

IN THE COURT OF APPEALS OF IOWA

No. 4-502 / 93-1732

**FILED**

JAN 23 1995

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RICKY JUNIOR MOSES,

Appellant.

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Appeal from the Iowa District Court for Black Hawk  
County, George L. Stigler, Judge.

Defendant appeals his conviction and sentence for one  
count of second-degree sexual abuse and one count of  
first-degree burglary. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John F.  
Fatino, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich,  
Assistant Attorney General, and Thomas J. Ferguson, County  
Attorney, for appellee.

Considered en banc.

**PER CURIAM**

Defendant, Ricky Moses, was charged by trial information with one count of second-degree sexual abuse and one count of first-degree burglary stemming from the alleged rape of a fifteen-year-old girl in her Waterloo home. According to the record, the young girl, K.C., testified on May 15, 1993, she and her nine-year-old brother, R.C., were asleep in their mother's bed while their mother was at work. During the night, K.C. was awakened by someone shaking her, and she observed an African-American male standing over her. According to K.C.'s testimony, the man began to fondle her and engaged in oral and vaginal intercourse. R.C. woke up and turned on the light. K.C. told him to call the police, but the man told them he had a gun and would kill her if the police were called. The man then continued to have intercourse with K.C. He ultimately left the home.

K.C. recognized the man who assaulted her as having stopped by her home a month earlier. She recalled a neighbor identifying the man as someone named Ricky. One week later, when Waterloo police approached Moses, he identified himself as Ricky Jones. Moses suddenly ran away and was ultimately subdued by the police.

At trial, DNA samples of semen taken during an examination of K.C. revealed they were consistent with known samples taken from Moses. Defense counsel attempted to elicit testimony from Officer Meeks regarding why

defendant ran away by asking him about the relationship between the African-American community and the Waterloo police. The State objected to this line of questioning. Defense counsel argued this testimony was important because it would show Moses ran away because of the perceived notion in the African-American community the Waterloo police were prejudiced against them. The trial court sustained the objection. Moses's mother, father, and daughter all testified he was at home on the evening in question.

The jury found Moses guilty as charged. He was sentenced to consecutive terms of imprisonment not to exceed twenty-five years on each count. Moses now appeals.

Moses contends the trial court erred when it excluded evidence of the bad relations between the Waterloo police and the African-American community. He claims this testimony would have explained why he ran away from the police when they questioned him.

Our scope of review is for abuse of discretion. State v. Nelson, 480 N.W.2d 900, 906 (Iowa App. 1991).

Iowa Rule of Evidence 401 provides relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. State v. Tracy, 482 N.W.2d 675, 680 (Iowa 1992). The reason defendant ran from the police was relevant to this jury's consideration. This issue was one of the

primary issues at trial. If defendant could explain he ran from the police for reasons other than guilt, it would materially help his case. Defendant is entitled to present evidence relevant to his theory of defense. Nelson, 480 N.W.2d at 906 (citing State v. Wilson, 236 Iowa 429, 442-43, 19 N.W.2d 232, 238 (1945); State v. Kelly, 196 Iowa 897, 902, 195 N.W.2d 614, 616 (1923)). Equally important, the jury is entitled to know the pertinent facts when reaching a verdict on the case. Nelson, 480 N.W.2d at 906 (citing Wilson, 236 Iowa at 443-44, 19 N.W.2d at 238)).

The trial court abused its discretion when it excluded the testimony at issue. However, this is not the end of our analysis. We must also determine whether the trial court's abuse of discretion caused prejudice to defendant. See State v. Mayhew, 183 N.W.2d 723, 728 (Iowa 1971) ("This court does not order retrials merely because error has been committed. It orders a new trial only for good reason--if the error in the first trial caused harm.") (citations omitted). The evidence of defendant's guilt was overwhelming. The victim positively identified Moses as the attacker. Additionally, DNA testing demonstrated semen samples taken during an examination of the victim were consistent with semen samples taken from defendant. In view of this strong evidence, we hold defendant was not prejudiced by the trial court's exclusion of the testimony.

**AFFIRMED.**

All judges concur except Huitink, J., who concurs in part and dissents in part.

HUITINK, J. (concurring in part and dissenting in part)

I concur with the majority's determination that the defendant was not prejudiced by the court's refusal to admit this evidence. I do, however, disagree with the majority's determination that the trial judge abused his discretion.

In its ruling sustaining the State's objection to the excluded evidence, the trial judge stated:

The question placed on the floor by [defense counsel] Mr. Rodriguez would basically call for evidence that systematically there are sufficient problems between the black community and the Waterloo Police Department such that a black person who is approached by a police officer, not knowing whether the police officer wants to arrest him or simply wants to make inquiry on whatever, is justified in running from the police and also is justified in giving the police a fictitious last name. I don't think that there is anything to warrant that conclusion on this record.

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I don't really think that any relevant purpose would be served by allowing the witness to answer that question. And even if by some stretch of the imagination there were to be some relevance in that question, its unfair prejudicial effect to the State would be such that it would greatly outweigh whatever marginal probative value the answer might hold.

The admission of evidence at trial is left to the discretion of the trial judge. We should not reverse unless we find a clear abuse of discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985).

Relevant evidence is admissible. All evidence which is not relevant is not admissible. Iowa R. Evid. 402. Relevant evidence may be excluded if it is substantially

outweighed by its prejudicial effect or if it would confuse the issue or mislead the jury. Iowa R. Evid. 403. The balancing of the probative value against the grounds for exclusion is for the trial court's discretion. State v. Harmon, 238 N.W.2d 139, 145 (Iowa 1976).

Although evidence explaining the reason for Moses's flight from the police is relevant, I do not find one police officer's characterization of the Waterloo Police Department's general relationship with the black community of any probative value on this issue. Even if it were relevant, there was a danger that the jury would be distracted by this potentially inflammatory issue.

My review of the trial judge's ruling indicates that he thoughtfully considered all of these factors and determined that the evidence should be excluded. The fact that another judge may have concluded otherwise does not mean the trial judge abused his discretion.