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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-427 / 88-1070

498

STATE OF IOWA,

Appellee,

vs.

GARY R. TITUS,

Appellant.

Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

The defendant appeals from the judgment and sentence issued by the trial court following his conviction by a jury on charges of first degree murder. **AFFIRMED.**

Patricia M. Hulting of Roehrick, Hulting & Moisan, Des Moines, for appellant.

Thomas J. Miller, Attorney General of Iowa; Christie J. Scase, Assistant Attorney General; James Smith, Polk County Attorney; and Maggie Moss, Assistant County Attorney; for appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

HAYDEN, J.

The defendant, Gary R. Titus, appeals from the judgment and sentence following his conviction in a jury trial, of first-degree murder. He argues the trial court erred in admitting testimony he had robbed and assaulted a homosexual male two months prior to the murder and in admitting his prior statements that he hated gays and wished they were dead. We affirm.

Gary Titus was convicted of first-degree murder as a result of his role in the stabbing death of Kenneth Eaton, a Des Moines school teacher. Titus and his good friend, James Green, had been driving around the area north of downtown Des Moines known as the "gay loop" during the early morning hours of February 13, 1988. They met Eaton and accepted his invitation to go to the teacher's West Des Moines apartment to drink beer. Eaton was found by his daughter the next morning. He was on the bed, with blood all over the bed clothes. He died of a stab wound to his chest from one of his kitchen knives.

After Eaton was stabbed, Titus and Green took some clothing, jewelry, money, and video equipment from the apartment. They dumped the murder weapon and some cassettes in a plastic bag and threw them into a dumpster three blocks from Titus's apartment. The owner of the disposal service found the tapes and bloody knife and contacted the police. Titus and Green were subsequently

arrested, and jointly charged with first-degree murder for the stabbing death of Kenneth Eaton, a known homosexual.

The trial court sustained defendant Titus's motion for severance of trial. Titus then filed a motion in limine, requesting the trial court to instruct the State to limit testimony:

> 1. regarding defendant Green's intentions to go to the gay loop;
> 2. of Amy Miller and Teresa Dyer, two women friends, to exclude any reference to prior criminal misconduct of Titus;
> 3. of Dan Render to exclude reference to prior criminal misconduct of Titus.

Defendant argued the probative value of the conduct did not outweigh its prejudicial effect. The court denied the motion with regard to statements attributed to the defendant about his hatred for gays and desire to see them dead, testimony from Amy Miller about a black coat, and evidence from Dan Render concerning the allegation he was robbed by defendant.

The court cautioned the jury to consider this contested evidence only for the purpose of establishing motive, intent, or plan. The jury found Titus guilty. He now appeals.

Defendant alleges the trial court abused its discretion in admitting evidence of his dislike for homosexuals because his feeling toward gays in general was irrelevant to the question of his guilt of murder. The statements, defendant maintains, were too generalized and remote in

time to be evidence of intent, premeditation, or malice. Rather they were inflammatory and introduced to arouse the jury. Therefore the prejudice outweighs any probative value.

The State responds the trial court properly exercised its discretion in admitting the complained of testimony. It argues the evidence falls under the exceptions to the inadmissibility of other crimes or acts as defined in Iowa Rule of Evidence 404(b).

The general rule prevents the prosecution from proving a crime by offering proof the defendant committed another criminal act or has a criminal disposition. But Iowa Rule of Evidence 404(b) provides exceptions to that rule. State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982). The rule reads:

> 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.

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. Plaster, 424 N.W.2d 226, 229 (Iowa 1988). If the evidence satisfies this requirement, "it is prima facie admissible, notwithstanding its tendency to demonstrate the accused's bad character." Id.

A two-step analysis is used by the trial court to assess the admissibility of evidence of other crimes.

> 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. State v. Kern, 392 N.W.2d 134, 136 (Iowa 1986); Iowa R. Evid. 403. A positive finding as to the second step overcomes the evidence's prima facie admissibility. Barrett, 401 N.W.2d at 187 n. 2.

State v. Plaster, 424 N.W. 2d at 229. In this analysis, the court must exercise its discretion. Id. "For this court to hold that the court abused its discretion, the complaining party must show that the trial court's action was unreasonable in light of attendant circumstances." State v. Cott. 283 N.W. 2d 324, 329 (Iowa 1979).

1. **Relevancy.** Iowa Rule of Evidence 401 defines evidence as relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Plaster, 424 N.W.2d at 229.

Two women who had dated Titus testified about his open, obvious hatred of homosexuals which included repeated comments about wishing they were all dead. Defendant asks us to accept his argument statements of this nature are so commonplace they are not probative of anything but society's attitude toward this particular lifestyle. We agree with the State, such statements are neither routine nor irrelevant to the case at bar.

Defendant was charged alternatively as an aider and abettor of premeditated murder and felony murder. Therefore, his extreme hatred of homosexuals and often-stated desire to see them dead or kill them is relevant to proof of his motive, intent, and malice.

The evidence regarding the assault and robbery of Dan Render, an acknowledged homosexual, is likewise relevant to refute defendant's testimony he had no idea Green might have been planning to rob Eaton. Defendant and Green went together to the gay loop where they picked up Render and a friend and drove to an area north of University Avenue. Render was yelled at, beaten, and had his coat stolen. This occurred two and one-half months before Eaton's murder. Render's testimony described a scenario very similar to the encounter with Eaton the night he was murdered.

2. Unfair Prejudice. Having concluded the evidence at issue is relevant, Iowa Rule of Evidence 403 requires us to decide whether the probative value was substantially outweighed by the danger of unfair prejudice. However, a mere showing some prejudice might result from admission of the evidence is not sufficient to permit exclusion. "Rule 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 at 231

(emphasis in original). The potential for unfair prejudice was negated by the court's issuance of a cautionary instruction. It is only in extreme cases that the issuance of a cautionary, limiting instruction by the trial court is deemed insufficient to nullify the danger of unfair prejudice. Id. at 232.

Our reading of the record indicates there was clearly a use for this evidence in light of the question of whether defendant was an active participant in or aider and abettor to the murder; and if so, determination of the defendant's state of mind, intent, and malice. The trial court's cautionary instruction admonished the jury that this evidence may be used only to show motive, intent, or plan.

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.

AFFIRMED.