

IN THE COURT OF APPEALS OF IOWA

No. 2-473 / 91-1397

FILED

DEC 29 1992

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RUSSELL EUGENE DURHAM,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Durham appeals his convictions, following a jury trial, on two counts of sexual abuse in the second degree and two counts of lascivious acts with a child. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Carol J. Chase, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.
Schlegel, J., takes no part.

HAYDEN, J.

Defendant Russell Durham appeals his convictions for two counts of second-degree sexual abuse and two counts of lascivious acts with a six-year-old child, A.A. Durham contends the district court abused its discretion when it allowed evidence of prior bad acts and testimony on male sexual arousal to be admitted. He claims the evidence was irrelevant and unfairly prejudicial. We affirm.

Evidence of other acts which was admitted by the district court included the following testimonies and exhibits. At trial Sioux City Police Sergeant Anthony Sunclades testified regarding his participation in interviews with A.A. and another alleged child victim. He further testified concerning his interview with Durham in which Durham made admissions concerning A.A. and two other children. The State then introduced an edited videotape of an interview with Durham in which he made admissions regarding A.A. and another child and anatomically correct drawings on which Durham placed marks on the areas in which he touched the girls. The defendant's marks on the drawings were located in the genital areas. Durham objected to the above prior bad acts evidence, claiming there was no clear proof of the acts and the evidence was irrelevant and unduly prejudicial. The district court overruled Durham's objections.

The district court also overruled Durham's objections to Dr. Gary Carlton's testimony on the mental component of

male sexual arousal. The district court ruled the evidence was relevant in light of Durham's inability to attain an erection.

Our review of the evidentiary issues is on errors of law. Iowa R. App. P. 4. Determinations of relevance of evidence rests within the sound discretion of the district court and will be reversed only upon a showing of such discretion has been abused. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984). In order to show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (citation omitted).

I. Testimony of Prior Acts. Durham claims the district court erred in allowing evidence of prior acts with children other than the alleged victim. He contends this evidence violated Iowa Rule of Evidence 404(b).

Evidence of other crimes, wrongs, or acts is not admissible if it is offered to show only that defendant acted in conformity with such incidents. Iowa R. Evid. 404(b). However, several exceptions to this rule exist. Other acts may be admitted to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Id.

We find the evidence of defendant's prior acts was relevant to show opportunity. The defendant contends he lacked the opportunity to commit the crimes because he was

never left alone with the children. Durham's contentions made his opportunity to perpetrate the crime an issue at trial. The other acts evidence was relevant to this issue. The victim testified Durham was left alone with the children. The evidence also shows Durham admitted he abused A.A. and two other children. The drawings marked by defendant also indicate he touched the girls genital areas. The other acts evidence also gave considerable credence to the victim's story. We determine the other acts evidence was relevant.

We must then consider whether the prejudicial effect of this evidence outweighs its probative value. Iowa Rule of Evidence 403 "does not provide protection against all evidence that is prejudicial or detrimental to one's case; it only provides protection against evidence that is unfairly prejudicial. State v. Plaster, 424 N.W.2d 226, 231 (Iowa 1988). The evidence included Durham's own admissions and corroborated the victim's story. The probative value of this evidence was not substantially outweighed by unfair prejudice. Durham failed to meet his burden to establish the district court abused its discretion by admitting the other acts evidence. We conclude Durham was not unfairly prejudiced by the evidence.

In its instructions the district court cautioned the jury that the evidence allegedly showing Durham committed other sexual acts with other children may be considered

only to determine whether the defendant has a sexual passion or desire for persons such as the victim. The court stated the jury could not consider the evidence of the other acts as proof Durham committed the acts charged in the case.

Considering the cautionary instruction and the relevance and probative value of the other acts evidence, we conclude the district court did not abuse its discretion in admitting the evidence. We affirm the district court on this issue.

II. Expert Testimony. Durham contended he did not have the capacity to act with sexual purpose because he could not have erections. The capacity to act with sexual purpose is an element to the offense of lascivious acts. Iowa Code § 709.8 (1991). Thus Durham put his capacity into issue. The district court may admit expert testimony which "will assist the trier of fact to . . . determine a fact in issue." Iowa R. Evid. 702. Dr. Carlton's testimony regarding the mental and physical components of sexual male arousal was relevant to the issue. The expert testified a man who does not have erections can nevertheless experience the mental component of arousal. We determine Durham was not unfairly prejudiced by this testimony. The district court did not abuse its discretion by allowing such testimony.

We affirm the district court decision in all respects.

AFFIRMED.