IN THE COURT OF APPEALS OF IOWA

No. 0-613 / 09-0897
Filed November 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN WEST SICKELS,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury[1] County, Arthur E. Gamble, Judge.

Defendant appeals his conviction for second-degree sexual abuse. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

John West Sickels, appellant pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Andrew B. Prosser, and Becky Goettsch, Assistant Attorneys General, and Timothy R. Kenyon, County Attorney, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

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[1] Upon order of change of venue from Union County.

EISENHAUER, P.J.

John Sickels appeals his conviction for second-degree sexual abuse. Sickels argues: (1) the evidence is insufficient to support his conviction; (2) the court erred in denying his motion for a mistrial; (3) evidence was improperly excluded; (4) the court allowed an improper cross-examination of his character witnesses or, in the alternative, counsel was ineffective for failing to object; and (5) the court erred in setting the amount of restitution.[2] We affirm the conviction and remand for a new restitution hearing.

I. Insufficient Evidence.

James Christensen, the chief of police, and Sickels, the assistant chief of police, were co-defendants at trial. A jury found Sickels guilty of second-degree sexual abuse of L.S. and found Christensen guilty of second-degree sexual abuse of L.S. by aiding and abetting.

In his pro se brief, Sickels argues L.S. was lying because she was afraid of her boyfriend, because she had violated club rules by drinking on the job, and because she was motivated by money (restitution). Sickels also argues L.S.'s boyfriend had the ability and the motive to lie. Sickels points out inconsistencies in the evidence. In essence Sickels is arguing the State's evidence was insufficient to support his conviction.

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[2] Sickels's pro se brief also argues: (1) the DCI interview violated his Miranda rights; and (2) the court erred in admitting into evidence the video of his DCI interview because the DCI used deception, trickery, and psychological tactics to coerce his confession. These arguments were not brought before the district court and, therefore, will not be considered for the first time on appeal. *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002).

We review sufficiency of the evidence issues for correction of errors at law. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). The jury's verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. *Fenske v. State*, 592 N.W.2d 333, 343 (Iowa 1999). The jury is "free to reject certain evidence and credit other evidence." *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). "[W]e view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record." *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

A. The Evidence. Starting in July 2006, L.S. worked as a bartender/waitress at a country club. The club manager testified L.S. was dependable, hard working, and "kind of like my right hand." In April 2008, L.S. was working the Thursday "men's night" shift from 6:00 p.m. until close. By 1:30 a.m., Sickels, Christensen, and L.S. were the only people remaining at the club. Sickels and Christensen had been drinking throughout the evening and L.S. had a drink as her work shift was winding down.

L.S. and Sickels both testified that while Christensen was present, Sickels asked her to perform oral sex on both men and she said no. Christensen testified he does not remember Sickels making this request. L.S. testified Sickels and Christensen moved behind the bar, cornered her, and Sickels made the

same request. L.S. again said no. L.S. stated Sickels left the bar while Christensen kept her behind the bar. In contrast, Sickels and Christensen testified Christensen left the bar to use the restroom and then returned.

L.S. testified when Sickels returned to the room he walked behind her and both men began to touch her. L.S. tried to spin around and get away but Sickels and Christensen surrounded her with their arms and moved with her. As Sickels began having sex with L.S., they were all behind the bar and Christensen was beside L.S. with one arm on her shoulder and one arm on the bar. As the assault progressed, Christensen moved to sit in a bar stool directly across from L.S. and stroked her hair, held her hands, and "shushed her." During the assault L.S. verbally protested and cried.

As the two men were leaving, Christensen pointed his finger at L.S.'s face, looked her "straight in the eye and said, 'Nothing happened.'" L.S. interpreted this as a threat: "nothing happened, and if you say something, something, you know, bad will happen. So these are the two chief officers and I just was freaked out . . . ." L.S. testified:

> Q. Did you consider running out the front door to get help? A. No. There's no help out there. . . . I was really, really scared. There's nowhere to go other than out in the parking lot where they are. . . .
>
> Q. Did you consider calling the police? A. No.
>
> Q. Why not? A. Because the police just left.
>
> . . . .
>
> Q. Did you consider calling [your boyfriend] at this point? A. No.
>
> Q. Why not? A. Because I wanted to get out of there and go home. . . . I was just really, really in a state of—I don't know, I was in shock or something. I didn't know what to do. I didn't even finish vacuuming.
>
> . . . .

> Q. And you eventually did just go home? A. Well, I tried to vacuum and I know I sat down after turning off the vacuum—I kind of sat on the floor next to it and cried for I don't know how long. And then I didn't—I don't even think I wrapped up the cord on the vacuum cleaner. I put it where it goes and I went home.

Sickels testified after he and Christensen left the club around 2:00 a.m., they sat and talked while parked outside of Christensen's house. Sickels stated they talked about work-related issues and there was no discussion about events at the country club.

Lesha Clark, the club manager, testified she arrived at the club the next morning and was surprised to find the club in disarray. Suzie Stofferahn, the club bookkeeper/board member, arrived ten minutes later and also observed the disarray. Some doors were unlocked, chairs were not pushed underneath tables, popcorn was left on the floor, tables were not wiped off, and a check was left "beside the cash register." Clark described the condition of the bar area:

> There [were] items set on the edge of the bar that were knocked off into the sink which sits behind the bar. The straws, the swords, the toothpicks, they sit in containers on top of the bar and they were strung all over and dropped in the sink behind the bar . . . .

Because Clark was worried about L.S.'s safety, she tried to call L.S. at her school, but she wasn't there. Clark testified L.S.'s boyfriend had subjected her to domestic abuse in the past. Clark wanted to "know if something took place. . . . I didn't have any idea what had happened." Next, Clark called numerous club members and through a series of phone calls discovered Sickels and Christensen had been the last customers. Clark called the police station and eventually talked to Christensen. Christensen confirmed he and Sickels had been at the bar and stated they left together around 1:00 a.m. Over an hour

later, Christensen called Clark and stated he had talked to Sickels and he was calling to correct the time they left, it was closer to around 2:00 a.m.

L.S. was not scheduled to work again until the next Thursday evening. Clark asked L.S. to meet her Thursday morning at the club and stated:

> Q. When she comes to the club, what happens? A. She came into the club and sat down . . . I said, I believe that something happened out here last Thursday night and I need to know. I need to know. I need to be aware if something happened. . . .
> . . . .
> Q. Okay. When you're saying this to [L.S] . . . what was her demeanor like? A. She was upset.
> Q. Upset how? A. She was crying. She was shaking. She was just distraught . . . .

Based on L.S.'s statements, Clark called Stofferahn to come to the club and join the discussion. Stofferahn later told the DCI that L.S. stated Christensen left the bar for a few moments, not Sickels. At trial, Stofferahn also testified L.S. was upset during the Thursday morning meeting. Clark urged L.S. to contact the authorities and L.S. stated she would think about it. L.S. explained:

> I was scheduled to work that night after [the Clark/Stofferahn] meeting, yes. [Clark] offered for me not to work, and I kind of was trying to get that get-back-on-the-horse attitude, so I said, "I will work, you know. You will be with me the whole night, right?" And she agreed no one would ever work there alone again until close. So I worked and [Clark] stayed with me until close.

L.S. also worked Friday night and Saturday night. After working Saturday, L.S. requested and was granted a leave of absence: "I was having a difficult time being there. I gave it three times and it was not getting any easier. I was feeling really anxious when I was there . . . ."

L.S.'s boyfriend discovered her crying in the bathroom after her last Saturday at work and she eventually told him about the sexual abuse. Her boyfriend did online research for resources and L.S. first talked to the Rural Iowa Crisis Center and then to the DCI.

The DCI arranged for L.S. to conduct recorded conversations with Christensen. Meanwhile Christensen and Sickels had meetings with Tom Hartsock, the retired chief of police and their former boss. Hartsock testified: "I recommended to both James Christensen and Johnny Sickels that they should wear a recording device when meeting with L.S." Christensen also recorded the conversations. Christensen testified:

> Q. . . . [D]o you recall [L.S.] formally making an allegation of sexual assault. A. She makes a statement similar to that, yes.
> Q. . . . [W]ell, what did she want you to do? Did she want you to investigate further? Did she want John Sickels arrested? What . . . did she tell you that she wanted done? A. I don't remember the order of events of which requests were made. She did state that she wanted to file a report or have it investigated. I stated I would look into it, but, again, advised her, however, I was there. It did not happen.

Christensen did not contact any authorities about L.S.'s desire to report a sexual assault by his assistant police chief, Sickels. Christensen testified:

> Q. And, you know, I guess the bottom line is this: Why didn't you call the sheriff? Why didn't you call the county attorney or, I suppose the DCI? Why didn't you do that? A. Because it didn't happen.

A few days later, the DCI contacted Christensen. Christensen and Sickels agreed to an interview with the DCI and also met again with the retired police chief before the interview. Christensen and Sickels drove to Des Moines together. The DCI interviewed Sickels and Christensen in different rooms. At

first Sickels denied he had sex with L.S. and Christensen told the DCI nobody touched her. Christensen stated he saw Sickels and L.S. behind the bar, but "I never saw any sex act." Sickels had investigated sexual assault-type crimes and asked the DCI about DNA evidence. Sickels testified at trial:

> Q. And you were asking about DNA because you wanted to know exactly what evidence the DCI had, correct? A. No, I would say no to that.
>
> Q. Then why are you asking about DNA? A. I don't know. I wanted to give myself some time to concentrate, to breathe, and to figure out exactly what I was going to do.

Next, Sickels and Christensen had a private discussion in the parking lot. When they returned to their separate interview rooms after the discussion, Sickels admitted to consensual sexual intercourse with L.S. that started while Christensen left the bar to use the restroom. At trial Sickels testified L.S. became more flirtatious after the other members left and *silently* agreed to have sex with him when Christensen left the room.

After the parking lot discussion, Christensen also changed his story. Christensen told the DCI Sickels had told him for the first time that Sickels had sex with L.S. Christensen also admitted actions and statements consistent with L.S.'s claims, including: Christensen held her hand, what she said, and what Christensen said as he left.

Christensen's trial testimony contradicted his DCI interview statements: he denied holding L.S.'s hand, hearing her protest statements, or saying anything as he left. Christensen explained this change in testimony by stating his statements to the DCI were hypothetical in the context of "is it possible" and anything is possible.

On cross-examination, the DCI tape was played for the jury. After the tape was played, Christensen testified:

> Q. Okay. Did [Sickels] tell you all those details about what you did? You walked in, you held her hand, she said, This isn't right. On the way out the door, you said, Don't worry, this didn't happen? Did [Sickels] tell you that in the parking lot? A. He did not tell me that, no.
>
> Q. So where did you come up with that? A. I believe it was in the discussion with the [DCI agent].
>
> Q. But in this context, [the DCI agent] is not saying is it possible, right? You're talking. Those are your words. A. Yes.
>
> Q. So once again, how do you explain that you're looking right at the [DCI agent] on tape saying that those are the things that you saw, heard, and did, and yet today you're denying that you saw, heard, or did any of those things? A. At some point it was discussed already.
>
> . . . .
>
> Q. . . . Are you suggesting that [the DCI agent] put all that in your mouth or in your head? A. No.
>
> . . . .
>
> Q. Where did all this information come from that you're sitting here saying to him? A. It came from my head.
>
> Q. Okay. So, again, I'm back to the question. Did you hear or see any of those things that you just discussed on this interview? A. Yes, I did.
>
> Q. Okay. So did you see Sickels having sex? A. Yes.
>
> Q. And you did come into the room and see that? A. I did not see sex.
>
> Q. You saw movement which you believed to be sex? Yes.

B. Sufficiency of the Evidence. The testimony from both the club manager and the club bookkeeper describes the disarray in the bar area the morning after the assault. Both Sickels and Christensen made statements to the DCI consistent with L.S.'s description of the assault. We note the credibility of witnesses is for the factfinder to decide except for those rare circumstances where the testimony is absurd, impossible, or self-contradictory. *State v. Kostman,* 585 N.W.2d 209, 211 (Iowa 1998). None of those factors apply to

L.S.'s testimony. In contrast, both Christensen and Sickels lied to the DCI and then change their stories after they talked privately in the DCI parking lot. When viewing the evidence in the light most favorable to the State, we conclude a rational trier of fact could have found Sickels guilty. Because substantial evidence supports the jury's determination, we affirm the verdict.

II. Mistrial for Improper Argument.

Sickels seeks a new trial arguing he was "prejudiced by the overzealous and misleading rebuttal argument by the prosecutor." Sickels points to the fact the prosecutor began the rebuttal of her closing argument with a slide stating: "Not guilty/Nothing[3] requires you to believe defendants and not believe [L.S.]." Before the rebuttal argument began, Sickels objected because the slide misstated the law. The court immediately sustained the objection. The court stated "the slide was taken down within a matter of seconds."

The prosecutor discussed the concept of reasonable doubt and addressed the "girl gone wild defense." The prosecutor argued:

> We have also heard some talk about, well, she was in the bag. Let's talk about that misconception. The defendants want you to believe that somehow women have a couple cocktails and turn into the girl gone wild. Women have a couple cocktails and they're ready to have promiscuous sudden two-minute sex. . . . Use your common sense. Women do not just get half in the bag and then that's just okay. It's certainly not reasonable doubt. . . .
>
> Plus whether she's intoxicated, not intoxicated, I mean Mr. Sickels wants us to believe that, she was drunker than me. She was really drunk. If that's the case, he's a police officer; he should have known she couldn't consent. Which is it? You can't have it both ways.

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[3] The record at trial states "nothing" while the district court's ruling states "not guilty." We need not resolve the disparity because we reach the same result under either version.

Sickels objected the prosecutor misstated the law. The court held a hearing outside the presence of the jury and sustained the objection, stating: "[T]elling the jury that as a peace officer he should have known she couldn't consent is just an inaccurate statement." When the jury returned, the court stated:

> The objection is sustained. Under the crime charged by the State in the Trial Informations, the level of [L.S.'s] intoxication, if any, would not preclude giving consent. You may consider all the surrounding circumstances—all of the circumstances surrounding the defendant's act in deciding whether the act was done by force or against the will of [L.S.].

Next the prosecutor discussed: (1) the challenges to L.S.'s credibility based on a jealous boyfriend and prior domestic abuse; (2) the "I'll get fired [for drinking on the job] defense"; (3) an ambiguous time line is not reasonable doubt; and (4) the "against the will" element and the defendants' argument L.S. didn't run, didn't go to the hospital, didn't call the police. The prosecutor argued:

> Now, if you are being surrounded by two men that are within arm's length of you, are you thinking about going out the back door? Are you thinking you can even run at that point? No. And I asked [L.S.], why didn't you do that? She said, I don't know. I don't know. I wasn't thinking that. Why did you not scream? Well, who's going to hear?
>
> Also the conceptions that we have about what we would do if we were being attacked. I submit to you they're different for whether it's someone you know or whether it's a stranger jumping out of the bushes and chasing you down the street with a ski mask.

The court sustained Christensen's objection to improper argument and the prosecutor resumed her rebuttal, stating:

> [T]he victim is not running out the back door, is not screaming, is not fighting because she knows it's not going to do any good. It's also—as she testified to you, this happened very suddenly to her.

> . . .
>
> The other thing that we have heard some mention of about is the warrant. She has lots of motives I think is what we heard. We hadn't heard about the warrant. There was some discussion that maybe there was a warrant out. You heard the testimony that neither she nor either one of the defendants . . . .
>
> [Sickels's objection "there was something mentioned that is improper rebuttal" is sustained.]
>
> When you're done looking at all the facts, there's no reasonable doubt here. There's no reasonable doubt left. All the things that they want you to believe, all the rabbit holes that they want you to go through don't hold water.
>
> In order to find the defendants not guilty, there has to be some element in you to believe what the defendants have told you in their statements and in their testimony.

Sickels objected, the jury was excused, and the parties met in chambers. The defendants argued the prosecutor had shifted the burden of proof and urged the court to grant a mistrial. The court sustained the objections but denied the motions for mistrial. Upon continuing her rebuttal, the prosecutor immediately stated: "We have the burden of proof in this case. You heard the defendants testify. You have to ask yourself about their believability." The prosecutor concluded her rebuttal without further objection and properly argued the credibility of the witnesses and reasonable doubt.

Neither defendant sought a cautionary instruction, but the issue of prosecutorial misconduct was raised again in defense motions for a new trial. The trial court denied the motions, ruling the defendants established prosecutorial misconduct, but failed to prove prejudice. On appeal, the State argues the trial court correctly determined Sickels was not prejudiced.

"Prosecutorial misconduct entitles a defendant to a new trial only when it appears to have been so prejudicial as to deprive the defendant of a fair trial."

State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). We intervene on appeal "only if the trial court abuses the broad discretion which it has to determine whether prejudice results." *Id*. We accord trial courts "considerable discretion" in determining whether any alleged misconduct was prejudicial or affected the outcome because the trial court "has before it the whole scene, the action and incidents of the trial as they occur, and is in a much better position to judge" prejudice. *Mays v. C. Mac Chambers Co.,* 490 N.W.2d 800, 803 (Iowa 1992). Therefore, we will not interfere with the trial court's determination "unless it is reasonably clear discretion has been abused." *Id.*

We view the statements of the prosecutor in the context of the entire trial. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). Sickels has the burden to establish:

> [T]here is reasonable probability the prosecutor's misconduct prejudiced, inflamed or misled the jurors so as to prompt them to convict the defendant for reasons other than the evidence introduced at trial and the law as contained in the court's instructions.

State v. Graves, 668 N.W.2d 860, 876-77 (Iowa 2003).

Guided by the *Graves* decision, the trial court carefully analyzed the prejudice issue, including the "strength of the State's case" element of prejudice:

> Contrary to the assertions of the defendants, this is not simply a "he said, she said" case. . . . DNA was certainly not required in light of Sickels' admission that he had sexual intercourse with the victim.
>
> Furthermore, [L.S.'s] testimony was corroborated by the physical evidence found by the Club manager . . . at the scene of the crime the next morning. . . . [T]he bar was in disarray and cocktail skewers and straws were spilled into the sink in the location where [L.S.] testified that she was sexually abused.

> More importantly, [L.S.'s] testimony was significantly corroborated by the admissions of the defendants. For example, in his trial testimony, Sickels admitted that he asked L.S. for [oral sex] for himself and Christensen after the other patrons had left the Club. Sickels even admitted the first thing that happened after L.S. said [no] was that he approached L.S. behind the bar, kissed her, [and had sexual intercourse]. While Sickels testified that L.S. reciprocated, Sickels admitted not another word was exchanged between them after L.S. said "no" to oral sex. Defendant Christensen admitted that after the sex act was completed, he said to L.S. "this never happened," or words to that effect, as he and Sickels were leaving the Club. While Christensen testified that he said this because he thought L.S. was embarrassed because he had walked in on something, Christensen's testimony corroborates [L.S.'s] testimony that these words were said.
>
> Given the physical evidence at the crime scene and the admissions of the defendants, the State's case was strong. The complainant's testimony was credible. Her statements to the DCI, her deposition testimony and her trial testimony were consistent on her central allegations of sexual abuse. The testimony of the defendants was neither consistent nor credible. Under the circumstances of this case, the Court doubts that the misstatements of the prosecutor on rebuttal had any serious impact on the outcome.

The court also analyzed the "severity and persuasiveness" element of prejudice:

> Nevertheless, the performance of the prosecutor in her rebuttal closing smudged an otherwise clean record in this long and difficult trial. The prosecutor repeated the offensive burden shifting statement on at least two occasions in rebuttal. But when viewed in the context of the entire trial, these isolated statements did not rise to the level of a due process violation.
>
> This trial was not characterized by the pervasive lack of civility or unprofessional conduct that has warranted a new trial or a reversal of a conviction in other cases. . . . While this Court does not condone the prosecutor's conduct during her rebuttal closing, the Court does not find that this trial contained the sort of improper questioning or disparaging and belittling remarks by the prosecutors concerning the defendants that has supported a finding of prejudicial prosecutorial misconduct in our jurisprudence.
>
> This trial was conducted over the better part of eight days. There will be hundreds of pages of transcript on appeal. The prosecutors exhibited professionalism throughout the trial. They honored the presumption of innocence and assumed the burden of proof throughout voir dire, opening statement, the presentation of

> evidence and the opening closing argument. It was only on rebuttal that the prosecutor erred in the formulation of her argument. She prepared her rebuttal in advance and was not able to adjust after the Court sustained the first objection. But in the context of the entire trial, these missteps alone did not deprive the defendants of a fair trial. The misconduct of the prosecutor was not severe and pervasive.

(Citations omitted.)

The court concluded "the defendants failed to establish that the misconduct of the prosecutor denied them a fair trial or deprived them of due process," stating:

> This Court was a firsthand observer of the entire trial including the prosecutorial misconduct and the jury's reaction to it. The Court is firmly convinced that there is no reasonable probability the prosecutor's misconduct prejudiced, inflamed or misled the jurors so as to prompt them to convict the defendants for reasons other than the evidence and the law contained in the Court's jury instructions. Instead, the Court believes the jury took the prosecutor's arguments, the defendants' objections and the Court's rulings sustaining the objections in stride. The Court believes the jury returned a verdict based on the evidence and the law set forth in the Court's jury instructions.

(Citations omitted.)

We note generally, a jury is presumed to follow its instructions. *State v. Frank*, 298 N.W.2d 324, 327 (Iowa 1980). "[B]ecause the trial court is a firsthand observer of both the alleged misconduct and any jury reaction to it," we recognize "a trial court is better equipped than appellate courts can be to determine whether prejudice occurs." *Anderson*, 448 N.W.2d at 34. When we view the prosecutor's misstatements in the context of the entire trial, we are convinced the misstatements did not deprive Sickels of a fair trial and conclude he has failed to prove prejudice.

III. Excluding Evidence.

Sickels claims the court erred when it ruled testimony concerning L.S.'s allegedly kissing another club member several months prior to the sexual assault is inadmissible. We review "standard claims of error in admission of evidence for an abuse of discretion." *State v. Stone*, 764 N.W.2d 545, 548 (Iowa 2009).

Before trial the State made a motion in limine to exclude the testimony which Sickels characterizes as a former false claim of sexual misconduct by L.S. The court granted the State's motion, stating: "The [witnesses] allege [L.S.] engaged in inappropriate behavior of a sexual nature. The Court believes the type of behavior alleged is precisely the type of evidence which [Iowa] Rule [of Evidence] 5.412 is intended to keep out of trial." After the defendants made an offer of proof at trial, the court affirmed its prior ruling.

Rule 5.412 is "the rape shield law" and it "prohibits introduction of reputation or opinion evidence of [a victim's] 'past sexual behavior' and substantially limits admissibility of evidence of specific instances of a complainant's past sexual behavior." *State v. Alberts*, 722 N.W.2d 402, 408 (Iowa 2006). Its purpose "is to protect the victim's privacy, encourage the reporting and prosecution of sex offenses, and prevent parties from delving into distractive, irrelevant matters." *Id*. at 409. However, prior false claims of sexual misconduct are not protected by the rape-shield law. *State v. Baker*, 679 N.W.2d 7, 10 (Iowa 2004).

We find no abuse of discretion. Sickels did not offer evidence that L.S. made a prior claim of any kind about the incident. Evidence L.S. may have

kissed one man several months prior to the sexual assault is legally irrelevant to the issue of consent at the time of the assault. *See State v. Ball*, 262 N.W.2d 278, 280 (Iowa 1978) (stating "evidence of the victim's prior sexual conduct with a third party had no bearing on the issue of her consent").

IV. Cross-examination of Sickels's Character Witnesses.

Before trial, the defendants filed motions in limine over the admissibility of evidence of the defendants' earlier behavior at the Twilight Zone, a local bar. The court described the limine evidence:

> This incident occurred the fall previous to the night at issue in this case. The State has two witnesses it states will testify to the following: One night at Twilight Zone, some men, including defendants, were behaving in a rowdy manner. Defendant Sickels allegedly repeatedly asked the female bartender to flash her breasts at the men. Later, Defendant Christensen allegedly followed a female into the restroom, where he pressured her to engage in sexual activity with him. When she refused, Christensen apparently kissed her and touched her breast, though he allowed the woman to leave the restroom without further incident.

The State argued the evidence was admissible to show a common plan on the part of the defendants to solicit sexual activity at bars. The court disagreed and granted the defendants' motion in limine, ruling:

> Two incidents, wherein the defendants allegedly behaved in a sexually inappropriate manner while drinking at a bar, does not show a common scheme or plan. . . . The Court is inclined to keep evidence of the Twilight Zone incident out of this trial unless the defendants open the door by introducing evidence of their good characters of peacefulness and nonviolence. If they do so, the[y] run the risk of having this incident introduced as rebuttal. The prosecutors shall alert the court and counsel before they attempt to introduce this evidence.

At trial, defense witnesses Sean Smith and former police chief Hartsock testified Sickels had a reputation for peacefulness and nonviolence. On cross-

examination, without objection, the prosecutor briefly asked the witnesses if they were aware of Sickels's earlier behavior at the Twilight Zone. Smith responded he was not aware of the incident, but the incident would not change his opinion about Sickels. Former chief Hartsock testified he was aware of the incident from speaking with Sickels, but Hartsock was not sure it had actually occurred. Hartsock further stated the incident would not change his opinion.

On appeal, Sickels challenges the court's decision to allow the cross-examination of his character witnesses about the Twilight Zone incident. The State responds Sickels did not preserve error because he did not object to the evidence on improper character evidence grounds. *See* Iowa R. Evid. 5.103(a)(1) (2010) (requiring a timely objection "stating the specific ground"). Sickels argues "[i]t was clear from the court's ruling that this was a final ruling so as to preclude the necessity of an objection when the question was asked."

We conclude the language used by the court in its limine ruling reveals it was not a final ruling. Therefore, Sickels was required to make a specific objection to preserve error. *See id.* In addition to "the Court is inclined" and "they run the risk," language quoted above, the limine ruling contains additional language showing the court's ruling was not definitive:

> Sexual abuse is a crime of violence. Therefore, this Court believes the defendants' character traits of peacefulness and nonviolence are pertinent character traits for the purposes of . . . character evidence. The Court will allow the defendants to introduce reputation or opinion evidence concerning these character traits . . . . However, if the defendants introduce such character evidence, it *may* open the door to specific instances of conduct offered by the prosecution to rebut the same . . . . It *may* open the door to evidence of the incident at the Twilight Zone in cross-examination or rebuttal.

(Emphasis added.) We conclude Sickels has not preserved error on this issue.

Sickels raises an alternative argument in this direct appeal: trial counsel's failure to object to questions posed to Smith and Hartsock concerning the Twilight Zone incident constitutes ineffective assistance of counsel.

We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow an adequate record of the claim to be developed "and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). This is not the "rare case" allowing us to decide Sickels's ineffective assistance claims on direct appeal without an evidentiary hearing. *See State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). We preserve his claims for possible postconviction relief proceedings.

V. Restitution.

On July 14, 2009, the court held a restitution hearing and subsequently ordered restitution. The court rejected Sickels's causation and due process challenges ruling:

> This proceeding provides the defendants an opportunity to seek relief from the [Crime Victim Assistance Program] CVPA award of compensation "if such payment was unauthorized by rule or statute." However, *since we are dealing with a CVPA award of compensation, the Court does not determine proximate causation between the offender's activities and the victim's damages*. This procedure does not deprive the defendants of due process so long as it preserves whatever civil or administrative remedies the defendants might have to challenge the [Department of Justice]'s determinations as to causation.

> . . . While the defendants have raised interesting arguments concerning the wage rate and period of disability used by the Department in calculating the CVPA award for lost income, *the Court is bound by the Department's determination*.

(Emphasis added and citations omitted.) In October 2009, Sickels appealed the restitution order and in December 2009, the Iowa Supreme Court consolidated the restitution appeal with the criminal appeal.

Sickels seeks a new restitution hearing and argues he has "had the amount in controversy, the reimbursement owed to the program, determined by the [Department] without benefit of the due process protections." We review restitution orders for correction of errors at law. *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004).

The same causation/due process issue was recently addressed by the Iowa Supreme Court in September in *State v. Jenkins*, ___ N.W.2d ___ (Iowa 2010) (holding "a district court is not precluded from reviewing CVCP payments to determine" causation). Here, the district court used the prevailing pre-*Jenkins* analysis in ordering restitution. During oral argument the State conceded Sickels is entitled to a new restitution hearing under *Jenkins*. Accordingly, we remand for a new restitution hearing.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.