



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	377
Plaintiff-Appellee,	)	Filed December 17, 1987
vs.	)	
KEVIN RAY PLASTER,	)	<u>7-250</u>
Defendant-Appellant.	)	86-1632

Appeal from the Iowa District Court for Scott County (125092), James E. Kelley, Judge.

Defendant appeals his conviction, following a jury trial, for sexual abuse in the third degree. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Christie J. Scase, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

The defendant was convicted, in a jury trial, of the crime of sexual abuse in the third degree. He appeals that conviction, claiming (1) that the court erred in admitting evidence of a prior occurrence with a female other than the victim, and (2) that there was insufficient evidence in the record to find him guilty of third degree sexual abuse. We affirm.

Defendant, Kevin Plaster, was accused of having committed a sex act upon another individual with whom he was not cohabiting as husband or wife, and did so by force or against the will of the other individual in violation of section 709.4 of the Code of Iowa (1985). A brief recitation of the facts as disclosed by the record will be helpful.

Defendant and the complainant, Christine Adrian, met and spent some time together on the night of the alleged incident. After drinking together for a time, they went to Kevin's apartment, for the purpose of engaging in sexual activity. They engaged in what can best be described as a variety of sex acts, including oral sex (both fellatio and cunnilingus) and other touching and fondling. All of this was with the consent of both parties. At some point in the encounter, Kevin inserted his fingers into her vagina, in what he described as an effort to "turn her on" by massaging her "G" spot. The effect was painful to Christine, and she cried out for him to stop. She claimed that he used such force that it caused severe pain and, although she cried out for him to stop, he continued to use his hand. She pulled away from him and he stopped. He then attempted to comfort her and to put her at ease. Later, he asked her to engage in penile/vaginal sex. She initially said no, but after that refusal, Kevin told her that if she didn't permit sexual intercourse, he would use his hand again. Following that statement, she submitted.

I. Sufficiency of the Evidence. That there was consent to all of the acts that occurred prior to the painful conduct that resulted from Kevin's effort to massage Christine's "G spot," is not disputed. It would be fair to assume that there was even consent for the experiment that led to the pain for Christine. We cannot assume that, as a matter of law, there was continuing consent for the activity that was painful. Kevin claims that the activity was carried out with Christine's consent, and that when she expressed discomfort, he stopped the activity. The jury could find that Christine's testimony concerning the facts was more believable, and that Kevin persisted in the painful activity after she asked him to quit. The question with which we must deal is: Following the pain-producing act that Kevin performed, was Christine's acknowledged reluctance to carry on the sexual encounter, a withdrawal of consent, and was any consent given thereafter obtained by force, duress, or fear of harm?

The situation here is unique in the body of law concerning rape and sexual abuse. We are unable to find any body of case-law concerning the withdrawal of consent, once several consensual and continuous sex acts have occurred. Once consent has been given and the sexual encounter has proceeded for a protracted time, and then, because of the occurrence of something that is unpleasant one of the parties refuses further sexual activity, may that party be said to have withdrawn consent, or refused consent to further sex acts?

Under the law prior to the adoption of the criminal code and chapter 709, which became effective on January 1, 1978, "there could be no conviction for rape (now an offense within the definition of "sexual abuse") unless the State could prove the victim had "exerted the utmost resistance to the attack." "State v. Bauer, 324 N.W.2d 320, 322 (Iowa 1982) (citation omitted). As stated in Bauer:

The requirement for "utmost resistance to the attack" was case law. It was not based on statute, nor was it codified in the new

Iowa Criminal Code, as applicable here, where, sexual abuse is defined in section 709.4 as follows:

Any sex act between persons who are not at the time cohabiting as husband and wife is sexual abuse in the third degree by a person when the act is performed with the other participant in any of the following circumstances:

1. Such act is done by force or against the will of the other participant.

(Emphasis added).

"By force or against the will of the other participant" is treated in section 709.5 as follows:

Under the provisions of this chapter it shall not be necessary to establish physical resistance by a participant in order to establish that an act of sexual abuse was committed by force or against the will of the participant. However, the circumstances surrounding the commission of the act may be considered in determining whether or not the act was done by force or against the will of the other.

Id.

In Bauer, the court held that the subjective as well as objective circumstances should be considered in determining if the act was performed by force or against the will of the other participant. In that case, unlike this one, the defendant had entered the house where the victim slept, uninvited, through a window, and had simply taken advantage of the sleeping victim, without any expressed consent. While, therefore, Bauer certainly disposes of the prior doctrine of "utmost resistance," it does not help us on the issue of withdrawal of consent or lack of consent for further sex acts, when such consent had been freely given throughout the evening.

The jury could believe that Christine did not assent to the penile/vaginal sex following the painful incident, and that she only participated in it after Kevin said he would use his hand. Certainly, we cannot hold that consent to sexual activity of various types implies consent to sexual activity involving

injury. Christine's protestations to the activity that was painful was surely a warning that she did not want to continue that activity. If the jury found that Kevin continued that activity after her protests, it would be justified in finding that such activity continued without the consent of Christine.

More clearly, however, we believe the jury was justified in finding that Christine's consent for the final act of penile/vaginal sex was obtained by force or against her will. See id. Upon the record, and considering all the circumstances, subjective as well as objective, see id., there was sufficient evidence to support the jury verdict.

II. Evidence of other acts. Defendant further contends that the court committed error in admitting the testimony of Melissa German and Dr. Eugene L. Kerns. Ms. German testified concerning sexual activity between herself and the defendant, with specific reference to an incident where defendant used his hand in a manner similar to that described by Christine, with the result that Ms. German suffered lacerations to her vagina. Dr. Kerns testified concerning his examination of Ms. German.

Defendant filed a motion for an advance ruling upon the admissibility of that evidence, seeking to exclude such testimony. The trial court ruled that the evidence would be allowed. Defendant further objected to the introduction of that evidence at the time it was offered in trial.

Defendant claims that the trial court erred in allowing this testimony, for the reason that such testimony was extremely prejudicial, had no probative value and did not fall within any of the recognized exceptions to rule 404(b) of the Iowa Rules of Evidence.

Iowa Rule of Evidence 404(b) states:

Other crimes, wrongs, or acts. 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.

A. Relevancy of the evidence. To determine the admissibility of the evidence, we must determine if the court abused its discretion. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979). In the instant case, the trial court held:

The court notes that the evidence of a similar incident by defendant with a different victim on July 27, 1984, up to but not including defendant's use of a knife, would be relevant, material and admissible evidence of motive, opportunity, intent, preparation, plan, identity, knowledge, or absence of mistake or accident.

In reviewing the trial court's exercise of discretion in admitting the testimony, we first consider the basis upon which relevance of the evidence may be found. State v. Coen, 382 N.W.2d 703, 705-07 (Iowa App. 1985); Cott, 283 N.W.2d at 326. Clearly, in this case, the court's finding that it would be relevant, material, and admissible upon all of the grounds enumerated by the court, cannot be supported by the evidence. It is sufficient to uphold the ruling of the trial court upon the admissibility of the evidence, if it is relevant upon any of the grounds set out in the rule. See State v. Hinkle, 229 N.W.2d 744, 748 (Iowa 1975) ("there is no reversible error if trial court's ruling which admitted the evidence in controversy may be sustained on any ground").

Defendant claims that all of the acts here were carried out with the consent of Christine. He claims that what he did was not intended to injure her. The evidence objected to shows that at a different time, under quite similar circumstances, he engaged in the identical conduct, with results which were similar, if not worse. It appears clear that the evidence is relevant for the sole purpose of showing that his conduct was not the result of mistake or accident, but was willful and intentional. We hold that the evidence was relevant.

B. Is the probative value of the evidence outweighed by its prejudicial effect? Having determined that the evidence was relevant to whether defendant's conduct was the result of mistake or accident, we must determine if the court "abused its discretion in determining whether any danger of unfair prejudice created by the evidence substantially outweighed its probative value." Coen, 382 N.W.2d at 707 (citation omitted). As set out in Coen, in order to hold that the trial court abused its discretion, "the complaining party must show that the trial court's action was 'unreasonable in the light of attendant circumstances.' " Id. (citing State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979)).

Defendant falls short of the obligation upon him to show that the court's actions in admitting the questioned testimony were unreasonable in the light of attendant circumstances. There was no evidence, save that of Christine, of the events leading up to the activity resulting in her injury. Kevin's claim was that his conduct was not such as to cause injury, and that the further act of sexual intercourse was not by any compulsion or against Christine's will. Therefore, there was a need for the evidence Kevin objects to; to establish, not that his character is undesirable, but as corroboration for the testimony given by Christine.

The court gave a cautionary or limiting instruction to the jury, explaining the limited purpose for which the evidence was admitted. Generally, cautionary or limiting instructions will be sufficient to remove the danger of prejudice from the admission of other-crimes evidence. Coen, 382 N.W.2d 708 (citation omitted).

We do not believe the probative value of the testimony objected to by the defendant is outweighed by the possibility of prejudice to Kevin. The trial court's ruling to admit the testimony of other acts by the defendant was not an abuse of discretion.

There being no error in the admission of evidence, and there being sufficient evidence to support the jury verdict, the judgment is affirmed.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur in the result only.