidents of abuse. Shortly after midnight on May 17, 2006,[4] Jane stated that Fred told her, "I'm either going to rip your breasts off or kill you." Jane replied, "Well, ripping my breasts off would hurt

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[3] Photographs were introduced showing where Jane's hair had been pulled out and showing a scar behind her ear.

[4] A neighbor testified that at around 11:00 p.m. on May 16, she saw Fred trying to run down Jane with his truck, threatening to "crack her f___ing skull." The neighbor then saw Fred and Jane go into the house.

too much. You might as well kill me, I guess." At that time, Fred began to fondle Jane's breasts so much that they began to hurt. Fred then put Jane on the bed, went to his bedroom dresser, and pulled out a handgun. Fred then fired two shots just over Jane's head. Jane testified the first shot struck a spindle of the headboard of the bed, and the second shot went through the wall and into another neighbor's house. Evidence at trial showed that one of the spindles on the headboard was missing. The neighbor also testified at trial. He told the jury that he heard the shots fired, saw a hole in his bedroom wall, and found a bullet on his bedroom floor. That same neighbor reported the incident to the sheriff's office.

Jane also testified about a separate incident, where Fred "took a belt out and he whipped me with the belt and then he put it around my neck and strangled me, and I lost consciousness then."

Further, in June 2006, Jane testified to another incident where Fred opened their shower door and threw her into the bathtub. He then pulled her out, took her to the toilet, and "kept sticking [her] head under the water in the toilet and holding it there and hitting [her] head on the toilet." Jane testified that following this incident, she began to have trouble walking and speaking. Jane could not do anything with her left hand. Nonetheless, Fred did not take her to the hospital until two to three weeks following the incident. At the hospital, Jane was diagnosed with "bifrontal subdural hematomas that were subacute" (bleeding in between two layers of the brain that was at least two to fourteen days old). At the hospital, the staff noted Fred often answered questions for Jane, and Jane never told anyone about the abuse. In the days that followed, Fred told various

people that Jane had suffered a stroke or seizure, contrary to the actual diagnosis provided by the hospital.

The radiologist who had examined the CT scans of Jane testified there was no question that Jane had these subdural hematomas, or bleeding on the brain, due to trauma. He testified that the mortality rate for people who suffer such an injury is fifty percent or above, and a full recovery is seen in only nineteen or twenty percent of patients. He attributed Jane's difficulties in walking and talking to these hematomas. He testified that the injuries were "significant." In addition, the radiologist testified that an MRI revealed additional hematomas in the rear of her head that would have occurred at a different time.

Jane testified that she still has problems with her speech and balance. She cannot ride a bike any longer (she used to be an avid biker) and she has to hold a railing when walking. Even Fred's sister and brother-in-law, who testified at the trial on Fred's behalf, acknowledged that when they saw Jane during a fishing trip to the Quad Cities after her head injury and before Fred's arrest, she was "slow at speaking," "limping," and "having problems walking."[5]

Jane also testified to a second incident involving the toilet, where Fred violently pushed her into the toilet's water tank causing the tank to break into pieces.

Jane testified that Fred generally required her to go with him when he left the house, and that she was very afraid to report him because she feared he would subject her to further verbal and physical abuse. As noted, when Fred left

[5] Fred's sister also testified that Fred never explained what had happened to Jane.

for work in the morning, he would pull out the landline telephone and take it with him.

In early August 2006, Fred and Jane went on a fishing trip in Minnesota. While in Minnesota, Jane's son, Chandler, invited them to meet for dinner. Jane testified she was afraid to tell her son what had been happening. Chandler, however, noticed a change in his mother.

Shortly thereafter, Chandler contacted the Polk County Sheriff's Office. After meeting with the sheriff's office in Des Moines, Chandler phoned Fred and asked Fred and Jane to join him for dinner at a restaurant on August 13. Chandler showed up at the restaurant with a sheriff's deputy. Jane left with Chandler. Later that day, Jane began to open up about the abuse.

On August 28, 2006, the State filed a trial information charging Fred with kidnapping in the first degree and willful injury causing injury. The case eventually went to trial beginning May 19, 2008.

Prior to trial, Fred filed a motion in limine seeking to exclude the testimony of Fred's ex-wife, Maureen Little, and their two daughters, Barbara Wilkey and Margaret Pirkl, regarding Fred's abusive and controlling behavior toward Maureen in the prior marriage. The district court reserved ruling on the motion until evidence was presented at trial.

At trial, Fred again objected to the testimony. The following exchange ensued:

> THE COURT: I can tell you at this point that, based on what I've seen of this case and the theories being advanced by the Defendant, I am going to let you get into these statements from the other family members because I think it clearly does go to the exceptions that are contained in 404B, so if that is of assistance to

you in dealing with this particular exhibit, that's where I am at this point.

MR. FORITANO (Prosecutor): Thank you, Your Honor.

MR. DICKEY (Defense Counsel): Is that a final decision on that, our motion in limine?

THE COURT: Yes, it is.

MR. DICKEY: For the record, could I—I'm trying to understand which exception of 403—

THE COURT: Not 403, 404.

MR. DICKEY: I'm sorry, 404.

THE COURT: And thank you for reminding me. To me this is clearly more relevant and probative than it is prejudicial, and I think you guys have opened this door as to allowing this testimony in from family—the other abuse and I'm going to refer to it as being claimed by the State. I think it is absolutely coming in this case.

MR. DICKEY: And, for the record, how did we open the door?

THE COURT: Because you've got all kinds of theories you've advanced to this jury on how Jane Little fell accidentally, how these other injuries were incurred accidentally or by some other illness, all things that are contemplated specifically in the rule. That's what's being rebutted by the State and you're the ones that have brought this up.

. . . .

MS. CAMPBELL (Defense Counsel): So the theories that you are going under 404B is identity?

THE COURT: Lack of accident, intent—there's a whole raft of things that have been opened up.

. . . .

MR. DICKEY: And there's no time limit as to how far back they can go in terms of the prior acts?

THE COURT: Well, I don't know how far we're going. I have not been asked to deal with remoteness and I don't know what we are dealing with. I haven't heard that part.

MS. CAMPBELL: Your Honor, we could advance with this—we could give you the depositions if you would like to read them? The remoteness for abuse of his children occurred when they were 12 and younger and they are now—this is over 20 years ago. The abuse of his ex-wife, one incident, is two years ago, and then the rest of those are—go all the way back to 40 years ago.

THE COURT: Well, they may or may not be relevant. Remoteness is a really slippery slope in this kind of case because you are not talking about a claim of an isolated incident. You are talking about a pattern of behavior, a method of controlling people, and I think it's extremely unfair to ask a jury to consider domestic abuse in a snapshot. That's not the way it works.

According to the State, the purpose of this testimony was to show the "power-and-control dynamic" and "what methods [Fred] used to instill that."

Thus, the family members were allowed to testify about Fred's first marriage. They took the stand immediately after Jane Little. Barbara Wilkey, Fred's oldest daughter, testified first for the State. She stated that Fred first introduced her to Jane in April 2006. According to Barbara, "once [Jane] started talking, it sounded like my mom 20 years ago. And then it clicked and I was sort of freaking out inside." Eventually, the prosecution explored the causes for this concern.

> Q. Can you tell me how your father exercised power and control over your mother, Maureen? A. Yes. He beat her. He threatened her. He screamed at her. He interrogated her mercilessly. He used to—a trigger would set him off, whether it was jealousy, paranoia, whatever it was; whether she passed somebody in the street and glanced up. She kept her head down a lot. And if she glanced up and it was a man, that would be a trigger for him to start interrogating her on how she knew him, when they were having the affair and all this stuff about her being unfaithful to him.
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> . . . .
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> Q. Tell me exactly what you mean by "interrogation." [Objection overruled] A. He would get something in his head. One instance—he would start interrogating her, asking her a million questions over and over again. And if she didn't comply or acknowledge or agree with exactly what he was saying, regardless of how unrealistic it was, he would escalate more and more to where he's shoving her around. Then he was slapping her, hitting her.
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> I seen him take her by the head and just shake her head, like a shaken-baby-syndrome thing. I have seen him backhand her and slap her and pin her down with his knees on her shoulders and slap her. I have seen him drag her down the hall, like a caveman, by her hair many, many times. That's not a "once" time. And she would have a chunk of hair missing from her head that big. (The witness indicated.)
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> Q. Is it fair to say that oftentimes, as a result of the interrogation, it led to some type of physical assault? A. Almost always.

> Q. And you described that you actually personally saw your father on a number of occasions grab your mother by her hair? A. Yes.
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> Q. Was this was a common thing that you saw? A. Yes.
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> Q. How often would that occur? A. Every day, every other day. There was a physical altercation in our home from the time I can remember at three years old and on through my adulthood, and he—if the dinner wasn't cooked correctly or he said the pork chops were burned—I remember one traumatic incident for me that I remember vividly. He chased her out of the—she ran out of the house down the driveway and he chased her down with a pork chop. [Objection overruled] He pinned her down in the driveway so she couldn't move, his legs around her shoulders again, and he tried to shove the pork chop down her throat and was calling—saying something. "How do you like that?" And he was referred to it as a "black man's penis." I mean, he was like—I thought for sure he was going to kill her this time.
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> And I ran back in the house. I told my brother—I said, "We have to call the police," and I dialed it. I was so scared because of what he would do. He usually would—well, he used to pull the phone out of the wall, you know, frequently.
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> . . . .
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> Q. Was it a common thing, either during the course of the interrogations or any of the physical abuse, for your dad to make statements in regards to "black men" or "black men's penises"? A. Yes. He— [Objection overruled] He had a thing about black men. I almost got kicked out of the University my freshman year because I had a black roommate, and he forced me to go and try and get it changed because he didn't want a lot of her black male friends hanging around my dorm room.
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> Q. So he expressed concerns to you about you being around back men? A. Yes. And anybody. He used to always talk about black men and black people in a very derogatory way, racist.

Barbara testified that her father's interrogations always seemed to revolve around sex and cheating. Barbara added that they always lived in "remote areas." She also told of an incident where she had to take her mother to the hospital to get stitches, and that no one ever talked or called the police due to a "code of secrecy." On cross-examination, Barbara admitted she was testifying about a time period when she was between the ages of three to twenty-two, and

that she was now forty-three years old. In other words, the incidents she described had occurred over twenty years ago.

The State next called Fred's youngest daughter, Margaret Pirkl, to testify. Margaret is thirty-five years old. Again, the direct examination soon turned to, "At any point while you were growing up or in any of your personal observations of the interactions of your dad and your mom, did you have any concerns in regards to your dad having power/control over your mom?" Margaret testified that as they were growing up, the house was fraught with domestic violence, how her father would accuse her mother of infidelity, how he would hit her and pull out her hair, how he isolated her mother from the community and her church, and how he would strike her with a belt. According to Margaret, her mother was once beaten when Fred wanted her to tell him she would have an abortion if someone raped her. Margaret explained that her mother "had her tubes tied to end this argument." Fred would control the clothing and makeup that her mother wore. "He controlled that house." According to Margaret, she also never reported domestic abuse, and her testimony concerned events that occurred when she was "between ten and into high school."

Finally, the State introduced testimony from Fred's ex-wife, Maureen Little. Maureen testified that she met Fred at the age of nineteen, and they were married by twenty (she is now sixty-four). Maureen separated from Fred in March 2004, when she was sixty. Again, the questioning soon moved into, "At any point during your relationship with Fred Little, did you start to feel that he was exercising some type of power/control over you?" Maureen testified that even before they were married, Fred would ask her questions about other men and her

relationship to them, and that he "just kept asking me until he heard what he felt there was to hear." She further testified that three months after their marriage, he forced her to call her mother and confess to her prior sex life. Also around the beginning of their marriage, Maureen testified that Fred forced her to throw away "any pictures that [she] had, any articles, purse . . . anything that I had that wasn't from him." Maureen stated that Fred used "guilt and shame" to control her physically, sexually, emotionally, and mentally. She testified that Fred would not let her leave the house and if she did, "there would be an inquisition" where she was asked questions over and over again. She further testified that Fred was "very, very jealous" and constantly accused her of cheating.

When the State asked, "Was it always physical abuse or were there other types of control techniques that he used to manipulate you?" Maureen testified about Fred's control over the finances and instances where Fred took the car keys, although Maureen did not recall Fred pulling the phone out.

Maureen also stated that Fred physically abused her throughout the entirety of their marriage. He often pulled her hair and hit her on the side of the head so she wouldn't have bruises. Maureen also testified to her and Fred's sex life. She stated Fred wanted sex "pretty much every day" and it was more about "fulfilling his needs." She also stated Fred forced her to watch and even make pornography. Fred forced her to have anal sex and he "put paraphernalia on."

After calling Fred's ex-wife and daughters, the State briefly recalled Jane Little to the stand, and then called Laurie Schipper as an expert witness. Schipper is the executive director of the Iowa Coalition Against Domestic Violence. Schipper explained that her organization "represents all the local

domestic violence programs in our state," certifies domestic violence advocates and shelters, and provides legal advocacy and training.

After testifying about domestic violence in general, Schipper was asked to describe the "characteristics of a batterer." Over objection, she proceeded to list a series of characteristics including "conjugal paranoia" or obsessive jealousy, rigid sex roles for the male and the female, an intense fear of abandonment, an external locus of control, a skewed criminal belief system, and learned or witnessed abuse. The State then directed Schipper, again over objection, to provide her paradigm of a batterer, including the "power and control" model.[6] Schipper testified as to how the batterer typically controls his victim, including isolation, emotional abuse, intimidation, coercion and threats, economic abuse, using male privilege, minimizing, denying, and blaming. Schipper gave examples of these control tactics such as taking away the telephone, denying access to cars, not allowing electronic communications, putting the woman in fear of her life with a gun, spending her money, requiring the woman to be available for sex "24/7," and telling law enforcement that the woman is a head case. Schipper also testified that if the battered woman manages to leave, the batterer may bring her flowers and say he is sorry, but then resume the battering when she returns.

Schipper also described the effects of battering on the victim. According to Schipper, who testified again over Fred's objection, it is common for battered women to experience post-traumatic stress syndrome. Aspects of this syndrome

[6] According to Schipper, the power and control model consists of two wheels stacked upon each other. As Schipper explained, "The inside wheel represents the tools and tactics the perpetrators use in order to lower a victim's self-esteem and to isolate her from outside help and resources," while "[t]he outside wheel represents the physical and sexual violence." Power and control over one's partner is "the ultimate goal."

include impaired memory, where the hippocampus of the brain is damaged up to twenty-five percent, and there is a permanent memory loss that can never be recovered. Schipper also testified that it is common for battered women to give "different explanations for their injuries," out of embarrassment, shame, and fear. In addition, Schipper explained the "Stockholm Syndrome," where the victim is so brainwashed that she is afraid to seek intervention even when it is seemingly safe to do so. "[B]ecause of trauma, [battered women] don't believe escape is possible." Schipper was the prosecution's final witness.

Fred took the stand in his own defense. He claimed his wife and children were having difficulties accepting the divorce and they were angry about how quickly he remarried. He further testified that Jane was "a pathological liar," and she made up stories all the time. Fred claimed that in Oklahoma he stayed in the motel room instead of golfing because he was having migraines, but that Jane was free to go out (and did go downstairs to have breakfast). He denied driving up and down the interstate after the marriage, or throwing a beer on her or physically abusing her at that time.

Fred also admitted to breaking the side mirrors on the car, her cell phone, computer, PDA, and bicycle, but said he only did so because Jane told him stories about cheating on him and her "sex addiction." Fred claimed he took these actions because Jane's stories upset him or, in some cases, he destroyed the item so Jane's supposedly illicit activities could not be traced. Fred testified that Jane was "very sick" and "needed a lot of help." Fred also testified that he was only trying to protect Jane from her impulses, and that "she couldn't be

trusted with [phones]." Fred claimed it was Jane who wanted to throw away her possessions.

Fred also admitted he fired the two shots on May 17, 2006, but said he was just disassembling a pistol and when he put it back together he accidentally grabbed a clip that had two shells in it. Fred claimed that the gun went off, twice, accidentally.[7] Fred further stated that Jane was in the room at the time, but she was watching TV "on the other side of the bed." He denied having threatened her.

Fred testified that he did not commit any physical abuse toward Jane except on one occasion when he got upset and pulled her ears and hair. He denied ever pushing Jane's head into the toilet and claimed she had just had some falls. Fred claimed the toilet had simply fallen apart one day when he tried to repair it. Fred claimed that he locked Jane out of the bedroom not because she refused to have sex, but because he wanted to be alone at times when he got upset from hearing her sex stories. He also claimed he only would lock her out briefly, never an entire night.

On cross-examination, Fred admitted that he had told others, inaccurately, that Jane's head injury was a "small stroke." Fred also admitted that on a monthly calendar they kept in the house, he had written under May 2, 2006: "Jane gave up lying. Jane gave up being dishonest. Jane gave up lesbianism. Jane gave up manipulation." Fred admitted lying to the sheriff's office by stating he did not know anything about the gunshots when they came to investigate. Fred did admit striking his ex-wife at times. The State also punctuated its cross-

[7] Fred is a former Army marksman.

examination with questions like, "The same thing happened with Maureen; isn't that right?" "That's happened with Maureen, right?" "And, you were concerned with Maureen's sex life prior to your marriage, right?"

Following a three-and-a-half week trial, Fred was found guilty of both charges. Based on a prior stipulation between counsel, the district court determined the willful injury causing serious injury conviction merged into the kidnapping conviction. Thus, on June 25, 2008, the court sentenced Fred to a life sentence without the possibility of parole. *See* Iowa Code §§ 701.2; 902.1. Fred appeals.

II. Scope and Standard of Review.

We review the district court's evidentiary rulings regarding the admission of prior bad acts for an abuse of discretion. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009). "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.'" *Id*. (quoting *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001)). "'A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.'" *Rodriquez*, 636 N.W.2d at 239 (quoting *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000)). If an abuse of discretion occurred, reversal will not be warranted if the error was harmless. *Reynolds*, 765 N.W.2d at 288.

III. Analysis.

A. Prior Bad Acts.

The admissibility of prior bad act evidence is controlled by Iowa Rule of Evidence 5.404(*b*), which states:

> 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. of Evid. 5.404(*b*). This rule is a codification of our common law and is the counterpart to Federal Rule of Evidence 404(*b*). *State v. Sullivan*, 679 N.W.2d 19, 23 (Iowa 2004).

The policy underlying this rule

> "is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds."

Id. (quoting *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985)). Thus, rule 5.404(*b*) seeks to exclude evidence that "serves no purpose except to show the defendant is a bad person, from which the jury is likely to infer he or she committed the crime in question." *Rodriquez*, 636 N.W.2d at 239. Therefore, to be admissible, the evidence must be relevant "'to prove some fact or element in issue other than the defendant's criminal disposition.'" *Id*. (quoting *State v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979)).

In Iowa, courts are to employ a two-step analysis to determine whether the bad-acts evidence is admissible. *Sullivan*, 679 N.W.2d at 25. First, the court must decide whether such evidence is relevant and material to a legitimate factual issue in dispute other than a general propensity to commit wrongful acts. *Id*. If so, the court must then decide if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id*.;

see also Iowa R. Evid. 5.403. In doing so, the court should consider the following factors:

> the need for the evidence in light of the issue and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

Reynolds, 765 N.W.2d at 290 (quoting *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004)). If the probative value is substantially outweighed by the danger of unfair prejudice, the court must exclude the evidence. *Sullivan*, 679 N.W.2d at 25.

In this case, the prosecution called Fred's ex-wife and two daughters to testify regarding incidents of domestic abuse spanning over forty years, in addition to general accusations that Fred frequently harassed, interrogated, and abused his then-spouse. The subject the prosecution sought to explore was Fred's exercise of "power" and "control" over Maureen, which it wanted to analogize to his power and control over Jane. This is demonstrated by the State's lead-in questions to each witness concerning prior bad acts:

> Q. [to Barbara Wilkey] Can you tell me how your father exercised power and control over your mother, Maureen?
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> Q. [to Margaret Pirkl]. At any point while you were growing up or in any of your personal observations of the interactions of your dad and your mom, did you have any concerns in regards to your dad having power/control over your mom?
>
> Q. [to Maureen Little]. At any point during your relationship with Fred Little, did you start to feel that he was exercising some type of power/control over you?

We have difficulty accepting the prosecution's theory that acts showing Fred's power and control over his ex-wife Maureen can be admitted to prove he

seriously injured and kidnapped Jane years later. This seems to us a classic example of impermissible "propensity" evidence.

If the conduct had involved the same victim, *i.e*., Jane, this would of course be a different case. *See State v. Taylor*, 689 N.W.2d 116, 125-29 (Iowa 2004) (holding evidence of defendant's prior assaults against his wife admissible in prosecution for domestic abuse assault causing bodily injury and first-degree burglary; citing out-of-state cases that hold such evidence admissible when the same victim is involved). In particular, the supreme court has recognized that the prior abuse relationship between a defendant and a victim is relevant in establishing whether the victim was "confined" for purposes of a kidnapping charge. *See Rodriquez*, 636 N.W.2d at 242. However, the key distinction between *Rodriquez* and this case is that the testimony involved acts directed at the same person.[8] Here, the challenged testimony from the ex-wife and the two daughters related to uncharged acts of physical, sexual, and/or mental abuse against the *ex-wife*. This case is much more akin to *State v. Williams*, 427 N.W.2d 469 (Iowa 1988). In *Williams*, the State sought to introduce testimony from the defendant's ex-wife that the defendant used to beat her in the defendant's murder trial of his current wife. *Id*. at 472. In holding the evidence inadmissible the supreme court held:

> [T]he challenged evidence is not such as will independently establish malice or lack of mistake with respect to the present

[8] *See also Reynolds*, 765 N.W.2d at 290-91 ("In sexual assault and domestic violence cases, we have recognized that the prior relationship between the defendant *and the victim* is relevant in establishing intent and/or motive." (emphasis added)); *Taylor*, 689 N.W.2d at 128 n. 6 ("The relationship between the defendant *and the victim*, especially when marked by domestic violence, sets the stage for their later interaction." (emphasis added)).

> crime. It only serves that purpose if it is viewed as establishing the type of propensity inference which Iowa Rule of Evidence 404(a) is designed to prevent.

Id.[9]

Our courts have allowed evidence of prior sexual assaults involving other victims to be admitted in certain sexual abuse cases. *See, e.g., State v. Anderson,* 565 N.W.2d 340 (Iowa 1997); *State v. Howell*, 557 N.W.2d 908 (Iowa Ct. App. 1996); *State v. Casady*, 491 N.W.2d 782 (Iowa 1992); *State v. Plaster*, 424 N.W.2d 226 (Iowa 1988). But we think those cases present a different situation. In *Howell* and *Plaster*, to rebut the defendants' claims that their victims had consented, the State was permitted to introduce evidence that the defendant had committed prior acts of sexual abuse of "striking similarity." *Plaster*, 424 N.W.2d at 231 (noting the defendant's painful hand manipulation of each victim's vagina causing bleeding following consensual sex was "so unique as to constitute a signature"); *see also Howell*, 557 N.W.2d at 912 (noting "numerous factual similarities" between the assaults, including the fact that the defendant picked up both women at a bar, directed or drove both of them to a remote location in Jester Park, physically assaulted both of them, and then sexually

[9] We note there is a recent trend in which *legislatures* have adopted statutes or rules that allow a defendant's commission of domestic violence against another victim to be admitted in a case involving a domestic violence offense. *See* Alaska R. Evid. 404(*b*)(4); Cal. Evid. Code § 1109; Colo. Rev. Stat. § 18-6-801.5; 725 Ill. Comp. Stat. 5/115-7.4; Mich. Comp. Laws § 768.27b; Minn. Stat. § 634.20. But this simply highlights, in our view, the limits of admissibility under prevailing common law doctrine. *See* Andrea M. Kovach, "Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future," 2003 U. Ill. L. Rev. 1115, 1153 ("It is time for the remaining states to support similar evidence rules that truly hold batterers accountable and bridge the gap between traditional evidence law and the reality of domestic violence."); *see also* Andrew King-Ries, "True to Character: Honoring the Intellectual Foundations of the Character Evidence Rule in Domestic Violence Prosecutions," 23 St. Louis U. Pub. L. Rev. 313 (2004).

assaulted both of them). In *Casady*, the issue was whether the defendant intended to commit sexual abuse when he approached a thirteen-year-old girl in his car, lured her to his vehicle, and then grabbed her and tried to pull her into the car. To prove the defendant possessed such an intent, the prosecution was allowed to introduce evidence the defendant had previously committed two sexual crimes (for which he had been convicted) "with many factual similarities" to the present case. The similarities included stalking the female victim by car and then pulling or trying to pull her into the vehicle. 491 N.W.2d at 784-85. In *Anderson*, both consent and intent were at issue in a case involving the defendant's entry into the apartment of a female colleague from work, followed by his choking and then raping her. 565 N.W.2d at 341. The prosecution was allowed to introduce evidence of three prior instances (all resulting in criminal convictions). Again there were "certain similarities" in that the defendant had approached someone he already knew, tried to get her to have sex, choked her when she resisted, and ultimately raped her. *Id*. at 343.

In short, each of those cases approved the admission of one, two, or at most three prior incidents to show either the victim's consent or the defendant's intent as it related to a single charged act that occurred on a specific date. Each of these prior incidents was very similar to the single charged act. The evidence was used to establish the victim's lack of consent or the defendant's intent with respect to that single charged act.

Here, by contrast, the State's goal was far more ambitious, and we believe inconsistent with rule 5.404(*b*). As the State put it in closing argument, "[Fred] engaged in a pattern of manipulation that ultimately used violence to control

Maureen Little throughout their marriage and continued that pattern into his relationship with Jane Little." As the foregoing statement indicates, we believe the State essentially put Fred's propensity and character during his adult lifetime on trial.

The district court found the evidence of Fred's abuse of his prior wife was admissible to rebut the defense theory that Jane had fallen accidentally, as opposed to having had her head slammed by the defendant. As the court put it, "Lack of accident, intent—there's a whole raft of things that have been opened up." In the district court's view, by suggesting that "her injuries were the result of accident, not caused by the defendant," the defendant "opened the door."

We respectfully disagree. It is true that evidence of other bad acts may be admissible to show "intent" or "absence of mistake or accident." Iowa R. Evid. 5.404(*b*). However, intent is almost always an issue in a criminal case. So that the 5.404(*b*) exception does not swallow the rule, it is important the evidence bear *directly* on intent, rather than passing through the filter of character or propensity. *See Sullivan*, 679 N.W.2d at 26-27; *Williams*, 427 N.W.2d at 472. In other words, if the evidence would establish the defendant intentionally committed the act primarily because of his propensity or character, it is inadmissible. *Sullivan*, 679 N.W.2d at 26-27; *Williams*, 427 N.W.2d at 472. The supreme court emphasized in *Sullivan* that rule 5.404(*b*) is an exclusionary rule. 679 N.W.2d at 28. Therefore, unless the State can articulate a valid

noncharacter theory of admissibility, the evidence should not be admitted. *Id*. at 28-29.[10]

In this case, the evidence crossed that line. As the prosecution openly avowed, its trial theory regarding the other bad acts was that Fred had exercised domination over Maureen through a series of abusive acts; therefore, he did the same with Jane. The State was not using a specific act against Maureen to prove that a specific act against Jane occurred. Rather, it was trying to establish that Fred had a predisposition or tendency toward extreme power and control that manifested itself in both relationships. The overarching theme was power and control.[11] That was how the State tried this case.

On appeal, the State primarily argues for a somewhat different theory of admissibility—namely, that the *acts themselves* were very similar, thereby establishing a modus operandi. There are certainly similarities in Fred's treatment of both spouses. Maureen, like Jane, described Fred's tearing her hair out, demanding sex every day, interrogating about other men and isolating her, hitting her and putting her in fear. However, we are unable to agree that this is a

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[10] In *Taylor*, a domestic violence case, the supreme court clarified that *Sullivan* did not prohibit the State from introducing evidence of certain prior acts of violence by the defendant toward his victim. 689 N.W.2d at 128 n.6. Quoting from a law review article, Jane H. Aiken & Jane C. Murphy, Evidence Issues in Domestic Violence Civil Cases, 34 Fam. L. Q. 43 (2000), the court explained that "domestic violence is a pattern of behavior, with each episode connected to the others." *Taylor*, 689 N.W.2d at 128 n.6 (quoting Aiken & Murphy, 34 Fam. L. Q. at 56). But to be clear, the Aiken and Murphy article was discussing "a pattern of abuse *between the parties*," Aiken & Murphy, 34 Fam. L. Q. at 57 (emphasis added), a point later highlighted by our supreme court in *Reynolds*. 765 N.W.2d at 290-91.

[11] As the district court put it in its post-trial ruling,

> [I]n the Court's view, the importance of the similar conduct was not the particular method of control per se, but rather the use of force and intimidation to isolate first Maureen Little and then Jane Little. The efforts to isolate each of these two women were strikingly similar, albeit forty years apart.

straightforward modus operandi case like *Anderson*, *Howell*, *Casady*, or *Plaster*. One problem is that the most disturbing conduct of Fred toward Jane—his slamming of Jane's head against the toilet (which, according to the State, caused her subdural hematomas) and his firing the gun toward her—has no parallel in his marriage to Maureen. Some of the control and abuse techniques were similar, but Fred was not on trial for controlling and abusing Jane, but for willful injury causing serious injury and kidnapping.

At the same time, the danger of unfair prejudice was high. The jury listened to Fred's ex-wife and his estranged daughters testify for approximately a full day on Fred's cruel and inexcusable treatment of his ex-wife. They recounted incidents extending over a forty-year period. In addition to brutality, the incidents included examples of racism and unusual sexual practices. Moreover, the State's decision to call Laurie Schipper right after they testified compounded the potential for unfair prejudice. Although Schipper's testimony about the characteristics of a batterer and the "power and control" model may have been admissible under *State v. Newell*, 710 N.W.2d 6, 27-28 (Iowa 2006),[12] the presence of that expert testimony gave Maureen Little's, Barbara Wilkey's, and Margaret Pirkl's bad acts testimony added force.[13] Once a batterer, always a

[12] Three justices specially concurred in *Newell*, finding her "power and control" testimony therein to be "improper use of profiling evidence." 710 N.W.2d at 34. For reasons discussed below, we do not here reach the issue of whether the district court abused its discretion in admitting Schipper's testimony.

[13] We note an apparent disconnect in the State's arguments defending the admissibility of both the rule 5.404(*b*) evidence and Laurie Schipper's testimony. On the rule 5.404(*b*) front, the State argues that Fred's actions of isolation, emotional abuse, intimidation, coercion and threats, economic abuse, using the male privilege, and minimizing, denying or blaming are a "signature" or his "modus operandi." Yet, in defending the admission of Laurie Schipper's testimony, the State seems to maintain that her testimony about these traits was not a form of profiling but simply testimony

batterer. For the foregoing reasons, we believe the district court abused its discretion in admitting evidence from Fred's ex-wife and daughters regarding Fred's control and abuse of his first wife.

We think *Reynolds* informs the analysis here. In that assault case, the State introduced evidence of eleven past incidents where the defendant had threatened or assaulted his victim over a span of five years predating the assault at issue. *Reynolds*, 765 N.W.2d at 287-88. The supreme court agreed that individually some of the incidents might have been admissible, but found collectively that the danger of unfair prejudice exceeded the probative value. *Id.* at 291. In its decision, the supreme court emphasized how they were used by the prosecution at trial—in effect, to establish that the defendant had a propensity to assault the victim. *Id.* at 293. Here, too, the evidence was used primarily to show Fred had a propensity to exercise power and control over his spouses.

B. Harmless Error.

We now turn to the question of whether any error was harmless. The State contends the evidence of guilt was overwhelming. Because any error was not of constitutional dimensions, we need not be convinced that any error was harmless beyond a reasonable doubt. Rather, we should reverse only when it appears the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice. *Id.* at 292. However, we presume prejudice and "reverse unless the record affirmatively establishes otherwise." *Id*. (quoting *Sullivan*, 679 N.W.2d at 30).

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about general characteristics of batterers. In our view, the State wants to have it both ways.

"'Evidence of the accused's uncharged misconduct is potentially prejudicial because the jurors perceive the uncharged conduct as immoral and consequently react adversely to the accused.'" *State v. Castaneda*, 621 N.W.2d 435, 442 (Iowa 2001) (quoting Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 583 (1990)).

> When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. That, of course, is why the prosecution uses such evidence whenever it can. When prior bad acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered[:] to suggest that the defendant is a bad person, a convicted criminal, and that if "he did it before he probably did it again."

Castaneda, 621 N.W.2d at 441-42 (quoting *United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994)).

Upon our review of the record, we agree with the State's harmless error argument as regards the willful injury conviction, but disagree with it as to the kidnapping conviction.

There is no real dispute that Jane suffered multiple head injuries, as confirmed by the medical evidence, and indeed the photographic evidence. It is difficult to convey in a judicial opinion the disturbing impression left by the "before and after" photos of Jane, which contrast her appearance in May 2006 to her appearance in August 2006. The State presented compelling evidence to show that Jane's subdural hematomas were life-threatening and that her head injuries

caused her trouble walking. In short, unlike in *Sullivan*, we are confident the State's case on the willful injury charge was "so overwhelming that the State would have prevailed even in the absence of the boost it received when the jury heard" the prior bad acts evidence. *See Sullivan*, 679 N.W.2d at 31.

Nor did Fred's testimony undermine the State's powerful evidence on the willful injury charge. *Cf*. *Sullivan*, 679 N.W.2d at 30-31 (noting, in contrast, that the defendant's admission was the only substantial evidence the State had to connect the defendant to the crime and the admission was, at best, ambiguous.). Rather, we think Fred's testimony actually strengthened the State's case on that charge, as his attempt to explain events was inherently unbelievable.

Fred asked the jury to believe that a toilet broke into pieces by itself, instead of when he smashed Jane against it. He asked the jury to accept that he (a trained marksman) *accidentally* discharged a pistol *twice* with Jane in the bedroom, although he admitted lying to the sheriff's office at the time that he knew nothing about the gunshots. Fred did not refute the neighbor's testimony that he had driven his truck at Jane that same night and said he would "crack her f___ing skull." Fred asked the jury to believe he never had physically assaulted Jane apart from one and only one incident where he pulled her hair, poked her eye, and pulled her ears. Fred took great pains to tell the jury, we believe unconvincingly, that this had only happened once.

To try to rebut Jane's testimony that her head was pushed into the toilet, Fred claimed Jane fell on a paint can in the bathroom. Fred then claimed he got concerned "while shaving" a few days later that Jane might develop a blood clot, so he brought her to the hospital. Fred also admitted he thereafter

misrepresented Jane's multiple subdural hematomas as a "small stroke." His testimony does not make sense to us, and we do not believe it would have made sense to a jury.

Furthermore, the rule 5.404(*b*) evidence would have provided less benefit to the State on the willful injury count than on the kidnapping count. The evidence did not show that Fred had ever inflicted a similar, life-threatening injury on Maureen. Where the rule 5.404(*b*) evidence was more helpful to the prosecution was on the kidnapping charge. There the sum total of non-5.404(*b*) evidence, particularly on the element of confinement, was more in equipoise. Even if a jury discounted Fred's testimony, it was not disputed that Jane went out by herself several times during the May 2006 to August 2006 time period, for example, to golf with a friend or run an errand. The evidence also showed Jane was alone at home for long periods of time. Fred continued to work during the day. A neighbor testified he would see Jane sitting by herself on the patio outside the house for hours during the summer. Notably, near the conclusion of cross-examination, Jane testified as follows:

> Q. Now, you know that the State has to prove that you were confined; right? A. Yes.
>
> Q. When were you confined? A. You mean when—when was I kept at home?
>
> Q. When were you confined? A. Well, I was pretty well confined when I was told I couldn't play golf and I couldn't go to the neighbor's and I couldn't visit with my friends, and Charlotte Kelley was going to come over and visit me one time and it was strongly discouraged that she not come. And I just knew I had to stay right there.
>
> Q. Did Fred ever threaten you and tell you he was going to hurt you if you did these things? A. No. But I thought he would. He had hurt me many other times, so common sense would have told me that that would happen.

These answers clearly troubled the prosecution, because later on they took the unusual step of recalling Jane to the stand to ask her:

> Q. Miss Little, in 2006, the summer of 2006, when you were at the house in Granger, did Fred Little have your permission or any authority to keep you at that house? A. No. I never asked him to do that.
>
> Q. Did you feel like you had a choice in whether you could leave or not? A. No. I really had no choice. I would think about it at night, but I was so deathly afraid of him finding out that I might have gone to the neighbor's, and the fact that I knew he had shot at me before, I had no idea what he might do if he found that I had tried to get out of there.
>
> MR. FORITANO: I don't have anything further, your Honor.

Accordingly, we conclude the erroneous admission of rule 5.404(*b*) evidence requires us to reverse Fred's kidnapping conviction, but not his conviction for willful injury causing serious injury.

C. Remaining Issues on Appeal.

We still must address several other aspects of this appeal. Fred has raised four other issues: (1) the denial of his motion for a bill of particulars as to the kidnapping charge; (2) the admission of Schipper's testimony regarding the characteristics of a batterer and regarding a battered woman's ability to remember and relate facts consistently due to post-traumatic stress syndrome; (3) alleged prosecutorial misconduct; and (4) the sufficiency of the evidence to sustain the kidnapping conviction.

None of these matters, in our view, undermine the jury finding that Fred committed willful injury causing serious injury. Two of the grounds, on their face, have nothing to do with the willful injury charge. Regarding the other two, we believe any error was clearly harmless.

As with the rule 5.404(*b*) "bad acts" evidence, Schipper's testimony may have affected the jury's decision on the kidnapping charge, but it did not taint its disposition of the willful injury charge. The photographic evidence, the medical evidence, and Fred's implausible explanations carried the day and by themselves led to Fred's conviction on this count. We cannot see that exclusion of Schipper's testimony would have made a difference here.

Likewise, the alleged prosecutorial misconduct, if misconduct at all, did not play a meaningful role at trial. Fred claims misconduct because the prosecution (1) failed to make several boxes of potential evidence available to the defense until jury selection and (2) asked a friendly witness whether Fred had told him about "smash[ing] Jane Little's finger with a hammer," a question that Fred contends lacked any good-faith basis in the record. The district court remedied the untimely disclosure by offering to give the defense a one-day recess to review the material, and by prohibiting the prosecution from using much of it in its case in chief. Fred does not explain why this remedy was inadequate or how the delayed disclosure actually impacted the trial. Although the factual basis for the "finger-smashing" question was debatable, there was photographic evidence that one of Jane's fingernails had been injured, as well as unrebutted evidence that Fred had used a hammer to damage Jane's property. It is difficult to see how this question would have prejudiced Fred in the overall context of the case. Accordingly, we reiterate that Fred's conviction for willful injury causing serious injury should be affirmed.

Turning back to the kidnapping charge, since we are reversing and remanding, we have to consider Fred's assertion that there should not be a

second trial, because the evidence was insufficient as a matter of law to establish kidnapping the first time around. *See State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003). On this point, we disagree with Fred. Fred wrote, in a letter that was admitted into evidence at trial, "There's a good reason why some people may have thought it appeared to be kidnapping, but it wasn't." Iowa law does not require any minimum period of confinement for kidnapping. *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). There was sufficient evidence from which a reasonable jury could conclude that Fred confined Jane, knowing he did not have her consent, with the purpose of inflicting serious injury or sexual abuse on her. Iowa Code § 710.1 (elements of kidnapping). There was also sufficient evidence from which a reasonable jury could find that Jane suffered serious injury or was intentionally subjected to torture or sexual abuse as a result of the kidnapping. *Id*. § 710.2 (additional elements of first degree kidnapping). For example, and this is just one example, a jury could have found that by brutally beating Jane, threatening to kill her, and taking away her means of communication with the outside world, Fred intended to and did confine her at home periodically against her will, so he could subject her to unwanted sex and perverse mind games.

Fred also urges us to hold that Schipper's testimony exceeded the bounds of admissibility, and should not be permitted on retrial. *See State v. TeBrockhorst*, 305 N.W.2d 705, 709 (Iowa 1981) (addressing other assignments of error to provide guidance on retrial). Fred contends that Schipper, in effect, gave the jury a "profile" of a guilty defendant, using examples that matched his own conduct as described by prosecution witnesses. *Cf. State v. Hulbert*, 481 N.W.2d 329, 332-33 (Iowa 1992) (holding that the trial court did not abuse its

discretion in refusing to admit expert testimony that the defendant did not fit the psychological profile of a child molester). Additionally, Fred contends that Schipper, who has a bachelor's degree in social work, lacked the requisite qualifications to provide expert psychological or psychiatric testimony on post-traumatic stress syndrome, including its impact on the hippocampus of the brain. Thus, according to Fred, Schipper's testimony was improper both because she purported to list the traits of a guilty defendant and because she was used to bolster Jane's credibility and explain her prior inconsistent statements and lack of recollection. *See Hulbert*, 481 N.W.2d at 332 (holding that "expert psychological evidence may not be used to merely bolster a witness's credibility"). The State, meanwhile, counters that Schipper's expert testimony fell within the parameters established by prior supreme court decisions and did not specifically refer to either Fred or Jane.

As both sides recognize, the supreme court has previously considered the admissibility of expert testimony in domestic abuse cases. In *State v. Griffin*, 564 N.W.2d 370 (Iowa 1997), the supreme court held that Laurie Schipper herself could testify on "battered woman syndrome, particularly as manifested by a victim's refusal to testify against her batterer." 564 N.W.2d at 374. In *Rodriquez*, our supreme court seemingly went a step further and upheld the admission of expert testimony regarding "'the cycle of violence,' and how different aspects of power and control, the core of domestic violence, are used by the abuser against the victim." 636 N.W.2d at 245. There, the expert testified concerning isolation and how it "commonly extends to controlling the victim's ability to work and her

access to economic resources, as well as access to medical care and treatment." *Id.*

Most recently, in *Newell*, the court permitted testimony from a police officer explaining "the issues of power and control involved in domestic violence," including "the use of intimidation, emotional abuse, isolation of the victim, blaming the victim, using children as pawns, economic abuse, coercion, and threats" as aspects of an abusive domestic relationship. 710 N.W.2d at 27. The expert there further testified to "the continuum of violence and the potential that domestic violence will escalate." *Id*.[14]

Since we are not required to decide whether Schipper's testimony was properly admitted in this case, we will decline to do so. Upon retrial, without the bad acts evidence, we expect the complexion of this case will be somewhat different, and Schipper may not be used in the same ways. *See State v. Lawler*, 571 N.W.2d 486, 491 (Iowa 1997) (declining to address issues that may not arise on retrial). We also decline to reach Fred's remaining issues, i.e., the bill of particulars and the alleged prosecutorial misconduct. We anticipate those issues also may not arise in the same way (or at all) on retrial. Fred now has the benefit of three-and-a-half week trial to provide him with details on the State's theory of prosecution. In addition, Fred has the material that he previously claimed was improperly withheld due to prosecutorial misconduct. So, we reverse and remand for a new trial on the kidnapping charge without reaching any issues other than bad acts and the sufficiency of the evidence.

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[14] As we have already noted, three justices concurred in the judgment in *Newell*, stating that the expert testimony "was an improper use of profiling evidence to establish Newell's guilt." *Id*. at 34.

D. Merger.

This brings us to a final question. After the jury verdicts were returned finding Fred guilty of both first-degree kidnapping and willful injury causing serious injury, the district court merged the two convictions. This occurred pursuant to an agreement the parties had reached in court and on the record, before the case went to the jury. Specifically, both sides agreed that if Fred was found guilty both of kidnapping in any degree, and of any willful injury, there would be a merger of the two offenses. Under these circumstances, can we separately affirm the willful injury conviction? The State urges that we can. Fred argues we cannot.

The merger doctrine is based on Iowa Code section 701.9:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

To determine whether one public offense is "necessarily included" in another public offense, we apply an "impossibility test." *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001). Under this test, "[i]f the greater offense cannot be committed without also committing the lesser offense, the lesser is included in the greater." However, "[i]f the greater offense is defined alternatively and the State charges both alternatives, the test for included offenses must be applied to each alternative." *Id*. at 851; *see also State v. Caquelin*, 702 N.W.2d 510, 511 (Iowa Ct. App. 2005) ("If the greater offense cannot be committed without also committing the lesser offense, the lesser is an included offense of the greater.").

Absent the parties' stipulation, we would have doubts as to whether the two offenses were properly merged. The jury was given a broad first-degree kidnapping instruction that included various alternatives. The defendant could have been found guilty if he confined the victim with intent to inflict serious injury *or* subject the victim to sexual abuse *or* secretly confine the victim, s*ee* Iowa Code § 710.1, provided the victim suffered, as a consequence of the kidnapping, serious injury *or* torture *or* sexual abuse. *See id.* § 710.2. When the statute defines an offense alternatively, all the alternatives are considered if they were part of the prosecution. *State v. Jeffries*, 430 N.W.2d 728, 740 (Iowa 1988). Here, the State argued these different alternatives to the jury in closing argument and told them they did not have to agree on any one of them. Hence, from our review of the record, it appears the jury could have found that Fred committed willful injury causing serious injury by slamming Jane's head inside the toilet, but that he committed kidnapping by confining her against her will so he could sexually abuse her and intentionally subject her to mental and physical anguish.

There is authority that where a kidnapping/sexual assault case is tried as one overall occurrence, it cannot be parceled into separate events to avoid merger. *See State v. Belken*, 633 N.W.2d 786, 802 (Iowa 2001); *State v. Morgan,* 559 N.W.2d 603, 611-12 (Iowa 1997); *State v. Newman*, 326 N.W.2d 796, 803 (Iowa 1982); *State v. Newman*, 326 N.W.2d 788, 793 (Iowa 1982). Those cases, however, involve circumstances where sexual abuse alone formed the basis for the kidnapping charge.

In any event, we conclude that, despite the prior merger, we may affirm the jury's verdict of guilty on the willful injury charge. A merger does not mean

that this verdict never existed. In *State v. Bullock*, 638 N.W.2d 728, 735 (Iowa 2002), where two offenses had been improperly merged, the supreme court undid the merger, vacated the sentence, and remanded for entry of judgments of conviction and sentencing on both counts. Here, by determining a new trial is required on the kidnapping charge, we have likewise unmerged the two offenses. *See also State v. Morris*, 677 N.W.2d 787, 788-89 (Iowa 2004) (citing cases) (noting that where the evidence does not support a conviction for a greater offense, but only for a lesser-included offense that was submitted to the jury, the appellate court may direct entry of a judgment of conviction on the lesser-included offense). This means that a conviction should be entered on the willful injury charge, but if Fred is subsequently retried and convicted of kidnapping, the offenses would be merged again according to the parties' stipulation. Otherwise, Fred would be sentenced on the willful injury causing serious injury conviction.

IV. Conclusion.

For the foregoing reasons, we reverse Fred Little's sentence and conviction for first-degree kidnapping and remand for a new trial. We affirm the finding that Fred Little committed willful injury causing serious injury and remand for entry of a conviction on that count. If Fred Little is retried and convicted of kidnapping, the offenses would again merge. Otherwise, the defendant should be sentenced on the willful injury causing serious injury count.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.