MAY 31 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,) Filed May 31, 1979

vs.)

ARTHUR STEWART COTT,) 93/62237

Defendant-Appellant.)

Appeal from Polk District Court - A. B. Crouch, Judge.

Defendant appeals conviction for performing lascivious acts with a person under the age of 16 years in violation of section 725.10, The Code 1977. Reversed and Remanded.

James R. Cook, of Des Moines, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona J. Hansen, Assistant Attorney General, for appellee.

Heard by Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ. Johnson, J., takes no part.

PER CURIAM

Defendant Arthur Stewart Cott was convicted by a jury of the crime of performing lascivious acts with a person under the age of 16 years in violation of section 725.10, The Code 1977, as a result of an incident occurring November 28, 1977, in Des Moines involving a five-year-old girl. Defendant appeals, contending that the trial court erred when it allowed testimony of defendant's prior criminal conduct to be introduced by the state. We reverse and remand for a new trial.

The trial court overruled defendant's motion in limine and at trial admitted over defendant's objection the testimony of an eight-year-old girl concerning a similar offense committed by defendant in July 1976, "for the limited purpose to show design, identity, common scheme." The jury was given a cautionary instruction that evidence concerning the previous incident was to be considered only for that limited purpose.

Evidence of similar acts on the part of defendant with persons other than the complaining witness may be admissible in a prosecution under section 725.10 to establish the identity of the defendant and a lewd disposition on his part. The evidence must be relevant and concern acts not too remote in time and place from the offense charged. State v. Hubbs, 268 N.W.2d 188, 191 (Iowa 1978); State v. Maestas, 224 N.W.2d 248, 251 (Iowa 1974); State v. Schlak, 253 Iowa 113, 116-117, 111 N.W.2d 289, 291-292 (1961).

Even when the evidence of other crimes meets the test of relevancy, the trial court must exercise discretion to determine whether the probative value of the evidence is outweighed by its prejudicial effect. "Exercise of trial court discretion . . . goes beyond the question of categorical classification to a determination whether the 'minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.' " State v. Johnson, 224 N.W.2d 617, 621 (Iowa 1974); State v. Wright, 203 N.W.2d 247, 251 (Iowa 1972). The trial court's discretion should be exercised to exclude evidence that may have substantial independent relevancy if its probative value is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the offense being tried. Johnson, 224 N.W.2d at 621, McCormick on Evidence, § 190 at 454 (Second Ed. 1972).

The only eyewitness against defendant was the five-year-old girl; he offered substantial alibi evidence on his own behalf. Where the evidence of guilt of the offense

charged is less strong, as here, disproportionate attention will be given to the evidence of prior similar offenses. Therefore, even though the evidence of defendant's prior offense had probative value, the proper exercise of trial court discretion balancing its relevancy against its prejudicial effect would have compelled its exclusion. Johnson. The trial court abused its discretion when it allowed the evidence in, and we reverse and remand for new trial.

REVERSED AND REMANDED.