IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
WILLIAM ARMANDO URRUTIA,) 8-141
Defendant-Appellant.) 87-812

Appeal from the Iowa District Court for Cerro Gordo County (No. 18920) J. W. Frye, Judge.

Defendant appeals his conviction in a jury trial of second-degree robbery. **REVERSED AND REMANDED.**

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes and Jack Burds, Assistant Attorneys General; Paul L. Martin, County Attorney; and Michael J. Houchins, Assistant County Attorney, for the plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

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The defendant appeals his conviction, following a jury trial, of second-degree robbery. The defendant contends that the trial court erred in excluding evidence corroborating his defense that the victim falsely accused him of robbery as a means of covering up a homosexual advance by the victim. Our review is for the correction of errors at law. Iowa R. App. P. 4.

The disputed facts in the case essentially involve a swearing match between the defendant, William Urrutia, and the victim, Fred Funk. What is undisputed is that on December 25, 1986, Urrutia stopped by Funk's home in Mason City, Iowa, to discuss "Armour or union business." Funk testified that he had known Urrutia for five years and they met when they worked together at the Armour plant. He also testified that Urrutia was not a close friend, but that he had occasionally given him rides home from work.

The next evening, December 26, 1986, Urrutia again stopped by Funk's house. After a short conversation, Funk offered Urrutia a ride home. During the ride, Urrutia offered to sell Funk a battery charger for sixty dollars. Funk replied that he did not need one. Funk drove Urrutia to the location where he had dropped the defendant off the night before, but once they arrived there and found no one at home, Urrutia requested Funk to drive him to the Schoolhouse Apartments, located only two houses away from Funk's residence.

Funk and Urrutia differ on what occurred next. Funk testified that while he and Urrutia were sitting in the car, Urrutia asked Funk if he had any money on him. When Funk said he did not, Funk testified that Urrutia demanded that he drive to his house and get one hundred dollars from his wife and threatened Funk. Funk further testified that after he drove to his house, he ran inside his house and told his wife to call the police while Urrutia banged against the door of his house, yelling at Funk. Urrutia, on the other hand, testified that while he and Funk were sitting together in Funk's car, he asked Funk for a thirty dollar loan, and Funk responded by putting his hand on Urrutia's crotch, telling Urrutia that he knew "an easy way you can make the thirty dollars without paying it back." Urrutia testified that he became very angry about this advance, attempted to punch Funk, and chased him into his house. He testified he heard Funk tell his wife to call the police because Urrutia was trying to commit a robbery.

After a jury trial, Urrutia was convicted of second-degree robbery in violation of Iowa Code section 711.1. During the trial, Urrutia made an offer of proof outside the presence of the jury regarding the testimony of Joseph Funk, Fred Funk's eighteen-year-old nephew. Joseph Funk offered testimony that approximately one year before the trial, his uncle approached him in a park and "asked me if I wanted to engage in an oral sex act." The State moved

in limine to prohibit Urrutia from presenting this testimony to the jury, and the trial court sustained the motion.

On May 13, 1987, Urrutia filed a motion for a new trial, asserting that Joseph Funk's testimony should have been admitted into evidence. The court overruled the motion. On June 9, 1987, Urrutia filed a notice of appeal. On September 22, 1987, Urrutia filed a motion for a limited remand in order for the district court to entertain and rule on a motion for new trial based on newly discovered evidence. On October 1, 1987, the supreme court granted the limited remand. On October 9, 1987, Urrutia filed a motion to correct judgment and a motion for a new trial. The motion asserted that newly discovered evidence existed that Fred Funk had made a homosexual advance to Mason City police officer Jay Lee on August 6, 1987. On October 21, 1987, the district court granted the motion to correct judgment, but denied Urrutia's motion for a new trial. Urrutia filed a notice of appeal from that denial on November 23, 1987, and the supreme court consolidated the two appeals.

In his defense, Urrutia contends that Funk made a homosexual advance toward him and falsely accused him of robbery to cover up that advance. He argues that because the proffered testimony of Funk's nephew, Joseph Funk, and police officer Jay Lee would corroborate this theory and would show Fred Funk's motion for falsely accusing him of robbery, the district court erred in refusing to allow him to present this evidence.

Urrutia claims that such evidence is admissible under Iowa Iowa Rule of Evidence 404(b). Rule 404(b) states:

> 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.

Rule 404(b) is a rule generally prohibiting the admissibility of character evidence. The evidence offered must fall under the exceptions contained in the rule.

> 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. Plaster, 1988 WL 45768 (Iowa)(filed May 11, 1988)(citations omitted). In the process, we must determine if the court abused its discretion. State v. Roth, 403 N.W.2d 762, 765 (Iowa 1987). The Iowa Supreme Court has not limited the application of these principles to defendants, but has extended the 404(b) analysis to cases in which a defendant wishes to introduce evidence of wrongdoing by another person in order to establish his or her own innocence. State v. Nebinger, 412 N.W.2d 180, 186 (Iowa App. 1987). We consider each piece of evidence in turn.

A. Testimony of Joseph Funk. Upon defendant's offer of proof regarding the testimony of Joseph Funk, Fred Funk's eighteen-year-old nephew, Joseph Funk testified that approx-

imately one year before trial, his uncle approached him in a park and "asked [him] if [he] wanted to engage in an oral sex act." The State moved to prohibit the introduction of this testimony, and the trial court sustained the motion. Upon defendant's motion for new trial, the trial court ruled that such testimony "did not show any motive, opportunity (or) intent . . . " and that the testimony was irrelevant. We disagree. Funk has emphatically denied that he made a homosexual advance toward Urrutia. His intent and motive are squarely in issue. Evidence that Funk made a request of his nephew most certainly homosexual in nature is indicative of Funk's possible homosexual tendencies; moreover, evidence of such similar conduct tends to add credence to Urrutia's story and therefore corroborates his defense. It is clear that the evidence is relevant and that it tends to establish a material issue in the case. See Roth, 403 N.W.2d at 765.

We further find that the probative value of such evidence outweighs any possible prejudicial effect, given the fact that no additional testimony was introduced at trial, save that of Funk, Funk's wife and Urrutia. That such evidence is cumulative is untenable; it most certainly makes it more probable than not that Urrutia was telling the truth.

We hold the trial court abused its discretion in failing to permit Joseph Funk to testify at trial. Such testimony would be admissible under Iowa Rule of Evidence 404(b) as evidence of Funk's homosexual intent and his motive for

falsely accusing Urrutia of criminal behavior. We therefore reverse and remand for a new trial.

B. Proposed Testimony of Officer Lee. Because it may arise on retrial, we also consider the admissibility of Officer Jay Lee's proposed testimony from his police report that Urrutia allegedly arranged to have consensual sex with undercover Officer Lee. Officer Lee's police report stated that on August 5, 1987, at 10:00 p.m., he received a phone call at his home from"a male voice about 60 years old" who said, "I hear you get it on." Officer Lee replied affirmatively and agreed to meet Lee the next day.

Wearing a hidden radio transmitter, Lee met the caller the next day and discovered it was Fred Funk. Lee and Funk discussed what they would do and agreed on a "blow job." Funk said his wife did not know about his homosexual affair and she would divorce him if she ever found out. Funk told Lee his homosexual affairs started when he was a young man. Lee was then arrested for solicitation and prostitution, but the charges were subsequently dropped for lack of evidence. Based upon this newly discovered evidence,Urrutia filed a motion for a new trial which was denied.

The Iowa Supreme Court has examined the admissibility of subsequent acts in the limited context of sexual abuse cases. See, e.g., State v. Munz, 355 N.W.2d 576, 581-83 (Iowa 1984); State v. Candler, 204 Iowa 1355, 1359-60, 217 N.W. 233, 235 (1928). In these cases, the court has held

that similar sexual abuse acts by the accused against the victim, which occurred before trial but after the date of the crime charged, may be admissible. In our research, we find no cases directly on point concerning the limited fact situation which we are called upon to decide here: subsequent acts of the victim toward one other than the defendant outside of the sexual abuse context. However, we see no reason why such evidence in this particular case should be excluded. Under a 404(b) analysis, we conclude that Officer Lee's proposed testimony is clearly relevant to the contested issue raised in this case concerning Funk's motive and intent for falsely accusing Urrutia of robbery for many of the same reasons articulated earlier and particularly in view of Funk's concern about his wife finding out about his homosexual affairs. We are further convinced that the probative value of such evidence far outweighs any prejudicial effect.

REVERSED AND REMANDED.