FILED
MAY 25 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JAMES RODNEY JOHNSON,)

Defendant-Appellant.)

Filed May 25, 1982

422

2-129
66190

Appeal from Dallas District Court - M. C. Herrick, Judge.

Defendant appeals his conviction of lascivious acts with a child in violation of Section 709.8, The Code. - AFFIRMED.

Gordon K. Darling, Jr., of Darling, Chickering & Darling, Winterset, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant appeals his conviction of lascivious acts with a child in violation of Section 709.8, The Code. On appeal, defendant asserts that trial court erred and abused its discretion by admitting testimony by the victim regarding the defendant speaking to her some five hours prior to the commission of the crime while standing on his apartment balcony in the nude.

The twelve-year-old female victim of the crime was subjected to lascivious acts at an apartment where she was babysitting shortly after midnight on May 25, 1981. She did not see the perpetrator of the crime because a blanket was held over her head. Because the perpetrator had spoken to her during the commission of the crime she believed that she was able to recognize the voice as being that of the defendant, who had spoken to her briefly about five hours prior to the commission of the crime. This voice identification was confirmed when the victim subsequently was permitted to again listen to defendant's voice. Entrance to the apartment where the crime was committed was obtained by prying off the door molding opposite the door knob and inserting an object into the lock mechanism at this point. Defendant was arrested about one hour after the crime was reported. At this time a screwdriver was found upon his person.

Defendant's primary contention on appeal is that the trial court erred in permitting the victim to testify that approximately five hours before the crime was committed, the defendant, who was staying in the same apartment complex, stood on the balcony of his apartment, spoke to the victim, and exposed his nude body to her. In addition to this testimony, the victim also testified that at another point in the evening after her initial encounter with the defendant she observed him leaning over a banister in the hall of the apartment building and watching her. When the victim thus discovered him the defendant moved to a position out of her view.

In urging that the evidence of defendant's nudity was inadmissible, he relies on State v. Cott, 283 N.W.2d 324 (Iowa 1979). He urges that Cott limits those instances wherein evidence of other criminal activity may be introduced in a criminal trial to specific categories of evidence, none of which are involved in the present case. We disagree.

Initially we are doubtful that it was the intention of the court in Cott to inflexibly fix all instances wherein evidence of other criminal activity by the person on trial can be introduced in a criminal prosecution. While certain categories of evidence are alluded to in Cott, the court also speaks approvingly of permitting introduction of evidence which will "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." Cott, 283 N.W.2d at 328. We believe the incident in question is of such temporal and geographic proximity to the crime to fall within this category of evidence. The evidence is factually material and relevant to the trial as bearing upon the circumstances under which the victim had an opportunity to hear the defendant's voice. It also is suggestive of a lascivious disposition toward the victim at a time and place closely connected with the occurrence of the crime. [1] The trial court did not err in permitting this testimony. We have considered all issues presented and find no basis for reversal.

AFFIRMED.

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[1] We are not in agreement with defendant's contention that Cott precludes evidence tending to show a contemporaneous lascivious disposition toward the victim.