

IN THE COURT OF APPEALS OF IOWA

No. 0-012 / 98-2187
Filed March 29, 2000

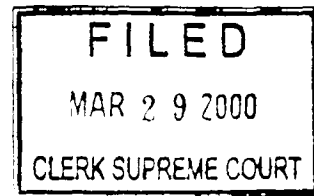
STATE OF IOWA,

Appellee,

vs.

GERALD EUGENE ANDERSON,

Appellant.



Appeal from the Iowa District Court for Mahaska County, Annette J. Scieszinski, Judge.

Gerald Anderson appeals his conviction for lascivious acts with a child.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Defendant Gerald Anderson appeals his conviction for lascivious acts with a child, **contending** he is entitled to a new trial based on the erroneous admission of evidence of prior bad acts. We affirm.

1. Background Facts and Proceedings. Anderson was charged with lascivious acts with a child following allegations of sexual contact with his then six-year-old granddaughter, H.B. On the day trial commenced, Anderson's attorney made a motion in limine seeking to prevent introduction of evidence that he had sexually abused his daughter when she was around eleven. After considering the State's offer of proof regarding the prior bad acts of evidence it wished to present, the court denied defendant's motion.

During trial, H.B.'s mother Teri testified that when she was eleven years old, the defendant had her touch his penis. She further stated that as a child she had witnessed the defendant molest her older sister who would have been ten or eleven at the time. Following trial, the jury found the defendant guilty as charged.

The following facts could be found from the evidence presented at trial. On October 4, 1997, Teri B. went to Minnesota to attend a wedding and left H.B. and her two brothers in her parents' care during the day. Due to her past experiences with the defendant, Teri had arranged for H.B. to spend the night with her sister and brother-in-law rather than at her parents' house. Her sons were to stay the night with Teri's parents.

At some point during the day, H.B.'s grandmother left the house with the two boys, leaving H.B. alone with her grandfather, the defendant. Anderson asked H.B. if she would like to rub his back and then took her to a back bedroom. Anderson

were only a shirt and underpants. H.B. rubbed Anderson's back while he lay in the bed. Anderson pulled down his underpants, took her hand, and placed it on his genitals. Later that day, H.B.'s uncle picked her up as planned and she did not spend the night at Anderson's home. H.B. told her mother about the incident and Teri reported it to the authorities. Anderson was interviewed by a deputy sheriff. He denied any genital touching between him and H.B. However, he admitted H.B. was alone in the bedroom with him. He also told the deputy he may have exposed himself to H.B. because his underwear was old and "full of holes."

Following trial, the jury found the defendant guilty of lascivious acts with a child. Anderson filed a motion for a new trial which the district court denied. He was sentenced to a term of incarceration not to exceed five years. His sentence was suspended and the district court placed him on probation and required him to participate in a sex offender program.

Anderson appeals. He argues the district court abused its discretion by admitting testimony regarding his sexual abuse of Teri and her sister, in violation of Iowa Rule of Evidence 404(b).

II. Scope of Review. We review evidentiary rulings for an abuse of discretion. See *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998) (reviewing admission of prior bad acts evidence under abuse of discretion standard). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

III. Admissibility of Prior Incidents of Child Sexual Abuse. Anderson claims the admission of Teri's testimony regarding prior incidents of abuse violates

~~rule 404(b)~~ Rule 404(b) provides that "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." However, evidence of 'prior bad acts' may be admitted as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 404(b).

The analytical framework for determining whether evidence of other crimes is admissible is a two-step process. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). The district court must first determine whether the evidence of other crimes is relevant. *Id.* If the evidence is relevant, the court must then decide whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *Id.* A positive finding at the second step overcomes the prima facie admissibility of the evidence. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996) (citation omitted).

A. Relevancy. Evidence is relevant if 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 that 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 the person knew of the proffered evidence." *Bayles*, 551 N.W.2d at 605 (citation omitted).

The consequential fact in this case is whether the incident between the defendant and H.B. occurred as told by H.B. The defendant gave an investigator an innocent explanation for at least part of H.B.'s allegation that she saw his penis. His counsel noted in both opening and closing arguments that the only evidence about what had occurred came from H.B.

Anderson's intent to commit the offense charged was a legitimate factual issue in this case. See *State v. Haines*, 259 N.W.2d 806, 811 (Iowa 1977) (stating intent is an element of lascivious acts with a child). Criminal intent may be inferred from a previous conviction for lascivious acts with a child. *State v. Propp*, 532 N.W.2d 784, 787 (Iowa 1995) (citing *State v. Casady*, 491 N.W.2d 782, 786-87 (Iowa 1992) (stating intent to commit sexual assault may be inferred from defendant's behavior, history of other criminal behavior, and attendant circumstances)). Teri's testimony regarding defendant's prior bad acts was relevant to prove intent and give credence to H.B.'s testimony. See *State v. Spaulding*, 313 N.W.2d 878, 881-82 (Iowa 1981) (noting victim's sister's testimony regarding defendant's prior bad acts gave considerable credence to victim's story). Because Anderson's prior bad acts were relevant proof of his intent to commit the offense, the district court correctly concluded the exclusionary provisions of rule 404(b) did not apply. See *Most*, 578 N.W.2d at 253.

Anderson contends the evidence of these prior bad acts was irrelevant because they occurred over twenty years ago. The fact that the prior acts were remote in time goes to the weight of the evidence, not its admissibility. See *Casady*, 491 N.W.2d at 785 (finding factual similarities rendered prior sexual abuse incidents relevant despite fifteen- and twelve-year time lapses); see also *State v. Seevanhsa*, 495 N.W.2d 354, 358 (Iowa App. 1992). However, remoteness in time may make "other crimes" evidence irrelevant "where the lapse of time is so great as to negative all rational or logical connection between the fact sought to be proved and the remote evidence offered in proof thereof." *State v. Zelladt*, 541 N.W.2d 558, 561 (Iowa App. 1995) (citations omitted).

Though the prior acts in this case were remote in time, the evidence of them was relevant to support H.B.'s testimony. The remoteness issue is further defused when the child sexual abuse is generational or intrafamilial, particularly when the prior incidents were similar to the current act. See *State v. Maestas*, 224 N.W.2d 248, 251 (Iowa 1974) (concluding intrafamilial nature of prior abuse coupled with similarity of the prior acts rendered six-and ten-year-old incidents admissible); see also *Bryson v. State*, 437 S.E.2d 352, 355 (Ga. Ct. App. 1993) (holding thirty-one-year lapse between abuse of daughter and granddaughter did not render prior abuse evidence inadmissible per se); *State v. Cichon*, 458 N.W.2d 730, 734 (Minn. Ct. App. 1990) (finding fourteen-year gap did not render prior abuse evidence irrelevant in intrafamilial situation when events were similar). We conclude the passage of time did not negate all rational or logical connection between the prior bad acts and the facts sought to be proved. We find this claim to be without merit.

B. Danger of Unfair Prejudice. Our conclusion regarding relevancy does not end our inquiry. Anderson's final contention is the probative value of the bad acts evidence was outweighed by its prejudicial effect. Even though evidence is relevant it may be excluded if its probative value was outweighed by the danger of unfair prejudice. See Iowa R. Evid. 403. Probative value gauges the strength and force and the relevancy of the evidence presented. *Plaster*, 424 N.W.2d at 231 (citations omitted). Unfair prejudice has been defined as "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *Id.*

In making a rule 403 determination, we consider the following factors:

(1) the actual need for the evidence in view of the issues and other available evidence, (2) the strength of the evidence showing the prior bad acts were committed by the accused, (3) the strength or weakness of the prior bad acts evidence in supporting the issues sought to be proven, and (4) the degree to which the jury will probably be roused by the evidence to overmastering hostility and use the evidence improperly.

State v. Query, 594 N.W.2d 438, 444 (Iowa App. 1999).

Applying the first factor of the rule 403 analysis, we conclude there was significant need for the evidence presented. The only evidence about what had occurred came from H.B. A lack of other relevant evidence may increase the probative value of the evidence available. *State v. Cott*, 283 N.W.2d 324, 329 (Iowa 1979). The prior bad acts evidence aided the jury in giving weight and credibility to H.B.'s testimony.

The second factor to be analyzed is the strength of the evidence showing the prior bad acts were committed by the accused. Clear proof of the alleged act is required when prior bad acts evidence is admitted. *See Zeliadt*, 541 N.W.2d at 560-61. Evidence that Anderson committed the prior bad acts was substantial. His own daughter established his identity. In addition, Teri's testimony was sufficiently specific as to the events described. We find the clear proof requirement was satisfied.

The third factor in assessing unfair prejudice against probative value is the strength or weakness of the evidence in supporting the issue sought to be proved. The prior bad acts evidence supported the State's contention that Anderson made H.B. touch his penis. Teri testified he had done this to her when she was a child. Her testimony made it more likely that H.B. was telling the truth and describing a similar occurrence with defendant. We find the third factor satisfied.

~~The final factor is the degree to which the jury will be roused by the evidence.~~
 The ~~prior bad~~ acts described by Teri, though disturbing, did not describe violent behavior. Her testimony was succinct and did not appear calculated to incite the jury against Anderson. In addition, the court took steps to address the danger the jury would use the prior bad acts evidence improperly. The trial court instructed the jury that if it found:

other wrongful acts (1) occurred and (2) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

We find the court's cautionary instruction lessened the danger the jury would use the prior bad acts evidence improperly.

Anderson contends *State v. Most* controls. See *Most*, 587 N.W.2d 250. There, we found an abuse of discretion in the trial court's admission of evidence of a defendant's prior acts of child sexual abuse. Two other child sexual abuse victims, ages eight and ten, gave dramatic testimony. Furthermore, their physician testified to their injuries. Unlike *Most*, the prior bad acts evidence here was not so prejudicial. In this case, one adult related a succinct, unadorned sequence of events. ~~There were~~ no injuries here and the testimony was not overemphasized.

~~Upon~~ consideration of all arguments raised on appeal, we conclude the probative value of the prior bad acts evidence was not outweighed by the danger of unfair prejudice. The district court did not err in admitting the testimony. Accordingly, we affirm Gerald Anderson's conviction of lascivious acts with a child.

AFFIRMED.