**IN THE COURT OF APPEALS OF IOWA**

FILED
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CLERK SUPREME COURT

No. 1-269 / 00-917
Filed June 13, 2001

**STATE OF IOWA,**
**Plaintiff-Appellee,**

**vs.**

**RONNIE NORMAN MURRAY,**
**Defendant-Appellant.**

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Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

The defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of third-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.4(1) (1999). **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, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

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**VAITHESWARAN, J.**

Ronnie Murray appeals his conviction for third-degree sexual abuse. He contends the district court abused its discretion in admitting evidence of a prior lewd remark and gesture. We affirm.

***I. Background Facts and Proceedings***

Murray was a friend of a woman named Lori. Early one morning, Murray stopped by Lori's house, apparently drunk and not himself. She let him in and, as her daughter was asleep in the parlor, led him to a bedroom, where Lori stated she hoped he would pass out. He did not. Instead, according to Lori, he shut the bedroom door and forced her to perform oral sex.

Later, Lori persuaded Murray to go outside the house, then screamed for help. Her neighbor, Deborah Higgins, responded. Police arrived at the scene soon after and took a statement from Lori.

The State charged Murray with third-degree sexual abuse. Iowa Code §§ 709.1, 709.4 (1999). At trial, the State called Higgins as a witness. She testified about her response to Lori's screams. In addition, over the strenuous objection of defense counsel, she testified about an incident the day before during which Murray unzipped his pants and touched himself.

Murray testified in his defense. He conceded Lori performed oral sex, but stated the act was consensual.

The jury convicted Murray and the district court adjudged him guilty and sentenced him to a prison term not exceeding ten years. This appeal followed.

***II. Admission of Prior Act***

Murray challenges the following testimony of Higgins:

> We were talking about sports. It was football season and he asked me what sports I liked best. I said football. He asked me why, and I said because it was exciting, more exciting than most sports. It was rough. I just enjoyed football. And he just made comments like, so you like it rough, exciting, comments like that. And he proceeded to unzip his pants and put his hands in his pants, and I just got up and said, I think its time to see if Lori is home, and we left.

Prior to its admission, defense counsel objected on the grounds the evidence was irrelevant, unfairly prejudicial, and inadmissible character evidence. The district court overruled the objection, "on the basis of relevance."[1]

Three rules of evidence are implicated here. Rule 402 states "[a]ll relevant evidence is admissible", subject to exceptions set forth elsewhere. Rule 403 states in pertinent part, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Rule 404(b) states,

> [e]vidence 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, identify, or absence of mistake or accident.

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[1] The district court did not explicitly balance the probative value of the evidence against its prejudicial effect. However, defense counsel does not take issue with this omission. Additionally, our cases do not appear to mandate on-the-record balancing, as long as there is support in the record for the district court's ultimate determination of admissibility. *See State v. Douglas*, 485 N.W.2d 619, 621 (Iowa 1992) (court properly excluded evidence as irrelevant, then independently noted prejudicial effect outweighed probative value); *State v. Brewer*, 247 N.W.2d 205, 211 (Iowa 1977); *State v. Knapp*, 426 N.W.2d 169, 173 (Iowa Ct. App. 1988) (no evidence trial court abused its discretion in admitting challenged evidence, even though court did not rule on issue); *Cf. State v. Daly*, ___ N.W.2d ___, ___ (Iowa 2001) (noting district court's failure to exercise discretion by balancing under rule 609(a) then balancing itself); *State v. Hackney*, 397 N.W.2d 723, 728 (Iowa 1986) (declining to rule on whether rule 609(a), requires on the record balancing). *Accord United States v. Sutton*, 801 F.2d 1346, 1362 (C.A.D.C.1986) (noting reversal or remand not required for failure to make on-the-record balancing under rule 403 where defense counsel did not object to omission and considerations germane to balancing readily apparent from record).

We turn to the question of 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 than it would be without the evidence." Iowa R. Evid. 401. If relevant, evidence is prima facie admissible even though it may demonstrate the accused's bad character. Iowa R. Evid. 404(b); *State v. Barrett*, 401 N.W.2d 184, 187 (Iowa 1987).

The State was required to prove Murray committed sexual abuse "by force or against the will of the other person." Iowa Code § 709.1. The State argues the prior lewd incident was "marginally relevant" to establish Murray's "sexually aggressive behavior." We have serious reservations about this contention, as prior aggressive behavior in and of itself would be inadmissible character evidence under Rule 404(b). *See State v. Cott*, 283 N.W.2d 324, 328 (Iowa 1979) (rejecting evidence of prior sex act to prove lewd disposition because it placed court "perilously close" to relying on criminal disposition to find relevance).[2] Additionally, we note the State had little need for this evidence in light of Higgins' testimony concerning Lori's cries for help and the police officer's testimony concerning the statement he took from Lori immediately after the incident. *See State v. Most*, 578 N.W.2d 250, 254 (Iowa Ct. App. 1998). Nevertheless, to the extent the incident evinced an interest on Murray's part in rough sex, we conclude the evidence was minimally relevant on the question of

[2] *See also State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994) (evidence defendant was a cocaine supplier not relevant in first-degree murder case); *State v. Schaffer*, 524 N.W.2d 453, 456 (Iowa Ct. App. 1994) (evidence of defendant's suppressed admission of abuse of another child not relevant to prove common plan, scheme, design, and motive to commit sexual abuse against victim); *State v. Christensen*, 414 N.W.2d 843 847 (Iowa Ct. App. 1987) (evidence of prior sexual abuse of another victim not relevant to prove intent).

his intent to engage in forcible sex with Lori just hours later. *See State v. Knox*, 464 N.W.2d 445, 449 (Iowa 1990) (finding relevance as to the issues of intent, motive, malice and identity from defendant's statement that he had watched the "Dr. Ruth" television show and did not like "any old white woman telling me how to . . . or make a woman feel satisfied."); *State v. Munz*, 355 N.W.2d 576, 583 (Iowa 1984) (noting evidence relevant if probative on matter of defendant's sexual desires).[3]

We next balance the minimal probative value of this evidence against the danger of unfair prejudice. Unfair prejudice is "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *State v. Castaneda,* 621 N.W.2d 435, 440 (Iowa 2001). Evidence that may cause a jury to base its decision on something other than an established proposition in the case would be considered unfair. 1 Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence § 403.04[1][b], at 403-36 (2001).

We conclude the danger of unfair prejudice was minimal here because the prior incident was insignificant in relation to the remaining evidence against Murray. *See State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) (noting uncharged crime did not involve conduct any more sensational or disturbing than charged offense); *Cf. State v. Brisk*, 171 F.3d 514, 525 (7th Cir. 1999), *cert.*

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[3] *See also State v. Anderson,* 565 N.W.2d 340, 342-3 (Iowa 1997); *State v. Casady,* 491 N.W.2d 782, 785 (Iowa 1992); *State v. Kern*, 392 N.W.2d 134, 137 (Iowa 1986);*State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985);*State v. Howell*, 557 N.W.2d 908, 912 (Iowa Ct. App. 1996) (relevant to establish intent); *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988); *State v. Spaulding*, 313 N.W.2d 878, 881 (Iowa 1981) (relevant to establish modus operandi); *State v. Newman*, 326 N.W.2d 796, 798 (Iowa 1982); *State v. Lawless*, 332 N.W.2d 120, 122 (Iowa Ct. App. 1983) (relevant on issue of identity); *State v. Zeliadt*, 541 N.W.2d 558, 561 (Iowa Ct. App. 1995); (relevant to show sexual pattern).

*denied by Sanapaw v. U.S.*, 528 U.S. 860, 120 S. Ct. 150, 145 L. Ed. 2d 127, (Oct 4, 1999) (affirming on this basis admission of testimony of drug activity predating charged drug crimes). The victim provided a graphic description of what occurred in the bedroom. Additionally, the officer who investigated the crime described Lori's statement to him immediately following the accident, including Murray's threat to "rip her daughter's arms off limb from limb" and "make her watch." Relative to this evidence, Murray's lewd gesture the day before was likely not the type of evidence that would "rouse the jury to overmastering hostility." *State v. Zeliadt,* 541 N.W.2d 558, 562 (Iowa Ct. App. 1995), *accord State v. Munz*, 355 N.W.2d at 580 (noting although photographs of prior bad acts shocking, so were the crimes charged). Therefore, we conclude the probative value of the evidence was not substantially outweighed by its prejudicial effect.

In light of our conclusion that the evidence was not unfairly prejudicial, we further conclude the district court did not abuse its discretion in admitting it.

Murray's judgment and sentence are affirmed

**AFFIRMED.**