IN THE COURT OF APPEALS OF IOWA

No. 0-224 / 99-546
Filed May 31, 2000

FILED
MAY 31 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAMON MONTEZ WILLIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, John G. Linn and William L. Dowell, Judges.

The defendant appeals his conviction and sentence for third-degree sexual abuse following a jury trial. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Michael A. Riepe, County Attorney, and Steven K. Young, Assistant County Attorney for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

Damon Willis appeals his conviction and sentence for third-degree sexual abuse. He alleges the district court abused its discretion in ruling on certain evidentiary matters. We agree, and reverse and remand for new trial.

I. Background Facts and Proceedings

Willis and Jimmy Shaw were inmates at the Mount Pleasant Correctional Facility. Shaw testified that, on the evening of January 26, 1997, Willis approached him in the shower and forced him to engage in anal sex for about thirty minutes.

Following an investigation, the State charged Willis with third-degree sexual abuse, in violation of Iowa Code sections 709.1(1) and 709.4(1) (1995). Willis filed a motion in limine which sought to exclude various pieces of evidence, including statements he made to law enforcement officers. The district court summarily overruled that portion of the motion relating to these statements, and the case proceeded to trial. After the jury found Willis guilty as charged, the court entered judgment and sentenced Willis to an indeterminate term not to exceed ten years. This appeal followed.

II. Reputation and Prior Bad Acts Evidence

Willis contends the district court abused its discretion in admitting statements he made to law enforcement officers. He urges the evidence should have been excluded under Iowa Rule of Evidence 404(b).[1] We review the

---

[1] Willis does not also argue that the evidence should have been excluded under Rule 404(a), which generally provides that character evidence is inadmissible. *See State v. Nebinger*, 412 N.W.2d 180, 187 (Iowa App. 1987) (evidence offered by defendant of another's depression and treatment was "precisely the type of evidence which rule 404(a) was enacted to prohibit"). Therefore, we need not address this issue. *See State v. Bartnick*, 436 N.W.2d 647, 648 (Iowa App. 1988).

court's ruling on the admissibility of prior bad act evidence for abuse of discretion. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998). An abuse of discretion will be found when the trial court "'exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable.'" *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999) (quoting *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994)). Even when we identify an abuse of discretion, we will not reverse unless the abuse results in prejudice to the defendant. *Id.*

Evidence of other crimes, wrongs or acts is not generally admissible to prove a defect in a person's character or to demonstrate action in conformity with that character defect. Iowa R. Evid. 404(b). However, the evidence may be admissible for other purposes, including, but not limited to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997) (citations omitted). We use a two-part test to determine whether evidence of other crimes, wrongs or acts is admissible. *Most*, 578 N.W.2d at 253. First, we determine "whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts." Iowa R. Evid. 401; *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992) (quoting *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988)). Second, we decide whether the probative value of the evidence outweighs the danger of unfair prejudice. *Casady*, 491 N.W.2d at 786. In certain instances, we have also required "clear proof" that the prior bad acts were committed by the defendant. *Id.*

Willis objects to the following testimony of Department of Corrections investigator Judy Scarff:

> [W]hen I asked Mr. Willis why Mr. Shaw would single his name out, his answer to me was, "I'm a sexual predator. That's a well-known fact in the prison. I have a past history. There was a rumor on the unit for a while and then I got called to the office. We were in the shower together."

He also objects to the following testimony of Department of Criminal Investigation agent Larry Hedlund:

> At the beginning of the March 17th interview, again, I would have advised him of his rights. And I made the comment to him that he had told me in the prior interview that he had engaged in this type of sexual assault before on inmates. And his response to my telling him that, or my reminding him of that, his quotation was, "Before I came here, I had taken part in that kind of thing."

A. Relevance

The State contends the evidence of Willis's prior bad acts and his reputation as a sexual predator was relevant to establish: (1) Willis's identity as the perpetrator of the assault; (2) his *modus operandi* of preying upon fellow inmates, and (3) the victim's state of mind.[2] Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Iowa R. Evid. 401.

When prior bad acts evidence is used to prove identity, the test is whether the act is "strikingly similar" or of a "unique nature" such that involvement in that crime makes it more likely the defendant committed the charged crime. *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994) (quoting *State v. Butler*, 415 N.W.2d 634, 636 (Iowa 1987)). Willis's own statements revealed nothing about the

---

[2] In a footnote, the State also asserts these statements were admissions. We conclude, even if the statements are admissible as admissions of a party opponent, we may determine whether the statements should be excluded on the ground that they are unfairly prejudicial. *See* Iowa R. Evid. 403; *McCormick on Evidence* § 255, at 138 (5th Ed. 1999). *State v. Bayles*, 551 N.W.2d 600, 606 (Iowa 1996).

circumstances surrounding the prior acts. *Cf. State v. Ripperger*, 514 N.W.2d 740, 749 (Iowa App. 1994) (holding evidence of prior sex crime admissible to establish identity where the incidents were similar and sufficiently distinctive). Willis did not enlighten the investigators about the manner in which he carried out the prior sex acts, nor did he admit he previously assaulted other inmates. Willis's statements are the type of evidence Rule 404 was designed to exclude. 2 *McCormick on Evidence* §190, at 658-59 (5th Ed. 1999). We conclude these statements were not relevant to prove his identity. We also cannot find the evidence relevant to establish a modus operandi of preying on inmates. *Cf. Casady,* 491 N.W.2d at 788 (noting defendant's prior assault was sufficiently similar to allow the trial court to infer a continuation of a plan to sexually assault the victim); *State v. Spaulding,* 313 N.W.2d 878, 881 (Iowa 1981) (noting sex crimes so unusual or distinctive that similar crimes by the defendant become relevant).

Finally, we agree with Willis that his statements are not relevant to establish the victim's state of mind. *Cf. State v. Bayles*, 551 N.W.2d 600, 605 (Iowa 1996) (concluding prior bad acts evidence relayed to victim relevant to establish her fear of the defendant and her passiveness during assault). Nothing in the record reveals Shaw knew of Willis's prior sexual history or considered that history in determining his conduct. In contrast, the court noted in *Bayles* that the victim's "testimony concerning Bayles' other crimes, which he had related to her, credibly explained and placed in context many of her statements and actions toward Bayles during the alleged kidnapping." *Id.* We conclude the evidence of

prior bad acts was not relevant and the district court abused its discretion in implicitly concluding otherwise.

B. Probative Value/Prejudicial Effect/Clear Proof

Although our conclusion that the prior bad acts evidence was irrelevant disposes of the issue, we will also briefly address the remainder of the test: whether the probative value of the evidence substantially outweighs the danger of unfair prejudice and whether there was clear proof of the prior acts. *Casady*, 491 N.W.2d at 786. "Probative value" gauges the strength and force of the evidence's relevancy. *Id.* "Unfair prejudice" is "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *Id.* In deciding whether the evidence is properly admitted, we consider:

> (1) the actual need for the evidence in view of the issues and the other available evidence, (2) the strength of the evidence showing that the prior bad acts were committed by the accused, (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven, and (4) the degree to which the jury will probably be roused by the evidence improperly.

Most, 578 N.W.2d at 254 (quoting *State v. Howell*, 557 N.W.2d 909, 912 (Iowa App. 1996)).

Even if we were to assume the statements were marginally relevant to establish Willis's identity, that limited relevance is outweighed by the inflammatory nature of the statements. A jury hearing Willis admit he was a sexual predator might have drawn impermissible inferences about his propensity to commit sexual crimes, including the crime he was charged with here. Accordingly, we conclude the evidence was unfairly prejudicial and should have been excluded. The statements also were so general that they did not constitute clear proof Willis committed similar sexual crimes. *Cf. State v. Jones*, 464

N.W.2d 241, 243 (Iowa 1990) (noting victim's testimony regarding prior instances of sexual abuse sufficiently credible and detailed to inform jury about prior acts).

Finally, we conclude the error was not harmless. Absent the challenged testimony, the evidence proffered by the State was not overwhelming. As Willis pointed out, there was no physical or medical evidence and no eyewitness to the offense. Therefore, we cannot conclude the outcome would have been the same if Willis's statements had not been admitted. We reverse and remand for new trial. In light of our conclusion, we need not address the remaining issues raised by Willis.[3]

REVERSED AND REMANDED FOR NEW TRIAL.

[3] We note the State concedes the court should not have admitted a statement referring to Willis's request to speak to counsel. Although the State contends this error was harmless, the State on retrial may wish to reconsider its decision to introduce this statement.