

IN THE COURT OF APPEALS OF IOWA

No. 8-396 / 97-0529

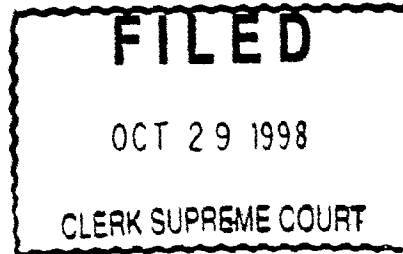
STATE OF IOWA,

Plaintiff-Appellee,

vs.

DEVON FULTON,

Defendant-Appellant.



Appeal from the Iowa District Court for Johnson County, L. Vern Robinson,
Judge.

Defendant appeals his conviction for assault with intent to commit sexual
abuse. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, J. Patrick White, County Attorney and Janet Lyness, Assistant County
Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

PER CURIAM.

Defendant-appellant Devon Fulton appeals his conviction of assault with intent to commit sexual abuse. *See* Iowa Code § 709.11. Defendant, who had been initially charged with third-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.4 (1995), was found guilty of the lesser offense. We reverse and remand.

Defendant was convicted after he allegedly had intercourse with a fourteen-year-old girl who had run away from a juvenile detention center in Dubuque. Defendant contends the trial court abused its discretion in admitting testimony defendant was a member of a gang. The State advances the evidence was properly admitted to counter defendant's contention the alleged victim's conduct following the event was evidence of her consent to the act.

The events forming the basis of the charge were to have occurred after the victim and Beth, a fellow runaway, went to the apartment of Beth's boyfriend in Iowa City. The victim testified Beth had told her she was a gang member so she knew there would be gang members there. She testified there were six people at the apartment when they arrived, and ultimately there were twelve to fifteen. The victim contended while she tried to sleep in a bedroom of the apartment defendant repeatedly asked her to have sex and she refused. She contended she finally agreed to a kiss and defendant pulled her on top of him. He then pulled down her slacks and underwear and forced intercourse.

Defendant admitted to a police officer he and the victim had sex. Defendant contended it was consensual. The victim did not report the incident until the second morning after it occurred, when she called her mother and turned herself in.

During her testimony, the victim said the people in the apartment were members of the Gangster Disciples. She also said defendant was a member of the same gang. The victim testified she left the apartment with defendant the next morning but lost him, and she then returned to the apartment. She claimed she waited to report the incident because of her fear of the gang. However, later at the apartment, she told Beth defendant had forced himself on her. Beth's boyfriend and two others were present. When asked, the victim said she was not raped, but she had not wanted to have sex either.

The next night the victim said a meeting was held at another home and there were about fifteen people there, mostly Gangster Disciples. The victim told her story and defendant told his. The victim then went back to Beth's boyfriend's apartment. The next morning, the victim made the call to turn herself in.

A police officer conducting the investigation told about speaking to people in gang units in Iowa City.

Prior to trial, defendant filed a motion in limine to exclude the challenged evidence of defendant's gang membership. The trial court overruled the motion and the testimony was objected to at trial. The State concedes error was preserved.

Defendant contends the trial court abused its discretion in admitting the evidence and it was highly prejudicial because there is a bias against people who join

gangs. Defendant further contends he was prejudiced because the jury verdict was, in fact, a compromise verdict for had the jury believed the victim's testimony, defendant would have been convicted of the more serious charge. The State advances the evidence was relevant on the issue of the victim's failure to make a timely report of the incident.

Defendant advances the jury knew the victim had run away from a juvenile detention center, which factor would be a deterrent to reporting the crime and turning herself in. Additionally, defendant points out the victim's own testimony was that she was free to leave the apartment the morning after it happened and wander the streets of Iowa City following the incident.

The State concedes error was preserved on the admission of testimony on gang activity. Though defendant made and the district court overruled a motion in limine to keep gang information from the jury, any error resulting from the district court's ruling on a motion in limine is not preserved unless a timely objection is made when the evidence which was the subject of the motion in limine is offered at trial. *State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa App. 1997). The victim was allowed to testify without further objection. She did not tell what happened because she did not know the whole gang situation. Consequently, error was not preserved on the admission of gang evidence as it related to the victim's hesitance to report the incident.

However, as the State concedes, error was preserved on the admission of other evidence of gang activity. We address defendant's challenge the district court abused its discretion in admitting it.

The court, in overruling the motion in limine, said it was not appropriate to excise the gang activity when it is part of what was going on at the time.

In *State v. Plaster*, 424 N.W.2d 226 (Iowa 1988), the court said:

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 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.

Id. at 229. In the process of employing the two-step analysis, the trial court must exercise its discretion. We will reverse its decision only when we find a clear abuse of discretion.

To determine whether the trial court abused its discretion in admitting the evidence, a first question is whether the evidence was relevant. The State argues it was because defendant used that fact to attack the credibility of the victim's testimony. Evidence of other offenses should never be admitted when the other offense is committed wholly independent of the one for which defendant is on trial. *State v. Zuch*, 267 N.W.2d 52, 55 (Iowa 1978). One crime cannot be used to prove another. *State v. Christensen*, 414 N.W.2d 843, 844 (Iowa App. 1987).

Error in admission of evidence must be prejudicial to an accused to constitute cause for reversal. *State v. Wallace*, 259 Iowa 765, 771, 145 N.W.2d 615, 619 (1966). We agree with defendant the evidence was clearly prejudicial. The admission of evidence of cocaine delivery and distribution is inherently prejudicial because it appeals to the public dislike of drug dealers. *State v. Liggins*, 524 N.W.2d

181, 188-89 (Iowa 1994). Likewise, evidence of gang membership and activity is inherently prejudicial; it appeals to the jury's instinct to punish gang members. *See State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995).

We agree with defendant the gang's presence and defendant's alleged gang membership had no relevance to the sexual assault.

The State contends we should look to statements made in defendant's appellate brief to support its proposition as to the relevance and probative value of the gang activity. The evidence of gang activity was not sufficiently probative as to outweigh the prejudice.

We reverse and remand.

REVERSED AND REMANDED.