

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

Supreme Court No.: 18-2239

JOHN CHARLES DONAHUE,
Defendant - Appellant.

Audubon County Case FECR048517

**APPEAL FROM THE IOWA DISTRICT COURT FOR AUDUBON
COUNTY**

Honorable Jeffrey L. Larson

**APPLICATION FOR FURTHER REVIEW FROM
COURT OF APPEALS DECISION ON JULY 22, 2020**

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ISSUES FOR REVIEW

Whether the Court of Appeals erred in limiting cross examination of T.G. based on a ruling on a motion in limine ('ruling in limine') and the Iowa Rape Shield law.

Whether the Court of Appeals erred in finding sufficient evidence existed to support Donahue's conviction.

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STATEMENT SUPPORTING FURTHER REVIEW

John Donahue is a family man who supported his biological and extended family from providing a home to buying school supplies to helping with homework. In 70+ years, there was no controversy about time spent time with children, grandchildren, great grandchildren or their friends and relatives. Donahue was then accused of abusing T.G., his granddaughter's stepdaughter (step great-granddaughter).

The first trial against Donahue resulted in a mistrial. The second trial contained substantial unfairly prejudicial errors leading to conviction. The district and appellate courts barred Donahue from cross examining T.G. after the State opened the door by referencing a separate allegation of abuse. Allowing the State to assert multiple allegations of abuse created the impression to the jury that Donahue was a reprehensible repeat offender. Forbidding Donahue from responding to the State's line of questioning prevented Donahue from correcting that impression and violated Donahue's constitutional right to confront a witness. Essentially the second allegation became uncontroverted. Neither the ruling in limine nor the Iowa Rape Shield Law's prohibit such cross examination once the State opens the door.

Further, the district and appellate courts were incorrect to find the State established sufficient evidence to support Donahue's conviction. There is no physical evidence supporting T.G.'s claims. The only evidence against Donahue is T.G.'s own testimony, which is riddled with inconsistencies.

Factual Background:

On April 26, 2017, a criminal complaint alleged Donahue committed lascivious acts with a child spanning years. (Appx. at 4.) On May 30, 2017, a Trial Information alleged Donahue committed Sexual Abuse in the Second Degree, based on one report. (Appx. at 4, 5-6.) On May 22, 2018, the State amended the Trial Information to Sexual Abuse in the Third Degree. (Appx. at 9-10.) On June 28, 2018, the trial ended in mistrial. (First Trial Trans. at 203, ln. 13-14.)

On October 30, 2018, a second jury trial commenced in which T.G. testified her parents were separated and she moved to be with her father and his wife after her biological mother physically and mentally abused T.G. (Trial Trans. at 209, ln. 6-14.) T.G. testified John Donahue, her stepmother's grandfather, sexually abused her more than once. (Trial Trans. at 223, ln. 23-25; 224, ln. 1.) T.G. detailed one allegation, alleged to occur in Donahue's home. (Trial Trans. at 229, lns. 17-21; 232, lns. 3-11.)

The defense attempted to cross-examine T.G. about a specific other allegation about Donahue, as addressed in depositions ("the Carroll allegation").

(Trial Trans. at 256, ln. 17-24.) The State objected. (Trial Trans. at 256, ln. 25; 257, ln. 1.) Defense argued the prior Motion in Limine did not control the second trial, and asserted the State opened the door to questioning based on the State's opening statement and direct examination of T.G. (Trial Trans. at 260, ln. 21- 25.) Defense further argued the prior bad acts clause in the Motion in Limine does not bar this line of questioning, nor does Rule 5.412. (Trial Trans. at 266, ln. 6-14.) The court sustained the State's objection. (Trial Trans. at 268, ln. 1- 9.)

Following testimony, the parties discussed jury instructions. (Trial Trans. at 364, ln. 23 – 367, ln. 18.) Donahue objected to State's proposed instruction 20. (Trial Trans. at 366, ln. 22-25; 367, ln. 1-4.) The court overruled Donahue's objection based on *State v. Barnhardt*, a May 2018 Iowa Court of Appeals case. (Trial Trans. at 367, ln. 6-10.)

The jury found Donahue guilty of Sexual Abuse in the Third Degree. (Appx. at 34.) Donahue appealed. (Appx. at 89.) The Court of Appeals affirmed.

BRIEF IN SUPPORT OF FURTHER REVIEW

I. The Court of Appeals erred by affirming the district's decision to prohibit cross examination about the Carroll allegation.

The appellate court found cross examination of T.G. about the Carroll allegation was prohibited by both Iowa's rape shield law and the ruling in limine

addressing ‘prior bad acts’ by Donahue. Neither the ruling in limine nor Iowa’s rape shield law bar the specific line of questioning from Donahue.

First, the ruling in limine does not preclude Donahue from offering evidence of his own alleged prior bad acts. A defendant has the right to prohibit the prosecution from entering evidence of prior bad acts. *State v. Taylor*, 689 N.W.2d 116, 123-24 (Iowa 2004)(citing Iowa R. Evid. 5.404(b)). Such right was intended to protect a defendant from past information that is prejudicial in nature.

Donahue’s motion requested, “[t]hat the jury not be told at any time by the State or the State’s witnesses about an alleged prior bad act by the Defendant.” The ruling in limine did not prevent Donahue from offering evidence regarding prior allegations. Here, the district and appellate courts were wrong to rule the motion in limine precluded Donahue from cross examining T.G.

Second, the appellate court incorrectly applies the rape shield law to Donahue’s case. The court’s ruling alleges the question asked of T.G. by the State was not sufficient to overcome the protections of the rape shield law or open the door for defense to cross examine. To the contrary, the State’s question, paired with the State’s opening and closing arguments, alleged repeated acts. By refusing to allow Donahue to cross examine on the allegations, multiple uncontroverted allegations remained before the jury. Even though Donahue was charged with one count of sexual abuse based on a single alleged interaction, the State’s question

guided the jury to believe the charge was one of numerous allegations. Allowing the State to open that door and paint a certain picture of Donahue is sufficient to allow cross examination of T.G.'s about the Carroll allegation and to dispel the perception that there were many similar admitted allegations.

Moreover, the rape shield law does not provide any protection for false claims of sexual activity. *State v. Baker*, 679 N.W.2d 7, 10-11 (Iowa 2004). The appellate court dismisses the argument that the Carroll allegation is false and instead suggests Donahue failed to comply with the necessary procedures to raise such an argument found in Rule 5.412(c)(1)(a). The appellate court misses, however, that Donahue did not intend to question T.G. on the Carroll allegation. The motion in limine precluded the prosecution from entering any evidence of prior bad acts. However, the prosecution characterized Donahue's alleged abusive behavior as a repeated occurrence and strongly alluded to the Carroll allegation. Donahue has a constitutional right to confront witnesses through the Sixth Amendment to the United States Constitution, as well as Article I, section 10 of the Iowa Constitution. *State v. Runyan*, 599 N.W.2d 474, 476 (Iowa Ct. App. 1999). Donahue was not required to comply with the notice requirements under Rule 5.412(c)(1)(a) because the testimony happened at trial and Donahue was not aware the State would open the door to the Carroll allegation.

Finally, the court errantly applied the logic within the rape shield law to Donahue's case. As stated in the order, rape shield laws are enacted to "(1) protect the privacy of victims, (2) encourage reporting, and (3) prevent time-consuming and distracting inquiry into collateral matters." *State v. Mitchell*, 568 N.W.2d 493, 497 (Iowa 1997). The court of appeals stated applying the rape shield law to bar cross examination would protect T.G.'s privacy in the uncharged Carroll allegation and encourage reporting sexual offenses. Both factors are nonissues, as T.G. made both allegations to law enforcement and to the jury. As for the third element, the cross examination in question is not collateral or distracting, as it relates directly to the allegations against Donahue. Rape shield is offered to protect an alleged victim from disclosing details of a sexual past that may be viewed unkindly by a jury or that may be embarrassing to an alleged victim. In the case where multiple allegations are made against one defendant, if some of those allegations are shown to be false, that showing may fairly be used to address credibility of the testifying witness.

Here, the Court of Appeals errantly found defense was barred from cross examining T.G. after the State opened the door to the Carrol allegation. The ruling in limine did not prevent Donahue from cross examining T.G. after the State brought up allegations aside from the charged allegation. Donahue has a constitutional right to defend himself after the State characterized the allegation as

part of a series of crimes. By analogy, it would be nonsense to allow a witness to testify a defendant charged in a bank robbery committed multiple prior bank robberies, but then to prevent the defendant from challenging that assertion.

II. The Court of Appeals erred by finding there was sufficient evidence to convict Donahue.

The appellate court incorrectly found sufficient evidence supports Donahue's conviction. In Donahue's brief, he lists the physical and direct evidence missing from the record. Despite this list, the appellate court supports its conclusion by stating, although there is no proof of a specific date or no physical evidence of a sex act, neither is required within Iowa Code § 709.4. The court concludes Donahue provides no authority showing the missing evidence was *required* by law. Donahue, however, lists lacking evidence to illustrate the only evidence against him is T.G.'s testimony. Although nothing else is required by statute, in this case, that testimony is insufficient to establish guilt beyond reasonable doubt to a rational trier of fact.

T.G.'s testimony is flawed. Her story changed several times and she admitted she changed her story based on who she told. (Trial Trans. at 283, ln. 24-25; 284, ln. 1-2.) The appellate court attempts rationalizes this inconsistency by saying T.G. lied because T.G.'s stepmother was present when police originally

questioned T.G. This conclusion fails to consider T.G. told a police officer no one in Audubon (which includes Donahue) touched or hurt her. (Trial Trans. at 274, ln. 20- 22.) Following interaction with police, T.G. was voluntarily around Donahue; including walking to his house with siblings, requesting assistance with homework, and generally treating him as any other elder family member (*See generally* Trial Trans. at 347-348.) After T.G. returned to her mother, she made allegations against Donahue. (Trial Trans. at 283, ln. 24-25 - 284, lns. 1-2.)

The timing of T.G.'s allegations, along with inconsistencies and lack of corroborating evidence, cast a serious doubt on the probative value of her testimony. As Donahue pointed out in his brief, no other evidence supports T.G.'s testimony. There was no physical evidence indicating harm. No witness testified Donahue behaved inappropriately with any family member No witness testified Donahue behaved inappropriately with T.G or with, *even though T.G. alleged witnesses were in the same room.* There was never a date or even definitive year of the allegation presented. Donahue refuted the State's claim he "groomed" T.G. by showing he was generous to his entire family. (Trial Trans. at 347, lns. 4-10; 350, lns.11-22.)

Accordingly, the State failed to prove guilty beyond reasonable doubt. Theoretically, testimony alone may be sufficient, T.G.'s testimony, however, lacked credibility due to inconsistencies and timing of allegations implying motive

to lie. The Court of Appeals is erred in finding sufficient evidence supports Donahue's conviction.

CONCLUSION

The Court of Appeals errantly prohibited important cross examination, and the record contains insufficient evidence to support conviction.

Accordingly, Donahue requests this Court review and reverse the July 22, 2020 Court of Appeals ruling.

As/ Christine E. Branstad

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE,
AND TYPE-STYLE LIMITATIONS AND REQUIREMENTS**

Pursuant to Iowa Rule of App. Procedure 9.1401

1. This application complies with the type-volume limitation of Iowa R. App.

P. 6.903(1)(g)(1) or (2) because:

[XX] this application for further review contains 1,967 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This application complies with the typeface requirements of Iowa. R. App.

P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f)

because:

[XX] this application has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in Times New Roman font size 14.

As/ Christine E. Branstad

August 11, 2020

CERTIFICATE OF FILING

I, Christine Branstad, certify I filed the Application for Further Review with the Clerk of the Supreme Court by EDMS on August 11, 2020

As/ Christine E. Branstad

August 11, 2020

CERTIFICATE OF SERVICE

I, Christine Branstad, certify copies of the Application for Further Review were served on all parties on August 11, 2020:

- Iowa Attorney General's office by EDMS, and
- John Donahue, appellant, by U.S. Mail

As/ Christine E. Branstad

August 11, 2020