IN THE COURT OF APPEALS OF IOWA

FILED
APR 25 1989
CLERK SUPREME COURT

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	381
SAMMY JOE BARBOUR,	)	9-07
		88-68
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Jackson County (No. 5389), James E. Kelley, Judge.

Defendant appeals his conviction and sentence for the crime of first-degree kidnapping. **AFFIRMED.**

William L. Wegman, State Public Defender, and Barbara M. Anderson, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mark J. Zbieroski and Mike Wallace, Assistant Attorneys General, for plaintiff-appellee.

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

DONIELSON, J. 382

Defendant appeals his conviction and sentence for the crime of kidnapping in the first degree in violation of Iowa Code section 710.2, entered on a jury verdict in district court. He claims the district court erred in: 1) overruling his objection to a portion of jury instruction No. 19, which was unsupported by evidence in the record; and 2) admitting evidence of prior acts under Iowa Rule of Evidence 404(b).

Defendant Sammy Joe Barbour was charged with kidnapping in the first degree, in violation of Iowa Code section 710.2. Barbour approached fourteen-year-old Lisa Schmidt on March 23, 1987, and asked for directions. He then asked her to get in his car, which she did. Barbour drove from Preston, Iowa, to Wyoming, Iowa. Barbour tried to force Schmidt to touch his penis with her hand, telling her he would shoot her if she did not comply. Barbour then touched her vagina with his tongue. Schmidt began honking the horn of the car and police officers arrived. When Barbour was arrested, he did not have a gun. During the trial, the State presented evidence that Barbour had been involved in a similar incident in Texas and had approached two other girls in Iowa, trying to get them to go with him in his car. A jury found Barbour guilty of kidnapping in the first degree. He was sentenced to a mandatory term of life imprisonment.

I. Defendant raises two arguments on appeal. The first is whether the trial court erred in overruling the defendant's objection to a portion of jury instruction No. 19 which was unsupported by the evidence in the record.

Instruction No. 19 was given to the jury as follows:

> The term "sex act" as used in these instructions means any sexual contact between two or more persons, by contact between the mouth and genitalia or by use of artificial sexual organs or substitutes for such organs in contact with the genitalia. You are instructed that a finger is a substitute for an artificial male sexual organ, and that a hand is a substitute for an artificial female sexual organ.

The trial information filed against the defendant charged him with kidnapping in the first degree, having subjected Lisa Schmidt to sexual abuse in violation of Iowa Code section 710.2. The definition of sexual abuse begins with "Any sex act between persons is sexual abuse . . . ." Iowa Code § 709.1. Sex act is defined in Iowa Code section 702.17 with the relevant portions included in jury instruction No. 19. The underlined portion represents Iowa case law interpreting this statute. See State v. Whetstine, 315 N.W.2d 758 (Iowa 1982); State v. Mueller, 344 N.W.2d 262 (Iowa App. 1983).

The defendant objected to instruction No. 19 "inasmuch as anything included in this instruction after the word 'genitalia.'" He claimed "there is not a factual basis under the uniform instructions that a finger is an artificial sexual organ, and throughout the end of the instruction." The objection was overruled.

Generally, an instruction submitting an issue unsubstantiated by evidence is prejudicial. State v. Mays, 204 N.W.2d 862, 865 (Iowa 1973). However, we find there was evidence to substantiate this instruction.

Our review of the evidence shows the defendant used one of the victim's hands as a substitute for an artificial female sex organ and also used his own hand and tongue for substitute sex organs. The victim testified that the defendant "stuck his hand in my vaginal area" and, further, that he "stuck his tongue in my vagina." She also said the defendant "started playing with himself" and wanted her to "help him get off" and "touch him and stuff."

An officer who took a statement from the defendant testified that defendant said: "I was eating her for 30 or 40 minutes before the trooper got there"; and "She rubbed my cock." The written statement indicates the defendant "was eating her pussy for 40 minutes" and that the girl "played with [his] dick for awhile."

No reversible error occurred as a result of instruction No. 19. There was evidence in the record to substantiate that a sex act had occurred as defined in this instruction.

II. The second issue is whether the trial court erred in admitting evidence of the defendant's prior acts under Iowa Rule of Evidence 404(b). The State presented evidence of prior, uncharged acts by the defendant through the testimony of five witnesses.

Iowa Rule of Evidence 404(b) provides:

> Other crimes, wrongs, or acts. 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 trial court overruled the defendant's objection and allowed the evidence as going to defendant's intent to remove the victim and to commit sexual abuse. Evidence of crimes, wrongs, and acts is admissible if it is relevant and material to issues of a defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Cott, 283 N.W.2d 324, 325 (Iowa 1979). If it is relevant and material for this purpose, it is prima facie admissible notwithstanding its tendency to demonstrate the accused's bad character. State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987).

If evidence of prior acts is found by the trial court to be relevant to any of these matters, then the court must also determine whether the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. State v. Spargo, 364 N.W.2d 203, 208-09 (Iowa 1985). The court's ruling on admissibility will not be disturbed unless it constitutes an abuse of discretion. Id. at 209.

The prior acts evidence included testimony about a similar incident which took place in Texas over five years

ago. Both the victim in this case and in Texas were fourteen years old at the time. Both were stopped by a car driven by the defendant and lured into the car. Each girl was offered an alcoholic beverage. Defendant drove each victim some distance before he allegedly committed the sexual abuse.

Two other girls testified that they had been approached by the defendant in his car. Both incidents occurred on the same day in Maquoketa. Each time he offered the girl $20 for directions to a supper club. The first girl walked away from the car and she was not followed. The second girl did get in the car. She jumped out at a stop sign when she noticed the defendant was not following her directions. A police officer testified about seeing the second girl talking with the defendant.

The evidence of prior acts was used to show defendant's intent. The jury was given a cautionary instruction explaining the limited purpose of the evidence. Generally, as it is here, such instructions are sufficient to remove the danger of unfair prejudice. State v. Coen, 382 N.W.2d 703, 708 (Iowa App. 1985).

Defendant argues that the State has the burden to present "clear proof" that the defendant did in fact commit the prior crimes, wrongs, or acts. However, we do not believe that this rule precludes admission of the prior acts evidence in question. See Spargo, 364 N.W.2d at 209.

Commission of prior acts need not be established beyond a reasonable doubt. Id. "The purpose of the rule is to prevent the jury from engaging in speculation or drawing inferences based on mere suspicion." Id. The testimony of the five witnesses was sufficient for the jury to conclude the defendant had committed similar acts. Huddleston v. United States, ____ U.S. ____, 108 S. Ct. 1496, 1501, 99 L. Ed. 2d 771, 782 (1988).

We believe the similarity between defendant's prior pattern of conduct and the facts in this case is strong enough to justify the conclusion that the trial court did not abuse its discretion in ruling that this evidence was relevant to the issue of defendant's intent to remove the victim and to commit sexual abuse. See Spargo, 364 N.W.2d at 209. Finding no abuse of discretion, the trial court's ruling on the admissibility of this evidence stands. Therefore, the decision of the district court is affirmed.

AFFIRMED.