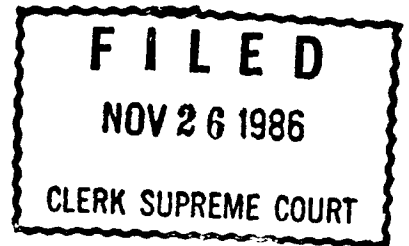


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 26, 1986

vs.

)

294

RICHARD DONALD MEYER,

)

6-360
85-1232

Defendant-Appellant.

)

Appeal from the Iowa District Court for Des Moines County (No. CRF 3330-0884) - Harlan Bainter, Judge.

Defendant appeals from judgment and sentence entered on jury verdicts finding him guilty of manufacturing a controlled substance, contending that photographs allegedly depicting him holding marijuana plants were improperly admitted under the "knowledge" exception to Iowa Rule of Evidence 404(b), and that the probative value of the evidence was outweighed by its prejudicial effect. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Deborah Goins and Dory Sutker, Assistant Appellate Defenders, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann Ryan, Assistant Attorney General; and William G. Brewer, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Schlegel, JJ.

PER CURIAM

On September 24, 1984, the appellant, Richard D. Meyer, was charged by trial information with possession with intent to deliver marijuana and with manufacturing marijuana. The information was subsequently amended to charge Meyer only with manufacturing marijuana. Prior to trial, Meyer filed a motion in limine and an amended motion in limine requesting the district court to declare inadmissible certain photographs that were seized during a search of Meyer's home. The pictures, according to the State, depict Meyer holding marijuana plants. Following a hearing on July 11, 1985, the district court overruled the motion in limine, insofar as it pertained to the photographs. The jury found Meyer guilty as charged, and he was subsequently sentenced to an indeterminate term not to exceed five years. This appeal followed.

The district court found the pictures to be admissible under the exception to Iowa Rule of Evidence 404(b) for proof of defendant's knowledge. As a part of this ruling, the district court found that the probative value of the evidence was not substantially outweighed by its potentially prejudicial effect. Meyer contends the evidence is irrelevant to the above-mentioned exception to rule 404(b) and that, even assuming its relevance, its prejudicial effect substantially outweighs its probative value.

The general rule is that "one crime cannot be proved by proof of another." State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979) (quoting State v. Schlak, 253 Iowa 113, 115, 111 N.W.2d 289, 291 (1961)). The purpose of the rule is to exclude from the jury's consideration evidence which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question. Id. This rule is codified as Iowa Rule of Evidence 404(b). See Iowa R. Evid. 404(b), federal advisory committee's note. That rule reads as follows:

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 exceptions to this rule are based upon the relevancy of certain evidence to the proof of some fact or element in issue other than the defendant's criminal disposition. Cott, 283 N.W.2d at 326. The test of admissibility under an exception to rule 404(b) is two-pronged. First, the evidence must be relevant to one or more of the issues for which exceptions are recognized. State v. Walsh, 318 N.W.2d 184, 185 (Iowa 1982). Second, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Munz, 355 N.W.2d 576, 579 (Iowa 1984).

Meyer's knowledge of marijuana is crucial to the State's case here. In cases such as this, and when the defendant's prior act tends to prove knowledge with respect to the current crime, the prior act becomes admissible in the face of the general rule against introducing prior acts. See State v. Mendiola, 360 N.W.2d 780, 782 (Iowa 1985). Although there must be clear proof that the defendant committed the prior acts, State v. Johnson, 224 N.W.2d 617, 620 (Iowa 1974), this does not require the State to establish the defendant's commission of the prior acts beyond a reasonable doubt. State v. Spargo, 364 N.W.2d 203, 209 (Iowa 1985).

Meyer questions the relevance of these photographs. He argues that the identification of the plants in the photographs as marijuana is only speculation on the part of the testifying officer. Officer Michael Johnstone identified the plants in the photographs as "what [he] believe[d] to be marijuana plants." The weight of authority permits an experienced police officer to express an opinion

that a substance is marijuana. E.g., State v. Cosgrove, 181 Conn. 562, 570, 436 A.2d 33, 45 (1980). Additionally, it has been held that a substance allegedly possessed or sold by a criminal defendant is sufficiently identified by the testimony of law enforcement officers only, even absent proof of chemical analysis or examination. E.g., State v. Maupin, 42 Ohio St. 2d 473, 476, 71 Ohio Ops. 2d 485, 488, 330 N.E.2d 708, 712-13 (1975). The present record contains evidence of Officer Johnstone's familiarity with marijuana. Although we note the extent of this foundational testimony is somewhat weak, Officer Johnstone's qualifications to express an opinion on the issue of the plant's proper horticultural classification is not challenged by Meyer. We find no error in the district court's determination of relevancy under rule 404(b).

Given our determination of the evidence's relevance, we must next consider and decide whether this relevance is substantially outweighed by the danger of unfair prejudice. Munz, 355 N.W.2d at 579. For purposes of this balance, "prejudice" refers to the likelihood of an undue tendency to suggest decision on an improper basis. See Iowa R. Evid. 403, federal advisory committee note. For us to reverse the district court's decision on this issue as an abuse of discretion, Meyer must show that the trial court's action was unreasonable in light of attendant circumstances. Cott, 283 N.W.2d 324, 329 (Iowa 1979).

Meyer has failed to make this showing.

AFFIRMED.