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IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. CHAD STATON, Defendant-Appellant.	SUPREME COURT NO. 22-0380

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE LINDA M. FANGMAN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 26th day of May, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Chad Staton, No. 6058760, Clarinda Correctional Facility, 2000 N. 16th Street, Clarinda, IA 51632.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was the evidence sufficient to support Staton's convictions for sex abuse and incest?

Authorities

State v. Crawford, 972 N.W.2d 189, 198 (Iowa 2022)

State v. Crawford, 974 N.W.2d 510, 516 (Iowa 2022)

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Iowa Code § 709.4(1)(b)(2) (2015)

Iowa Code § 726.2 (2011)

II. Whether the district court erred in allowing the State to present evidence of the Butler County incident pursuant to Iowa Code § 711.1?

Authorities

State v. Leedom, 938 N.W.2d 177, 191 (Iowa 2020)

Quad City Bank & Trust v. Jim Kircher & Assocs., P.C., 804 N.W.2d 83, 90 (Iowa 2011)

State v. Cox, 781 N.W.2d 757, 760 (Iowa 2010)

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State v. Sullivan, 679 N.W.2d 19, 24 (Iowa 2004)

Paul S. Milich, The Degrading Character Rule in American Criminal Trials, 47 Ga. L. Rev. 775, 792-94 (2013)

United States v. Foskey, 636 F.2d 517, 523 (D.C.Cir. 1980)

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III. Whether the district court erred by cutting off Staton's allocution by his attorney and not allowing the discussion of Staton's rejected of plea offers.

Authorities

State v. Wilson, 294 N.W.2d 824, 826 (Iowa 1980)

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Iowa R. Crim. P. 2.10(5)

Iowa R. Civ. P. 5.1101(c)(4)

State v. Knight, 701 N.W.2d 83, 88 (Iowa 2005)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: Chad Staton appeals from his convictions, judgment and sentences for sex abuse in the second degree, sex abuse in the third degree, and incest, following a jury trial in the Black Hawk County District Court.

Course of Proceedings: The State charged Chad Staton with one count of sex abuse in the second degree, a class B felony in violation of Iowa Code § 709.3 (2011); one count of sex abuse in the third degree, a class C felony in violation of Iowa Code § 709.4 (2015); and one count of incest, a class D felony in violation of Iowa Code § 726.2 (2011). (Trial Information) (App. pp. 4-6). Staton pled not guilty and waived his speedy trial rights. (Written Arraignment 4/27/20; Speedy Trial Waiver 10/1/20; 7/23/21) (App. pp. 7-10).

Staton sought to exclude evidence of an additional allegation of sex abuse against him involving the same victim but occurring in another county prior to the allegations in this case. (Motion for Admissibility 3/22/21; PTC Tr. 7:13 - 11:2) (App. pp. 11-12). The court denied Staton's request and concluded the evidence was admissible. (PTC Tr. 11:3 – 12:1). The case proceeded to trial on October 26, 2021, and the jury convicted Staton as charged. (Verdict) (App. pp. 17-19).

The court sentenced Staton to a 25-year indeterminate sentence for the second degree sex abuse conviction, subject to a 17.5-year mandatory minimum; a ten-year indeterminate sentence for the third degree sex abuse conviction, and a five-year indeterminate sentence for the incest conviction. The court ran the sentences consecutively for a total of forty years. (Sentencing Order) (App. pp. 20-24). The court imposed the minimum fine on the sex abuse third conviction, but suspended the fine on the incest conviction. (Sentencing Order) (App. pp. 20-24).

Staton filed a timely notice of appeal. (Notice of Appeal) (App. p. 25).

Facts: L.S. testified that her father, Chad Staton, sexually assaulted her on three occasions. She testified that the first incident was in 2012 when she was nine years old and her family lived in a home in New Hartford, Iowa, in Butler County. (Day 2 Trial Tr. 45:9-25). She remembered that her mother was gone with a friend to celebrate her birthday and left L.S. and her siblings home with Staton. She testified Staton had been drinking that night, and after she went to bed, he came into her room and laid down in bed with her. At first he snuggled with her, then he moved on top of her, pulled her pants down, and had intercourse with her. She testified it felt like she was "being ripped in half." While he was having sex with her, he grabbed her face and put his fingers in her mouth. When he was done, he got up and left the room. (Day 2 Trial Tr. 50:2 – 60:24).

Her parents separated later that year. L.S. and her siblings, along with her mother, moved in with her grandparents. She didn't have much contact with Staton until he moved into a house in Waterloo on Linwood Avenue with a couple roommates. L.S. testified that she and her siblings visited Staton on Linwood Avenue during the spring of 2013, and he sexually assaulted her again. She recalled that on that visit, he was drinking while she and her siblings watched TV in the living room. At one point, he went into his roommate's bedroom off the living room and called her in. He hugged her and then lifted her onto the bed and told her to take her pants off. He lay on top of her and had intercourse with her. She remembered it hurt, but not as bad as the first time. He grabbed her face and told her to look at him. While this happened, she could hear her siblings in the living room laughing and watching TV. When he was done, he got up and she went into the bathroom and cried. (Day 2 Trial Tr. 63:20 – 67:19; 68:10 – 80:4). She testified that on this occasion she

noticed that Staton had his penis pierced when she saw something reflecting in the light. She was confident that she saw the piercing and did not recall that anyone had ever told her that Staton had a penis piercing. (Day 3 Trial Tr. 54:13 – 57:17).

Staton later remarried and moved to a house on Dawson Street in Waterloo. L.S. and her siblings stayed with him and his new wife at the end of December 2015, when L.S. was twelve years old. She testified that Staton was drinking that night. She recalled that he and his wife got in a fight and his wife left the house. L.S. and her younger sister slept in the same room, and after they went to bed, Staton came into her room and asked if her sister was asleep. When L.S. told him she was, he pulled her comforter off of her and told her to take off her pants. Her father again had sex with her while her sister slept on a nearby bed. (Day 2 Trial Tr. 80:17 – 83:3; 85:7 – 98:11).

L.S. testified that in the following years, she had dreams in which someone was having sex with her and would wake up

panicked. She testified that the dreams helped her realize what had happened to her—that they weren't just dreams, they were memories. She eventually reported the abuse to her mother when she was sixteen years old. She first told her mother that she'd had a dream that her father had had sex with her, and then told her that it wasn't just a dream. (Day 2 Trial Tr. 106:15 – 108:22; Day 3 Trial Tr. 135:23 – 136:23).

Heather Staton, L.S.'s mother, testified that on occasion he would put his fingers in her mouth during sex, particularly when he'd been drinking. (Day 3 Trial Tr. 137:2-19). She further testified that she remembered going out to celebrate her birthday in 2012 and that she washed L.S.'s sheets the next day and found a spot of blood on them. At the time, she attributed it to a nosebleed which was common for L.S. (Day 3 Trial Tr. 126:2 – 128:25; 131:16 – 132:3).

Chad Staton testified on his own behalf. He denied that any of the sexual abuse described by L.S. happened. (Day 4 Trial Tr. 126:4-23). He clarified that he had his penis pierced

in the past, but that he had removed the piercing in 2011 when he needed an emergency MRI because of a ruptured spleen—a year prior to L.S.'s first allegation of abuse. (Day 4 Trial Tr. 113:13 – 115:16). The timing of the removal of his penis ring was confirmed by both Heather and Stephanie, Staton's current wife. (Day 3 Trial Tr. Day 3 142:3 – 144:5; Day 4 Trial Tr. 82:12 – 85:19). As well, he denied ever putting his hand or fingers in anyone's mouth during sex. (Day 4 Trial Tr. 125:17 -126:3). Stephanie Staton also confirmed that he had never put his hands in her mouth during sex. (Day 4 Trial Tr. 90:15-22).

Stephanie Staton testified that she had dated Staton off and on since 2013, after his marriage to Heather broke up. She confirmed Staton's testimony regarding the layout of the house on Linwood as well as the sleeping arrangements. When Staton's children visited, the kids slept in Staton's bedroom while Stephanie and Staton slept in the living room. Further, Staton's roommate's bedroom off the living room was situated such that if the door was open, anyone seated on the couch

would have been able to see directly into the bedroom. (Day 4 Trial Tr. 85:20 – 87:21; 89:5 – 90:14; 118:9 – 119:23; 120:21 – 122:7). That bedroom was virtually empty, and it did not have a real bed, only a mattress on the floor. (Day 4 Trial Tr. 87:22 – 88:14; 119:24 – 120:20).

Staton provided testimony from Dr. Kimberly MacLin, a psychology professor at the University of Northern Iowa, who specializes in psychology and the law with a focus on how memory is used in the legal system. (Day 5 Trial Tr. 5:7 - 6:16). She explained how the human brain forms memories and how easily memories can be contaminated by outside information. While the memory may seem true to the person who recalls it, the events recalled or details recalled may not be factually accurate. Particularly, the more one talks about a remembered event, the more prone to contamination the memory is—by responses or questions from other people or media. She also testified that dreams can be a source of contamination. (Day 5 Trial Tr. 18:23 – 31:13; 34:18 – 39:13;

40:21 – 43:19). She explained that once a memory has been contaminated, there is no way to sanitize the memory or remove the contamination. (Day 5 Trial Tr. 43:10-25).

ARGUMENT

I. The evidence was insufficient to support Staton's convictions for sex abuse and incest.

A. Error Preservation. Because Staton proceeded to trial and has been convicted, he may challenge to the sufficiency of the evidence supporting his conviction on direct appeal. State v. Crawford, 972 N.W.2d 189, 198 (Iowa 2022). Nevertheless, Staton moved for judgment of acquittal at the close of the State's evidence and renewed his motion at the close of all evidence. (Day 4 Trial Tr. 73:21 – 74:18; Day 5 Trial Tr. 76:5-18). Both motions were denied. (Day 4 Trial Tr. 76: 22 – 79:17; Day 5 Trial Tr. 77:1-15).

B. Standard of Review. Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. Crawford, 972 N.W.2d at 201. The court will consider whether the evidence, taken in the light most favorable to the verdict, is

supported by substantial evidence in the record. State v. Crawford, 974 N.W.2d 510, 516 (Iowa 2022). Substantial evidence is evidence that would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Id. "Evidence which only raises suspicion, speculation, or conjecture is insufficient." Id. "The evidence must at least raise a fair inference of guilt as to each essential element of the crime." Id. at 516-17.

C. Discussion. Each of the crimes for which Staton was tried required that he committed a sex act with L.S. (Jury Instr. Nos. 18, 19, & 20) (App. pp. 14-16). See Iowa Code §§ 709.3 (2011); 709.4(1)(b)(2) (2015); and 726.2 (2011). However, the evidence was insufficient to prove this element of any of the charges.

L.S.'s recollection of the abuse stemmed from sexual dreams she had. She testified she realized the dreams were actually memories of things that happened years before. Her memory of the events "improved" over time, as she thought

about the incidents more and more. (Day 2 Trial Tr. 106:15 – 108:22; Day 3 Trial Tr. 135:23 – 136:23). However, many of the details she recalled do not coincide with reality or are difficult to credit. For instance, she testified she saw a piercing in Staton's penis during one act of abuse. (Day 3 Trial Tr. 54:13 – 57:17). However, the uncontradicted testimony established that although Staton's penis had been pierced in the past, the piercing had been removed a year before she alleged he first abused her. (Day 4 Trial Tr. 82:12 – 85:19; 113:13 – 115:16; Day 3 Trial Tr. 142:3 – 144:5). Although L.S. did not recollect it, her mother testified that L.S. told her that one of Staton's girlfriends disclosed to her that he used to have his penis pierced. (Day 3 Trial Tr. 55:20 – 56:11; 144:6 – 145:5).

As well, her recollection that he lifted her onto a bed in the house on Linwood was undermined by Staton's and Stephanie's testimony that the bedroom only had a mattress on the floor. Further, L.S. testified that she could hear her siblings on the

couch in the living room laughing yet they didn't notice that she was being sexually abused in the next room. (Day 2 Trial Tr. 63:20 – 67:19; 68:10 – 80:4). However, Staton and Stephanie confirmed that anyone sitting on the couch in the living room would have been able to see directly into the bedroom where L.S. alleged the abuse was occurring. Staton also testified that the walls in the house were thin and noise carried from room to room. (Day 4 Trial Tr.85:20 – 88:14; 89:5 – 90:14; 118:9 – 122:7). L.S.'s testimony that on another occasion her father had sexual intercourse with her while her sister slept nearby in the same room is equally implausible. (Day 2 Trial Tr. 80:17 – 83:3; 85:7 – 98:11).

Dr. MacLin testified about the inherent malleability of memory and how easily it can be contaminated. While the memory may seem true to the person who recalls it, the events recalled or details recalled may not be factually accurate. Particularly, the more one talks about a remembered event, the more prone to contamination the memory is—by responses or

questions from other people or media. She also testified that dreams can be a source of contamination. (Day 5 Trial Tr. 18:23 – 31:13; 34:18 – 39:13; 40:21 – 43:19). Once a memory has been contaminated, there is no way to sanitize the memory or remove the contamination. (Day 5 Trial Tr. 43:10-25). Given that L.S.'s memories of the abuse originated from dreams, and given the extensive opportunities for those memories to become contaminated through her discussions with her mother, with her friends, and with Staton's girlfriend, as well as her interviews with CPS and depositions, L.S.'s testimony does not provide substantial evidence to support Staton's convictions.

D. Conclusion. Given the late disclosure, the opportunities for contamination, and the obvious implausibilities in L.S.'s recollections, which arose from dreams, the evidence that Staton engaged in sex acts with L.S. amounts only to speculation and conjecture and is insufficient to support a jury finding of guilt on all of the charges.

Accordingly, Staton's convictions should be vacated and his case remanded for dismissal of all counts.

II. The district court erred in allowing the State to present evidence of the Butler County incident pursuant to Iowa Code § 711.1.

A. Error Preservation. Generally, a ruling denying a motion in limine, seeking to exclude certain evidence, will not preserve error. State v. Leedom, 938 N.W.2d 177, 191 (Iowa 2020). However, an "exception exists when 'the court's ruling on a motion in limine leaves no question that the challenged evidence will or will not be admitted at trial, [thus] counsel need not renew its objection at trial to preserve error.' " Leedom, 938 N.W.2d at 191 (quoting Quad City Bank & Trust v. Jim Kircher & Assocs., P.C., 804 N.W.2d 83, 90 (Iowa 2011)).

In this case Staton sought to exclude evidence of the "Butler County incident," an allegation of sex abuse by L.S. that predated the charges for which Staton was on trial. (Motion for Admissibility; PTC Tr. 7:13 - 11:2) (App. pp. 11-12). After a pretrial hearing on the motion, the court denied Staton's request. The court concluded that because the prior allegation

involved the same victim and same defendant, because it happened close in time to the charges in this case, and after considering "the caselaw and the code section, that information would be admissible." The court "overrule[d] that and allow[ed] that testimony to come in." (PTC Tr. 11:3 – 12:1). Because the court's ruling in limine left no doubt that the evidence was admissible, error has been preserved.

B. Standard of Review. The appellate court will review a district court's evidentiary rulings regarding the admission of prior bad acts for abuse of discretion. State v. Cox, 781 N.W.2d 757, 760 (Iowa 2010).

C. Discussion. Normally, "[e]vidence 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." Iowa R. Evid. 5.404(b); State v. Cox, 781 N.W.2d 757, 760 (Iowa 2010). Evidence of prior bad acts cannot be used to show that because the defendant has committed a similar crime in the past he is more likely to have committed

the crime for which he stands trial. Id. The justification for the 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 State v. Sullivan, 679 N.W.2d 19, 24 (Iowa 2004)). See also Paul S. Milich, The Degrading Character Rule in American Criminal Trials, 47 Ga. L. Rev. 775, 792-94 (2013) (describing how juries are swayed by evidence of prior bad acts and the admission of such evidence effectively lowers the burden of proof) (hereinafter "Milich"). "This concept is 'fundamental to American jurisprudence.'" Sullivan, 679 N.W.2d at 23 (quoting United States v. Foskey, 636 F.2d 517, 523 (D.C.Cir. 1980)).

Empirical studies support both the notion that the evidence is highly influential to a jury and also that evidence of prior misdeeds is not reliable for determining guilt of current offenses. See Sullivan, 679 N.W.2d at 24.

> [T]he available psychological studies indicate that once they have characterized the accused's general character, the jurors are likely to attach great weight to that characterization in determining whether the accused acted 'in character' on the occasion of the charged offense.... Thus, having concluded that the accused is disposed to criminal misconduct, the jurors may ascribe great significance to that conclusion in deciding whether the accused committed the charged crime.

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, 581–82 (1990) (hereinafter "Imwinkelried"). Notwithstanding the popular notion that character is a good indicator of a person's conduct on a given occasion, the empirical studies debunk this notion. Imwinkelried, 51 Ohio St. L.J. at 582. "Situational factors are often more determinant of human behavior," and "[t]he upshot is that the jurors may give character far more weight than it deserves." Imwinkelried, 51 Ohio St. L.J at 582.

Consequently, even if the trial court gives a carefully crafted instruction limiting the significance of such evidence,

prejudice to the defendant is "well-nigh inescapable." Sullivan, 679 N.W.2d at 24 (quoting United States v. Carter, 482 F.2d 738, 740 (D.C.Cir. 1973)). See also Milich, 47 Ga. L. Rev. at 780 ("Once the jury learns that the defendant has a criminal past, the odds of conviction skyrocket.").

The rules of evidence do allow the admission of evidence of prior bad acts if the State intends to use to the evidence to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 5.404(b). However, before admitting the evidence, the court must determine that it is "relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts" and "there must be clear proof the individual against whom the evidence is offered committed the bad act or crime." Sullivan, 679 N.W.2d at 24. Additionally, the court must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair

prejudice to the defendant. Iowa R. Evid. 5.404(b); Cox, 781 N.W.2d at 761.

Iowa Code § 701.11(1) provides a different rule for prior sex offenses in a prosecution for a sex offense.

> In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

Iowa Code § 701.11(1) (2021). Thus, under section 701.11, the evidence of the prior sexual abuse may be considered for any purpose for which it is relevant, but it is still subject to a balancing test before it is admitted. Iowa Code § 701.11(1).

The Iowa Supreme Court considered whether section 701.11(1) violated a defendant's due process rights when evidence of prior sex abuse involving the same victim was

admitted. State v. Reyes, 744 N.W.2d 95, 99-102 (Iowa 2008). The court concluded there was no due process violation, in part because prior Iowa caselaw had allowed for the admission of evidence of prior sex abuse by the defendant against the same victim, to show that the defendant had "'a passion or propensity for illicit sexual relations with the particular person concerned in a criminal trial.'" Reyes, 744 N.W.2d at 102 (quoting State v. Spaulding, 313 N.W.2d 878, 880 (Iowa 1981)).

Ultimately, the court concluded the admission of the prior allegation of sex abuse did not violate Reyes's rights because it was "not offered to show a *general propensity* to be attracted to young girls, but instead to demonstrate the nature of the defendant's relationship and feelings toward a *specific* individual." Reyes, 744 N.W.2d at 103 (emphasis in original). After engaging in the balancing required by 701.11, the court concluded the probative value of the evidence was not substantially outweighed by the risk of against the risk of unfair prejudice or confusion of the issues: "The evidence of prior

sexual abuse was offered in a direct, concise, and noninflammatory fashion and was similar to the underlying charge against Reyes." Reyes, 744 N.W.2d at 103.

The Iowa Supreme Court further clarified the constitutional limitations on prior sexual abuse in State v. Cox, concluding that the Iowa Constitution prohibited the use of evidence of sexual abuse of someone other than the victim. State v. Cox, 781 N.W.2d 757, 769 (Iowa 2010). "Based on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, we hold the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity." Cox, 781 N.W.2d at 768. The court concluded 701.11 was unconstitutional to the extent it would allow evidence of prior sex abuse of someone other than the named victim because that would amount to general propensity evidence. Cox, 781 N.W.2d at 769.

In this case, the State contended the evidence of the Butler County incident was "relevant to creating an inference of the defendant's passion or propensity for illicit sexual relations with this specific victim," relying on State v. Spaulding, 313 N.W.2d 878 (Iowa 1981) and State v. Munz, 355 N.W.2d 576 (Iowa 1984). (PTC Tr. 7:20 - 8:6). However, given the nature of the State's case against Staton for the charged offenses, the issue of Staton's passion for illicit sexual relations with L.S. was not a *legitimate* issue at trial.

The charged offenses involved allegations that Staton had vaginal intercourse with L.S. on two occasions, and Staton's defense was a complete denial that the sexual acts occurred. He did not allege mistake or accident or that he had a legitimate purpose for the contact. See State v. Query, 594 N.W.2d 438, 444 (Iowa Ct. App. 1999) (finding evidence of prior sex acts admissible to rebut defendant's allegation acts were innocent or accidental). Identity was not an issue in this case. See State v. Ripperger, 514 N.W.2d 740, 748 (Iowa Ct. App. 1994)

(concluding evidence of prior sexual assault relevant to establish identity). Given the factual allegations in this case, Staton's passion for sexual relations with L.S. was not relevant to any legitimate issue—the details of the charged abuse resolve any concern regarding a passion or propensity for sexual relations with L.S. The district court erred in concluding otherwise.

Further, even if the evidence was relevant to a legitimate issue, the evidence should have been excluded because its probative value was substantially outweighed by the risk of unfair prejudice, confusion of the issues, and misleading the jury. Unfair prejudice is an "undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." State v. Castaneda, 621 N.W.2d 435, 440 (Iowa 2001). The court must seriously consider and exclude the evidence if its probative value is outweighed by the risk of prejudice. It is this "safety valve" that ensures a defendant's due process rights are protected. See

State v. Reyes, 744 N.W.2d 95, 102–03 (Iowa 2008) (citing United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) and Kerr v. Caspari, 956 F.2d 788, 790 (8th Cir.1992)).

The evidence of the Butler County incident was similar in many ways to the allegations of the other two incidents.

> Stated another way, that which makes the evidence more probative—the similarity of the prior act to the charged act—also makes it more prejudicial. As we explained in *Reynolds,* where a prior bad act is "similar to the incident in question, 'it would be extremely difficult for jurors to put out of their minds knowledge that the defendant had assaulted the victim in the past and not allow this information to consciously or subconsciously influence their decision.' "

State v. Cox, 781 N.W.2d 757, 769 (Iowa 2010) (quoting State v. Reynolds, 765 N.W.2d 283, 292 (Iowa 2009).

Beyond the prejudicial nature of the similarity of the acts, the Butler County incident is more likely to inflame the prejudices of the jury because in that reported incident, L.S. was even younger--roughly nine years old. Further, the details of the episode included testimony about how painful the intercourse was and how she bled. It also included testimony

that Staton bribed her with $3 to keep quiet. Those details are particularly inflammatory.

It was also likely to confuse the issues and mislead the jury. Although care can be taken to clarify that Staton was not on trial for the first incident, it would be difficult for the jury to keep the three incidents straight. They were each substantially similar, involving him being drunk and having sex with her at night in a dark room. Even if the jury could remember that the first incident was not part of the charges, the details between the three events were likely to blur together, at a minimum causing confusion and creating the opportunity for the jury to attribute the details of the Butler County incident to one of the charged counts. Again, the district court abused its discretion in concluding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. See Iowa Code § 701.11.

When a nonconstitutional error occurs in the admission of irrelevant evidence, prejudice is presumed unless the record affirmatively establishes a lack of prejudice. State v. Sullivan, 679 N.W.2d 19, 29-30 (Iowa 2004) (citing Iowa R. Evid. 5.103(a)).

The record in this case does not affirmatively demonstrate a lack of prejudice. The Butler County incident was not a side issue in the State's case—rather it was as much the focus of the State's case as the other incidents. It was one of the first events described by the State in its opening argument. (Day 2 Trial Tr. Day 30:22 – 31:22). L.S.'s direct testimony about the Butler County incident spanned 19 pages. (Day 2 Trial Tr. 44:19 – 63:19). She testified about the incident in great detail, including a description of the layout of the house and the room where it occurred and the admission of a sketch of the house by L.S. as an exhibit. (Day 2 Trial Tr. 46:3 – 48:9, 50:13 - 52:1). It included a description of the clothing she was wearing and the blankets on the bed. (Day 2 Trial Tr. 52:16 - 53:12). She

described how he crawled into her bed and snuggled her initially. She described how he pulled her pants down and how he rolled on top of her. (Day 2 Trial Tr. 52:22 – 58:18). L.S. described how it felt when she was penetrated; "I felt like I was being ripped in half." (Day 2 Trial Tr. 58:25 – 59:1). She explained how he "pushed into" in her several times before he finally stopped, got up and left the room. (Day 2 Trial Tr. 59:14 – 60:16). She explained how "it felt like [it lasted] a lifetime because it was terrifying." (Day 2 Trial Tr. 60:13-16). She described how she could smell blood, and how she threw her underwear away after discovering a bloodstain on them. (Day 2 Trial Tr. 59:4-13). She described finding ejaculate on her sheets the next day. (Day 2 Trial Tr. 61:6-20). And she described how Staton bribed her the next morning with $3 to not tell anyone about it. (Day 2 Trial Tr. 62:20 – 63:4). The level of detail and time dedicated to this incident was at least the same, if not greater, than was dedicated to the charged

incidents. (Compare Day 2 Trial Tr. 65:6 – 81:13 with Day 2 Trial Tr. 83:1 – 98:18 and 102:6 – 103:11).

The amount of time spent on the Butler County incident and the level of detail was "of a nature that would have incited overmastering hostility." See Reyes, 744 N.W.2d at 100 (concluding evidence of a prior sexual assault was "concise, direct, and noninflammatory" so that its probative value was not substantially outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury).

As described above, the evidence against Staton was not overwhelming, and the case came down to a credibility battle between L.S. and Staton. L.S. did not report the abuse until years later and then only because she had dreams about involving sex. Her testimony about the acts of abuse contained details that are implausible or directly contradicted by other evidence in the record. As well, Staton provided testimony from an expert about how easily memories can be contaminated by discussion and other outside sources. Given the length of

time from the alleged abuse until it was reported, and given how many times L.S. discussed the events, there were extensive opportunities for her memory to become irrecoverably contaminated.

D. Conclusion. Because the district court abused its discretion by allowing the evidence of the Butler County incident and because the record does not affirmatively establish that Staton was not harmed by the error, Staton's convictions should be vacated and his case remanded for a new trial. Sullivan, 679 N.W.2d at 31.

III. The district court erred by cutting off Staton's allocution by his attorney and not allowing the discussion of Staton's rejected of plea offers.

A. Error Preservation. Generally, a defendant is not required to raise an alleged sentencing defect in the trial court in order to preserve a right of appeal on that ground. State v. Wilson, 294 N.W.2d 824, 826 (Iowa 1980).

B. Standard of Review. Appellate review of a sentence is for correction of errors at law. State v. Damme, 944 N.W.2d

98, 103 (Iowa 2020). The court will not reverse a sentence unless the sentencing court has abused its discretion or there is a defect in the sentencing procedure. Id.

C. Discussion. Before the district court may enter judgment, "counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." Iowa R. Crim. P. 2.23(3)(d). The rule is mandatory. State v. Millsap, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996). Where the allocution requirement is not substantially complied with, a remand for resentencing is required. State v. Lumadue, 622 N.W.2d 302, 304 (Iowa 2001).

The court offered Staton's attorney an opportunity to speak. (Sentencing Tr. 11:16-16). Staton's attorney began by noting that a prison term was mandatory for two counts of the three counts, with count 1 requiring a 17.5-year mandatory minimum. He argued that concurrent sentences would be sufficient, given that the mandatory minimum will likely equal

a life sentence for Staton. (Sentencing Tr. 11:18 – 12:22). "I would point out that this case progressed over the time with COVID and things were shut down, we had a long time; and there were numerous plea offers made. And Mr. Staton –" (Sentencing Tr. 12:22-25).

At this point, the State objected "to any reference to plea agreements during this stage." (Sentencing Tr. 13:1-3). The court agreed: "Yeah. The Court's not going to entertain or be interested in plea offers, so let's skip over that and pick back up." (Sentencing Tr. 13:4-6).

Staton's attorney continued, noting that while he would normally encourage his clients to accept responsibility and express their remorse at the sentencing hearing, this case was different because Staton adamantly maintained his innocence of the charges. He assured the court that Staton was not "petulant" but that he cannot accept responsibility for something he did not do. (Sentencing 13:7-18). Staton was then given his opportunity to allocute, in which he expressed

his disappointment in the criminal proceedings and confusion over why his daughter would lie about being sexually abused by him. (Sentencing Tr. 14:10-23).

The district court abused its discretion by cutting off Staton's attorney's discussion of Staton's refusal to consider a plea agreement, effectively curbing his right to allocution. See State v. Stacy, No. 05-0475, 2006 WL 469022, at *1 (Iowa Ct. App. March 1, 2006) (holding that when the court cut off defense counsel's argument in mitigation, it violated the defendant's right to allocution).

There was no reason defense counsel or defendant should not have been allowed to discuss Staton's rejection of plea offers during the pendency of the case because he asserted his innocence. Although plea negotiations cannot be used against a defendant in later proceedings, in this instance, the evidence of the plea negotiations was not being used against Staton. See Iowa R. Crim. P. 2.10(5). Rather he wanted to use the evidence to support his argument for leniency. Further, the rules of

evidence do not apply to sentencing proceedings. Iowa R. Civ. P. 5.1101(c)(4).

Given that there was no legal prohibition on Staton's attorney's discussion of Staton's rejection of plea offers, he should have been allowed to present his mitigation of sentence unrestricted. Although Staton does not have to establish prejudice when denied his right to allocution, Lumadue, 622 N.W.2d at 304, the limitation on counsel's line of discussion was particularly damaging in this case. Staton's perceived lack of remorse and nonacceptance of responsibility for the crimes is a permissible and important sentencing factor. See State v. Knight, 701 N.W.2d 83, 88 (Iowa 2005) ("We conclude that a defendant's lack of remorse is highly pertinent to evaluating his need for rehabilitation and his likelihood of reoffending."). As well, the court specifically noted that he had not accepted responsibility and felt no remorse for his actions when it decided to impose consecutive sentences. (Sentencing Tr. 22:16-22).

D. Conclusion. Because Staton was denied his right to have his counsel make a statement in mitigation of punishment, Staton's case should be remanded for resentencing. Lumadue, 622 N.W.2d at 304.

NONORAL SUBMISSION

Counsel does not request to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.32, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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______________________________ Dated: _5/26/23_

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