IN THE COURT OF APPEALS OF IOWA

No. 0-422 / 89-850

STATE OF IOWA,

Appellee,

vs.

PAUL DAVID HENDRICKSON,

Appellant.

FILED
JAN 29 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Hendrickson appeals his conviction, following a jury trial, of assault with intent to commit sexual abuse resulting in bodily injury, by challenging two evidentiary rulings. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, William E. Davis, County Attorney, and James Ottesen, Assistant County Attorney, for appellee.

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

OXBERGER, C.J.

Paul Hendrickson was charged with the class D felony of assault with intent to commit sexual abuse resulting in bodily injury, a violation of Iowa Code section 709.11. A jury found him guilty of that crime, and he appealed the conviction. We affirm.

Hendrickson contends the district court erred by allowing the State to cross-examine his treating psychiatrist about Hendrickson's rape fantasies. Hendrickson argues this evidence violated his physician-patient privilege under Iowa Code section 622.10. The State responds that Hendrickson waived this privilege by calling his psychiatrist to the stand to testify about Hendrickson's mental capacity.

Hendrickson also contends the district court erred by allowing evidence about a 1979 assault which appeared to be sexually motivated. The district court excluded evidence of Hendrickson's conviction which resulted from the incident, but allowed admission of Hendrickson's statement to the investigating police officer. Hendrickson contends the district court erred by holding the evidence admissible under Iowa Rules of Evidence 404(b) to show identity and intent.

We review this matter for correction of errors at law. nIowa R. App. P. 4.

PHYSICIAN-PATIENT PRIVILEGE. Three elements must be established to show the existence of the doctor-patient privilege: (1) the relationship of doctor-patient; (2) acquisition of the information or knowledge during this relationship; and (3) the necessity of the information to enable the doctor to treat the patient skillfully. State v. Cole, 295 N.W.2d 29, 32 (Iowa 1980)(authorities omitted). Iowa Code section 622.10 states in part:

> A practicing . . . physician . . . , who obtains information by reason of the person's employment . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred.

We find, and the State does not attempt to dispute the doctor-patient privilege existed. We also find the trial court correctly found that Hendrickson waived the privilege.

Hendrickson relied on the defense of diminished capacity and insanity. We believe this defense served to waive the doctor-patient privilege. It would be incongruous to allow Hendrickson to place his sanity in issue and present his treating physician's testimony and then deny access of the State to relevant information. See State v. Cole, 295 N.W.2d at 35.

Hendrickson then argues that even if he waived his privilege, the information elicited by the State was irrelevant and prejudicial. Hendrickson did not raise these objections at trial and we will not address them on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974).

PRIOR BAD ACT EVIDENCE. Hendrickson also challenges the admission of his statement to the police officer who investigated a 1979 incident where he assaulted a young woman. In the statement, Hendrickson said "[t]he girl started praying out loud and that freaked me out so I got off of her and ran. I cannot say right now whether or not I would have raped her, but if she had not been praying out loud I probably would have."

After the officer's testimony the trial court instructed the jury "[y]ou may not consider this evidence as proof of his character or that he acted in conformity with that character at the time of the alleged assault. You may, however, consider that evidence only as it may relate to the proof of his intent."

Hendrickson filed a motion in limine prior to trial seeking to enjoin the state from mentioning the 1979 incident during trial. The court's ruling on the motion prohibited introduction of evidence of the felony conviction arising from the incident but allowed admission of the statement for proof of intent and identity. In its ruling the court relied on State v. Spargo, 364 N.W.2d 203

(Iowa 1985) and State v. Plaster, 424 N.W.2d 226 (Iowa 1988).

Iowa Rule of Evidence 404 (b) states:

> 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.

In State v. Plaster, 424 N.W.2d at 229. the court stated:

> In determining whether evidence of "other crimes, wrongs, or acts" is admissible, the trial court must employ a two-step analysis. The court must first decide whether the evidence is relevant. If the court finds that it is, the court must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. [citations omitted].

We find the statement was admissible to show Hendrickson intended to sexually abuse the victim. Additionally, the court did not abuse its discretion in finding that the statement was not so prejudicial as to require its exclusion. Further, the court's admonition to the jury cured any potential prejudice to Hendrickson. State v. Coen, 382 N.W.2d 703, 708 (Iowa App. 1985).

AFFIRMED.