ELECTRONICALLY FILED NOV 18, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, JOHN CHARLES DONAHUE, Defendant-Appellant.	Supreme Court No.: 18-2239 Audubon County Case No. FECR048517

ORAL ARGUMENT REQUESTED

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

Honorable Jeffrey L. Larson

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. CROSS-EXAMINATION ABOUT ‘THE CARROLL INCIDENT’

a. Preservation of Error

While the State is correct that simply filing a notice of appeal is often insufficient to generally preserve error, the errors discussed in this appeal were properly preserved for appellate review. First, as indicated by the State, Donahue argued the ruling on the motion in limine filed on the first trial was not applicable to the present trial. Donahue argued he should be able to offer the evidence from the Motion in Limine “the Carroll Incident”.

Second, the court was aware Donahue asserted the rape shield law did not apply, meaning the alleged incident was false and therefore not covered by the rape shield protections. *See State v. Baker*, 679 N.W.2d 7, 10–11 (Iowa 2004). (Trial Trans. at 266, lns. 10-14.)

Finally, the court was aware Donahue argued the State opened the door to this evidence through myriad references to multiple incidents. (Trial Trans. at 258, lns. 21-22; 266, ln. 15 – 267 ln. 8.) The court’s erroneous ruling which addressed each of the above arguments, (Trial Trans. at 268, lns. 1 – 19), when considered in light of the notice of appeal, provides proper preservation of error.

b. Argument

The State asserts several arguments in support of the trial court's ruling which prevented the entry of the proffered evidence. Each argument fails. First, the State argues the entry of the evidence was prohibited by the court's limine ruling, which ruling included a statement regarding the exclusion of prior bad acts. (Appx. at 19.) As previously stated, however, ***Donahue has the right*** to prohibit a prosecutor from entering evidence of prior bad acts, whether alleged or proven. *See State v. Taylor*, 689 N.W.2d 116, 123-24 (Iowa 2004) (citing Iowa R. Evid. 5.404(b)). As Donahue was attempting to offer evidence of his own alleged prior bad act, the State did not have standing or grounds to request exclusion of this evidence, and the court abused its discretion in preventing Donahue from entering this evidence. *Id.* The State further requested the submission of this evidence, in its limine filings, and should be precluded from now changing its position on this issue. *See State v. Spaulding*, 313 N.W.2d 878, 880 (Iowa 1981).

Second, The State asserts Donahue's claims were waived with regard to this issue because defense counsel failed to elaborate on what evidence he intended to illicit from T.G., and failed to make T.G.'s deposition part of the record. (State's Brief at 27). During the offer of proof, however, Donahue alerted the court that the rape shield law did not apply to the evidence Donahue was attempting to elicit from T.G. (Trial Trans. at 266, lns. 10-14.) This placed the court on notice that the

evidence sought was not barred by the rape shield law, regardless of whether or not T.G.'s deposition was made part of the record. *See State v. Baker*, 679 N.W.2d 7, 10–11 (Iowa 2004).

Third, whether or not rape shield law typically applies to this evidence, the State opened the door to admission of this evidence. During trial, T.G. was asked "[n]ow do you remember in this case, the attorneys had an opportunity to do a deposition asking you questions under oath?" (Trial Trans. at 237 lns. 9-11). She responded in the affirmative. (Trial Trans. at 237, Ln. 12.) She was then asked "[a]nd T[.], were you asked questions about what the defendant did to you? Yes" (Trial Trans. at 237 lns. 19-21). At no point did the State specify they were only referring to the incidents occurring at the Audubon home or indicated to T.G. that they wanted her to refer to specific allegations. Each of these instances of the State opening the door were further highlighted for the court during the offer of proof. (Trial Trans. at 258, lns. 21-22; 266, ln. 15 – 267 ln. 8.)

These myriad instances of the State referring to multiple incidents, eliciting testimony from witnesses relating to multiple incidents, as well as the use of a jury instruction specifically providing language indicating multiple incidents, each opened the door for the defense to question T.G. about other instances of alleged abuse, including the Carroll incident. *See, e.g.*, *State v. Jeffries*, 417 N.W.2d 237, 239 (Iowa 1987) (providing a defendant would have the right to rebut evidence

entered by the State regarding a victim's prior sexual history, regardless of the rape shield law). There was no limiting finding by the district court; therefore, the door was opened regarding all incidents, not just those allegedly occurring in Donahue's home. The door was opened by the State and the district court erred in limiting the line of questioning.

Finally, as discussed in original briefing, Donahue has a constitutional right to confront witnesses through the Sixth Amendment to the United States Constitution, as well as through Article I, section 10 of the Iowa Constitution. Those rights were infringed by the district court preventing the desired line of questioning of T.G. *State v. Runyan*, 599 N.W.2d 474, 476 (Iowa Ct. App. 1999). failure to allow cross examination on all T.G.'s statements, as well as failure to allow Donahue to enter evidence to counter statements made by the State, materially prejudiced Donahue. This impeachment material is probative, relevant for a defendant, and calls into question allegations made against Donahue in the present case. *See, e.g.*, *State v. Baker*, 679 N.W.2d 7, 12 (Iowa 2004) (providing embarrassment relating to proof that a complaining witness was a liar or boaster was not unfair prejudice and did not "outweigh the probative value of clearly relevant evidence. This is especially so when, as in this case, the countervailing right of a defendant to present a defense to a criminal charge is at stake.").

The district court erred when in prevented Donahue from exploring this line of testimony, abused its discretion, and violated Donahue's constitutional rights by excluding evidence and testimony relating to the allegation between Donahue and T.G. Reversal and remand is necessary.

II. JURY INSTRUCTION 20

a. Preservation of Error

The State asserts error was not preserved on this issue. However, the Iowa Supreme Court recognizes "[t]he claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it." *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). Here, counsel challenged the offensive jury instruction, and the district court overruled the objection. This is sufficient to preserve error for appellate review. *See id.*

b. Argument

In its brief, the State appears to argue T.G.'s "brief testimony that it [meaning sexual assault] had happened more than once" was insufficient to prejudice Donahue. (State's Br. at 42-43.) The record tells another story. (Trial Trans. at 194 lns. 14-15; 258, lns. 21-22; 266, ln. 15 – 267 ln. 8.) The Iowa Supreme Court

recognizes that, where repeated submission of evidence of other bad acts evidence, or argument highlighting a defendant's other bad acts evidence exists, "[t]he possible prejudice [is] great." *See State v. Belieu*, 288 N.W.2d 895, 901 (Iowa 1980). The State's repeated reference to additional acts for which Donahue was not on trial was prejudicial and erroneous. Additionally, the witness's repeated reference to additional acts for which Donahue was not on trial was prejudicial and erroneous. A jury may decide one report was misperceived or erroneous or an incorrect memory. Instead the jury was faced with an unchallenged report of serial abuse.

Following the state's repeated references to other alleged bad acts and following witnesses' repeated reference to other alleged bad acts, the jury was provided an instruction *which referred to multiple bad acts*. That instruction was erroneous and unfairly prejudicial. The district court had a "duty to instruct fully and fairly" on the law applicable to "all issues raised by the evidence." *State v. Schuler,* 774 N.W.2d 294, 297 (Iowa 2009). The court breached this duty by allowing an incorrect and prejudicial jury instruction. Jury instructions are given to the jury by the court, and are considered the law of the case. Clearly, a statement from the court to the jury that there were multiple instances of abuse, when a defendant is on trial for one instance, is erroneous and unfairly prejudicial. (Trial Trans. at 193, ln. 21-25; 194, ln. 1-5.) *See State v. Barnhardt*, 919 N.W.2d 637 (Table), 2018 WL 2230938 (Iowa Ct. App. 2018).

There was no testimony sufficient to support the use of this instruction containing the phrase "sexual offenses" by substantial evidence. *See State v. Benson*, 919 N.W.2d 237, 241-42 (Iowa 2018). Therefore, Instruction 20 used in this case is not an accurate statement of the law supported by substantial evidence in this case. Donahue was further prejudiced by the use of Instruction 20. The use of the phrase "sexual offenses" in instruction 20 implies Donahue is alleged to have committed multiple offenses against T.G., even though evidence of only one offense was charged and testimony was oddly expanded to allow T.G. to reference multiple offenses, but the defendant was not allowed to address multiple offenses. (Trial Trans. at 229-31, 237, ln. 4-21.) The prejudicial implication in Instruction 20 is furthered by the State's own opening statement, in which it told the jury that Donahue "repeatedly sexually abused [T.G.] during the time she lived with her dad . . . [and] [d]ue to the frequency with which he abused [T.G.] and over an extended period of time, only a few occasions stand out in her mind." (Trial Trans. at 196, lns. 20-22.) Considering the language of instruction 20, the evidence submitted at trial to the misstatements of the State made before the jury, it is clear the language used in Instruction 20 misled and confused the jury by its misstatement of Donahue's singular charge. *See Benson*, 919 N.W.2d at 241-42.

Donahue was charged with one count of Sexual Abuse in the Third Degree. (Appx. at 5.) All elements of trial, including instructions, should reflect this single

charge. The incorrect jury instruction fails to do so. Donahue was prejudiced and this case calls for reversal and remand.

III. DISTRICT COURT RULING ON MOTION FOR JUDGMENT OF ACQUITTAL

The State is in error that sufficient evidence exists in the record to support the conviction. In this case, the only evidence available to support Donahue's conviction is T.G.'s testimony. The State is correct that their case may rest solely on victim testimony pursuant to *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1990). However, that testimony must be credible in order to support the verdict.

Here, testimony is not credible and the district court erred in overruling Donahue's motion. The only evidence of the act was T.G.'s testimony; there was no physical evidence. (Trial Trans. at 316, ln. 25; 317, ln. 1-4.) T.G. could not provide a specific date, or even a month or general time of year. (Trial Trans. At 282, ln. 14-22.) T.G. admitted her story changed based on who she told. (Trial Trans. at 283, ln. 24-25; 284, ln. 1-2.) T.G. admitted she told a police officer that no one in Audubon touched or hurt her. (Trial Trans. At 274, ln. 20-22.) It was only later she alleged Donahue touched her. (Trial Trans. at 283, ln. 24-25; 284, ln. 1-2.) The vague changing story, coupled with the lack of corroborating evidence, provides insufficient evidence of this element.

Additionally, there was insufficient credible evidence that the alleged act was by force or against T.G.'s will. The State highlights T.G.'s testimony in its brief. (State's Br. at 48.) What the State omits is an explanation supported by the record as to why, T.G. continued to voluntarily (not just by direction from her parents) be in Donahue's presence. Testimony of multiple witnesses provided that throughout the entire time period alleged by the State, T.G. continued to voluntarily be around Donahue; including walking to his house with siblings, requesting assistance with homework, and generally treating him as any other elder family member (Trial Trans. at 349, ln. 15 – 354, ln. 9.) Moreover, there was no testimony that, during the alleged sexual abuse, T.G.: told Donahue to stop, said no, pushed his hand away, or otherwise provided indication that the alleged interaction was against the will of T.G. Considering both T.G.'s testimony, as well as the surrounding circumstances and her other actions during this time, there is insufficient evidence any alleged act was by force or against T.G.'s will.

Even if T.G.'s testimony is taken at its face, the evidence submitted at trial is insufficient to "convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt." *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009). The court erred in overruling Donahue's motion for a judgment of acquittal.

CONCLUSION

Donahue properly preserved error on his appellate claims. The district court erred in granting the State's objection to a line of cross examination questioning of T.G., erred in submitting an erroneous jury instruction, and erred in overruling Donahue's motion and renewed motion for judgement of acquittal. These errors warrant reversal and remand.

REQUEST FOR ORAL ARGUMENT

John Donahue maintains his request for oral argument.

CERTIFICATE OF PRODUCTION COSTS

I certify my total printing cost for this Reply Brief is $3.00

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/s/ Christine E. Branstad ______________________ November 18, 2019
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I, Christine Branstad, certify I filed the Appellant's Final Reply Brief with the Clerk of the Supreme Court. These copies were electronically filed on November 18, 2019 with Clerk of the Supreme Court.

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