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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
LARRY DEAN FIELDING,	)	8-266 87-195
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Cerro Gordo County (18424), Gilbert K. Bovard, Judge.

Defendant appeals from judgment and sentence, following his convcition in a jury trial, of felony murder. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

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The defendant, Larry Dean Fielding, appeals from a judgment and sentence, following his conviction in a jury trial, of felony murder. He argues the trial court erred in admitting evidence of the defendant's prior bad acts and by instructing the jury on lesser-included offenses over the defendant's objection. We affirm.

I.

The defendant was charged with first-degree murder for killing eighteen-year-old Richard Vargas when both men were prisoners in the Cerro Gordo County jail in July of 1986, by forcing or attempting to force Vargas to perform oral sex acts on him. The trial court, overruling defendant's objections, permitted two witnesses to testify about incidents in 1978 and 1985 during which the defendant had forced them to perform similar acts. The trial court also overruled the defendant's objections to jury instructions on lesser-included offenses. The jury found defendant guilty of first-degree murder and he was sentenced to a mandatory term of life imprisonment, to run consecutively to the defendant's three existing life sentences on convictions in Missouri.

II.

As grounds for this appeal, the defendant alleges the trial court erred in allowing testimony of past violent sexual conduct. Defendant urges the testimony was not

relevant because it did not fall within any of the recognized exceptions under Iowa Rule of Evidence 404(b) and the testimony admitted here was more prejudicial than probative. Second, the defendant argues he had an absolute right to send his case to the jury on an all-or-nothing basis and by giving instructions on the lesser-included charges, the court suggested to the jury there was at least some culpability on the part of the accused.

The State responds the district court did not abuse its discretion by admitting the complained of testimony. It argues the evidence admitted falls under numerous recognized exceptions to Iowa Rule of Evidence 404(b). Further, the State urges the trial court correctly found there was a factual basis for submitting the lesser offenses of second-degree murder and involuntary manslaughter. In addition the State argues in any event the submission of lesser offenses is ordinarily considered to be to the defendant's advantage and thus, could not be prejudicial error.

III.

A. Defendant's Prior Bad Acts. The defendant contends the trial court erred by admitting the testimony of Delmar and Bonnie about his prior violent sexual conduct toward them. In support of his contention, he argues the testimony was not relevant because it did not fall within any of the exceptions in rule 404(b) of the Iowa Rules of

Evidence. In addition, he argues even if the testimony was relevant, its probative value was greatly exceeded by its prejudicial effect and thus should have been excluded pursuant to Iowa Rule of Evidence 403.

Rule 404(b) provides:

> 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 purposes outlined in the rule are not exclusive. State v. Plaster, 424 N.W.2d 226, 228 (Iowa 1988). Admissibility hinges on "whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts." State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987). If the evidence meets this test, "it is prima facie admissible, notwithstanding its tendency to demonstrate the accused's bad character." Plaster, 424 N.W.2d 226, 229 (Iowa 1988) (quoting State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987)).

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 evidence is relevant; if the court finds it is, the court must then decide whether the evidence's probative value is substantially outweighed by danger of unfair prejudice. Plaster, 424 N.W.2d at 229; Iowa R. Evid. 403. In the

process of employing this analysis, the trial court must exercise discretion. We will reverse its decision only when we find a clear abuse of discretion. Plaster, 424 N.W.2d at 229.

1. Relevancy. The test to determine whether evidence is relevant can be stated as "whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence." Plaster, 424 N.W.2d at 229 (quoting 1 Weinstein ¶ 401 [07], at 401-48).

In this case, the State was charged with proving the defendant, while participating in a felonious assault upon Vargas, asphyxiated him. Two theories of felonious assault were submitted by the State, they included assault with intent to commit sexual abuse and sexual abuse. To prove the former, the State had to demonstrate the defendant assaulted Vargas for the purpose of committing a sex act. To prove the latter, the State was required to show the sex act was committed by force or against the will of the victim, or by consent obtained through threats of violence. Therefore, the meaningful inquiry here is whether the victim freely consented to performing oral sex on the defendant. Our inquiry is then pared to a single question: Is the likelihood that defendant did not have Vargas's consent enhanced by evidence of past sexual abuse toward others in similar circumstances?

The Iowa Supreme Court recently determined the question whether evidence of past sexual abuse toward another is relevant to the issue of the victim's consent in State v. Plaster, 424 N.W.2d 226 (Iowa 1988). In its decision, the Supreme Court indicated such evidence is relevant if the defendant's sexual conduct toward prior victims tended to show the same peculiar and characteristic behavior pattern manifested in the crime charged. Plaster, 424 N.W.2d at 229.

Here, the State submits forcing persons to commit oral sex upon oneself is of such a unique nature as to qualify admission of this evidence under a identity or modus operandi exception. Modus operandi is defined as a "distinct pattern or method of procedure thought to be characteristic of an individual criminally and habitually followed by him." Plaster, 424 N.W.2d at 231 (quoting Webster's New International Dictionary (3rd ed. 1976)). We determine defendant's prior violent sexual conduct toward Delmar (attempting to force fellatio through beating) and Bonnie (unsuccessful forced fellatio resulting in a shooting) tends to show the same peculiar and characteristic behavior pattern manifested in the crime charged; consequently, such conduct makes it more probable Vargas did not freely consent to the defendant's wishes on the night of his death. Thus, we hold defendant having done this unique act of forcing others to commit fellatio

on himself, not once but twice before, is relevant to show defendant acted in a similar manner on the night of Vargas's death.

2. Unfair Prejudice. Having concluded the testimony of Delmar and Bonnie was relevant, we now decide whether the probative value of such testimony was substantially outweighed by the danger of unfair prejudice. See Iowa R. Evid. 403. "Unfair prejudice" in Federal Rule of Evidence 403 has been defined as "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." Plaster, 424 N.W.2d at 231 (quoting Fed. R. Evid. 403 Advisory Committee's Note). Rule 403 only provides protection against evidence that is unfairly prejudicial. Plaster, 424 N.W.2d at 231. Here the defendant has the burden of establishing the trial court abused its discretion in the balancing process under rule 403. State v. Cott, 283 N.W.2d 224, 329 (Iowa 1979). Thus, to establish the district court abused its discretion, defendant must show the court's action was unreasonable in light of the attendant circumstances. Id.

Our scrutiny of the record indicates there was a use for this evidence in light of the defendant's consent defense and other evidence available to the prosecution. In addition, we note the district court, through a cautionary instruction, admonished the jury that it must

not convict defendant on the basis of this evidence. From this record we do not assume the jury failed to follow the court's instruction. See State v. Plaster, 424 N.W.2d 226, 232 (Iowa 1988). We conclude the probative value of the challenged evidence outweighs the danger of unfair prejudice to the defendant. The trial court did not abuse its discretion in admitting the challenged evidence.

B. Lesser Included Offenses. Defendant next contends the trial court erred by submitting instructions to the jury for the lesser offenses of second-degree murder and involuntary manslaughter. Defendant argues he should have been able to force the jury into an all or nothing decision. The State argues the court was bound to include the lesser-included offenses because evidence was adduced that supported a conviction on those defenses.

We hold the Iowa Supreme Court's decision in State v. Hilleshiem, 305 N.W.2d 710 (Iowa 1981), is controlling here. Like the Hilleshiem court, we do not decide here whether the record supported submission of the lesser-included offenses; instead, we focuse on whether or not the defendant was harmed by such submission. In Hilleshiem the court stated: "When a defendant is convicted of a greater offense, he usually cannot complain of the fact the jury was also permitted to consider his guilt of a lesser offense. . . . Ordinarily the submission of lesser offenses is considered to be to a

defendant's advantage. . . . [citations omitted]" Hilleshiem, 305 N.W.2d at 717-718.

Although the defendant argues the submission constituted a suggestion that he must be guilty of something, we do not agree. We hold the general rule articulated in Hilleshiem is applicable. We thus determine defendant is not entitled to reversal on this ground.

AFFIRMED.