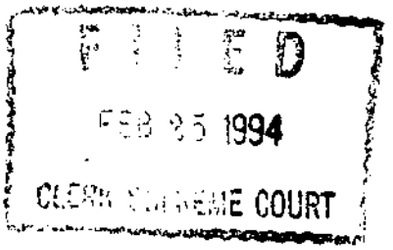
IN THE COURT OF APPEALS OF IOWA

No. 4-010 / 93-04



STATE OF IOWA,

Appellee,

vs.

EUGENE P. VAN DRIEL,

Appellant.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr., Judge.

Defendant appeals his convictions, following a jury trial, of third-degree sexual abuse and harboring a runaway with intent to commit sexual abuse. **REVERSED AND REMANDED FOR A NEW TRIAL.**

Kent A. Simmons, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald and Virginia Barchman, Assistant Attorneys General, and William E. Davis, County Attorney, for appellee.

Heard by Schlegel, P.J., Habhab, J., and McCartney, S.J.*

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

SCHLEGEL, P.J.

The defendant, Eugene P. Van Driel, appeals his convictions, following a jury trial, of third-degree sexual abuse, in violation of Iowa Code section 709.4(2)(c)(4) (1991), and harboring a runaway with intent to commit sexual abuse, in violation of Iowa Code section 710.8 (1991). He contends the district court erred in admitting improper character evidence and in failing to submit his requested limiting instruction concerning that testimony.

Van Driel bought a five-plex which he is renovating to include his single family dwelling on the first floor and basement and four efficiency rooms on the second floor. On September 7 or 8, 1991, Nathan M., then fifteen years old, was living with his girlfriend at Van Driel's house. He stayed for about two weeks.

On October 2, 1991, Nathan was at Van Driel's house visiting some juvenile boys that lived there; the three "borrowed" Van Driel's car and were arrested in the early morning hours of October 3 for car theft. A police officer overheard the boys talking about getting even with Van Driel. Later that day Van Driel told Nathan to stay away from the house. Nathan stole some money from a friend's mother and was picked up by police at a motel.

Nathan was ordered into a juvenile group home but ran away on October 6. He arrived at Van Driel's house and asked to stay. When Van Driel learned that Nathan was a runaway on October 11, he took Nathan to Nathan's aunt's house, and Nathan was returned to the group home.

On October 22, 1991, Nathan again ran away from a group home. Nathan stayed at his mother's house until she threatened to turn him over to authorities. He then stayed in abandoned houses for several days. On Thursday, November 14, Nathan arrived at Van Driel's house seeking shelter. Van Driel told him he could stay there for the weekend, but would have to turn himself in on Monday. Nathan left Van Driel's house on Sunday. Sometime later he was returned to the juvenile home.

Van Driel was charged with sexually abusing Nathan in October (count I) and November (count II), and with harboring a runaway with intent to commit sexual abuse (count III). The first trial ended in mistrial when the jury deadlocked.

Van Driel filed a motion in limine before the retrial seeking to exclude the testimony of Marc Johnson as improper character evidence. Johnson had been allowed to testify during the first trial that Van Driel had performed oral sex on him in 1985 when Johnson was fifteen years old. The district court found the question "very close" but concluded that the evidence was relevant to Van Driel's intent to commit sexual abuse on the harboring charge.

Nathan testified that Van Driel had fondled him on two occasions in early October and had performed oral sex on him near the end of his November status as a runaway. Nathan testified each of these incidents occurred while he was a runaway from the juvenile home.

Van Driel admitted that he had had sexual contact with Johnson in 1985 or 1986, but believed Johnson was sixteen at the time. He denied ever having sexual contact with Nathan. The district court gave limiting instructions before Johnson testified and again in the jury instructions. Van Driel's requested limiting instruction concerning Johnson's testimony was rejected.

Van Driel was convicted of third-degree sexual abuse on count II and of harboring a runaway on count III. He received concurrent terms of imprisonment not to exceed ten years and two years and now appeals. We reverse and remand for a new trial.

Van Driel first argues the trial court abused its discretion in admitting evidence regarding his prior involvement in oral sex acts with Johnson six years prior to the alleged sex acts with the victim, occurring in October and November of 1992. The admissibility of such evidence is within the discretion of the trial court. State v. Brewer, 247 N.W.2d 205, 214 (Iowa 1976). On appeal, the trial court's ruling on the admissibility of evidence will be reversed only upon a showing of an abuse of discretion. Id. at 214; State v. Butler, 415 N.W.2d 634, 636 (Iowa 1987). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable'." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"The purposes listed in the rule are not exclusive." State v. Plaster, 424 N.W.2d 226, 228 (Iowa 1988) (citing State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987)).

> The key is "whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts." Barrett, 401 N.W.2d at 187. [Citation omitted.] If the evidence meets this litmus test, "it is prima facie admissible, notwithstanding its tendency to demonstrate the accused's bad character." Barrett, 401 N.W.2d at 187.
>
> In determining whether evidence of "other crimes, wrongs, or acts" is admissible, the trial court must employ a two-step analysis. The court must first decide whether the evidence is relevant. If the court finds that it is, the court must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. State v. Kern, 392 N.W.2d 134, 136 (Iowa 1986); Iowa R. Evid. 403. A positive finding as to the second step overcomes the evidence's prima facie admissibility. Barrett, 401 N.W.2d at 187 n. 2.

Plaster, 424 N.W.2d at 229.

> Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. The test is "whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence." [Citation omitted.]

Id.

In the present case, the State contended the evidence concerning the oral sex acts with Johnson in 1985 or 1986 was relevant to establish the defendant's specific intent with respect to the charge of harboring a runaway with intent to commit sexual abuse. We agree with the State that the evidence regarding the prior oral sex acts with Johnson is probative on the issue of Van Driel's intent to commit sexual abuse with the victim while harboring him. We do not agree with the State's contention that the events and conditions surrounding the prior acts were sufficiently similar or the acts sufficiently numerous to establish a pattern, plan, or design of conduct.

Once evidence of other crimes is deemed relevant, the trial court must determine, within its discretion, whether the danger of unfair prejudice created by the admission of the evidence substantially outweighs its probative value. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979). "Unfair prejudice" has been defined as "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." Plaster, 424 N.W.2d at 231.

> As applied to other-crimes evidence, one commentator suggests
>
> > balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to over-mastering hostility.

Id. at 232 (citing McCormick on Evidence § 190, at 453 (E. Cleary 2d ed. 1972)).

Having carefully reviewed the record, we conclude the danger of unfair prejudice created by the admission of the evidence substantially outweighed the probative value of the evidence. The admission of evidence concerning the prior oral sex acts committed on Johnson had an undue tendency to improperly suggest the defendant's guilt regarding the more serious crime of third-degree sexual abuse. This is particularly true in light of the trial court's failure to completely instruct the jury of the impropriety of using evidence of prior oral sex acts as proof of sexual abuse.

Specifically, the "prior acts" instruction submitted to the jury (Instruction 19) omitted critical legal concepts contained in Iowa Criminal Jury Instruction Number 200.34, which was requested by the defendant. The jury instructions given, when viewed as a whole, did not adequately cover or describe the requirements of similarity, connection in time, or "clear proof" which were included in the requested, uniform instruction. "The trial court is obligated to instruct fully on the law applicable to all jury issues." State v. Lindsey, 302 N.W.2d 98, 102 (Iowa 1981).

Jury Instruction 19 read as follows:

> You have heard evidence that the defendant allegedly committed sex acts with Marc Johnson, at the time age 14 or 15. The defendant is not on trial for those acts. This evidence has been

> submitted to you on the issue of whether defendant, in his actions with [the victim] did or did not intend to commit a criminal act involving [the victim], one of the elements of Instruction No. 16 [harboring a runaway child]. You may also consider this evidence as it relates to the issue of whether the defendant acted pursuant to a plan or scheme, and for the purpose of establishing motive.
>
> You are instructed that you may not use such evidence of prior sex acts in determining whether the defendant did or did not perform sex acts with [the victim].

The instruction requested by Van Driel, based on Iowa Criminal Jury Instruction 200.34, provided:

> You have heard evidence that the Defendant allegedly committed sexual acts with Marc Johnson. The Defendant is not on trial for those acts.
>
> This evidence must be shown by clear proof, and has been submitted to you on the issue of whether the Defendant, in his actions with [the victim] did or did not intend to commit a criminal act involving [the victim], one of the elements of Instruction No. 16. You may also consider this evidence as it relates to the issue of whether the Defendant acted pursuant to a plan or common scheme. If you find these other acts; (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar matter as the crime charged so as to form a reasonable connection between them, then and only then may such other acts be considered for the purposes of establishing whether or not there was intent, or whether or not it related to whether the Defendant acted pursuant to a plan or scheme.
>
> You are further instructed that you may not use any such evidence of prior acts in determining whether the Defendant did or did not harbor a runaway child as set forth in Instruction 16.
>
> You are further instructed that you may not use such evidence of prior sex acts in determining whether the Defendant did or did not perform sex acts with [the victim] as set forth in Counts I and II, as set forth in Instructions 12 and 13.

Having been presented with evidence of prior sex acts, it was critical for the jury to understand that the law questions the degree of relevance or probative value of

prior acts. If the trial court deems the evidence admissible, it must then instruct the jury on how to determine the weight of the evidence. The other critical purpose of the language omitted by the trial court's instruction is explaining the impropriety of considering propensity. Instruction 19 does inform the jurors that they are not permitted to consider the prior acts on the question of sex acts with the victim. However, Instruction 19 does not inform the jury regarding the questions of similarity and reasonable connection; such information would inform the jury that the proof of one crime is not necessarily proof of another crime.

In the instant case, the critical guidance the trial court omitted from the uniform instruction does not appear in any other instruction. See Lindsey, 302 N.W.2d at 102. This language was required for a proper consideration of the proof of intent on the harboring a runaway charge and to fully explain the impropriety of using the evidence as proof of sexual abuse.

For the reasons stated above, we conclude the trial court abused its discretion in admitting evidence of Van Driel's prior oral sex acts with Johnson. The danger of unfair prejudice (concerning the sexual abuse charge) resulting from this evidence substantially outweighed the probative value of the evidence. In addition, the trial court committed reversible error by failing to fully instruct the jury of the legal concepts of similarity,

connection in time, and "clear proof" with regard to consideration of the prior acts evidence. Accordingly, we reverse the defendant's convictions for third-degree sexual abuse and harboring a runaway with intent to commit sexual abuse.

REVERSED AND REMANDED FOR A NEW TRIAL.

McCartney, S.J., concurs; Habhab, J., dissents.

HABHAB, J. (concurring in part; dissenting in part)

To that part of the majority opinion that reverses and grants a new trial as to the charge of third-degree sexual abuse, I respectfully dissent. I do so for several reasons.

For the most part, the entire appeal centers on the claim the trial court erred in permitting Marc Johnson to testify the defendant had performed oral sex on him in 1985 when he (Johnson) was fifteen years old. The State offered this testimony, as the majority points out, to establish the defendant's specific intent with respect to the charge of harboring a runaway with intent to commit sexual abuse.

Cautionary instruction no. 19 relates to the testimony of Marc Johnson. In that instruction the court told the jury the defendant was not on trial for the commission of those acts against Marc Johnson. In addition, the court instructed the jury that the testimony of Marc Johnson of prior sex acts could not be used in determining whether the defendant did or did not perform sex acts with Nathan McLaughlin.

The trial court, in its carefully crafted instruction, informed the jury "this evidence has been submitted to you on the issue of whether defendant, in his actions with Nathan McLaughlin, did or did not intend to commit a criminal act involving Nathan McLaughlin, one of the elements of instruction no. 16." That instruction is the

instruction that relates to harboring a runaway child. It provides:

> Under Count III the State must prove all of the following elements for Harboring a Runaway Child:
>
> 1. During the months of August, September, October, or November, 1991, defendant provided aid to, supported or sheltered Nathan McLaughlin.
> 2. Defendant intended to commit a criminal act, to wit: six abuse, involving Nathan McLaughlin.
> 3. Nathan McLaughlin was under eighteen years of age.
> 4. Nathan McLaughlin was voluntarily absent from his home, without the consent of his parents, guardian or custodian.
> 5. Defendant knew Nathan McLaughlin was voluntarily absent from his home, without the consent of his parent, guardian or custodian.
>
> If the State has proved all of the elements, then the defendant is guilty. If the State has failed to prove any one of the elements, the defendant is not guilty.

The jury was told by the trial court that the testimony which forms the basis of the reversal by the majority was to be considered by it only as to the harboring charge. The court made this clear in its cautionary instruction. One of the effects of the cautionary instruction is that the jury was not to consider the objected to testimony on the third-degree sexual abuse charge.

It is settled law in this state that only in extreme cases will a cautionary instruction be deemed insufficient to nullify the danger of unfair prejudice. State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982). The jury is assumed to have followed the instruction. State v. Plaster, 424 N.W.2d 226, 232 (Iowa 1988).

Here there is no indication the jury made improper use of Johnson's testimony insofar as the third-degree sexual abuse charge is concerned. Factually, the contrary appears, for the jury acquitted the defendant on Count I for apparently it was not convinced beyond a reasonable doubt that the defendant put his hand down the front of C.D.'s pants and touched his penis. As the sole judge of credibility, the jury was free to disbelieve the victim as to this incident but to believe him as to the incident relating to the third-degree sexual abuse charge.

I am inclined to agree with the majority that the defendant is entitled to a new trial as to the harboring of a runaway with intent to commit sexual abuse. However, I would affirm the trial court on the third-degree sexual abuse charge.