

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

ELMER BIGGER,)

Defendant-Appellant.)

8-139
87-795

307

Appeal from the Iowa District Court for Jones County
(Small Claims Nos. 47061 & CRM 24-0287) - C. J.
Matthiessen, Judicial Magistrate, and Thomas J. Horan,
Judge.

Defendant was convicted before a magistrate of the simple misdemeanor of harassment in violation of Iowa Code section 708.7(1). The district court upheld the magistrate's conviction, and the defendant has now been granted discretionary review. **AFFIRMED.**

Charles C. Brown, Jr., of the Tom Riley Law Firm, Cedar Rapids, for the defendant-appellant.

Thomas J. Miller, Attorney General; Julie Ann Halligan, Assistant Attorney General; and Connie S. Ricklefs, County Attorney, for the plaintiff-appellee.

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

OXBERGER, C.J.

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Elmer Bigger was accused of making a series of harassing telephone calls to his estranged wife. Defendant Bigger has been granted discretionary review of his conviction before a magistrate of the simple misdemeanor of harassment in violation of Iowa Code section 708.7(1). He contends the trial court erred in allowing the introduction of evidence of calls on dates other than September 12, 1986. Defendant also alleges the trial court erred in overruling his motion for a bill of particulars, his motion for discovery, and his motion for a judgment of acquittal. Our scope of review is on errors assigned. The trial court's findings are binding upon this court if supported by substantial evidence. Iowa R. App. P. 14(1). We affirm.

I.

Bigger asserts he was only charged with an act that occurred on September 12, 1986, and evidence concerning acts that happened on other dates was improperly admitted in violation of Iowa Rule of Evidence 404(b). See Iowa R. Evid. 404(b). The admissibility of evidence is a matter for the exercise of the trial court's discretion. State v. Chadwick, 328 N.W.2d 913, 917 (Iowa 1983); State v. Clark, 325 N.W.2d 381, 384 (Iowa 1982). Iowa Rule of Evidence 404(b) provides:

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 there-

with. 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.

Iowa R. Evid. 404(b).

The exclusion of evidence of other crimes and bad acts is based on the view that it is ordinarily not relevant. State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982). The primary purpose for the exceptions provided in rule 403(b) is to allow evidence which is relevant and material to establish some legitimate issue in the case even though it might also reveal character or traits of character otherwise precluded by subsection (a) of rule 404. State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987).

The complainant testified that shortly after her separation from her husband in June of 1985 she began to receive numerous phone calls from him. She also testified these calls were of a threatening nature and were not for a legitimate purpose. Joyce Bigger further testified the defendant would sometimes start his conversations "Hi honey, how [are] you doing?" On the date charged, the defendant was only able to say "Good morning, dear" before the complainant hung up. The victim testified that such a friendly greeting was usually followed by threatening commentary.

The State argues the intent exception to rule 404(b) should apply and evidence of prior phone calls made by the defendant to the victim should be considered. The Iowa

Supreme Court has held that the intent exception does not apply when intent may be inferred from the nature of the act charged; it applies only when by its nature the act might have been entirely innocent. State v. Belica, 288 N.W.2d 895, 901 (Iowa 1980). The State asserts, and we agree, that under the circumstances it was necessary to refer back to the content of prior phone calls to give meaning to the words spoken on September 12. Further, intent is an element of the crime charged under Iowa Code section 708.7(1).¹

Once evidence has been determined to be relevant, it is subject to rule 403 balancing test of probative value versus unfair prejudice. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979). We find the evidence of prior calls was properly allowed because it is relevant and material as proof of the defendant's intent on the date in question. We find the probative value of this information as proof of intent outweighs any unfair prejudice to the defendant. Accordingly, we find no abuse of discretion by the trial court on this issue.

II.

The defendant also contends the trial court erred in overruling his motion for a bill of particulars. Defendant

¹ A person commits harassment when, with intent, the person does any of the following: 1. Communicates with another by telephone, telegraph, or writing without a legitimate purpose and in a manner likely to cause the other person annoyance or harm.

asserts the language of the complaint does not specify the particulars of the offense sufficiently to fairly enable the defendant to prepare his defense. The specific language the defendant finds ambiguous is that along with the date charged is written "on many other occasions." Defendant argues this ambivalence as to the exact nature of the charge renders the defendant unable to adequately prepare his defense.

The decision whether to grant a motion for a bill of particulars rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Marti, 290 N.W.2d 570, 576 (Iowa 1980). The standard for such a determination is whether the defendant is sufficiently notified of the particulars of the offense to fairly enable him or her to prepare an adequate defense. Iowa R. Crim. P. 10(5).

Defendant filed a motion for a bill of particulars on September 30, 1986, citing vague language in the complaint. The court denied defendant's motion and directed his attention to the probable cause section of the complaint.² The defendant filed a motion to reconsider on

2. Joyce Bigger and Karen Bigger have advised that defendant has made repeated telephone calls to each of them; that during said calls, defendant has threatened to kill Joyce Bigger and her children and her mother on numerous occasions; that said calls are being made to Joyce Bigger during the early morning hours many times each week; that defendant also threatens suicide during these conversations.

November 3, 1986. The court again denied the motion for the same reasons and further noted the phrase "and on many other occasions" constituted surplusage. The court affirmed that "it is clear that the defendant is required to defend upon and is charged with only one simple misdemeanor, the commission of harassment on or about September 12, 1986."

The employment of means other than a bill of particulars for informing the defendant may make a bill of particulars unnecessary. State v. Marti, 290 N.W.2d 570, 576 (Iowa 1980). We find calling the defendant's attention to the probable cause section in order to explain the vague phraseology of "and on many other occasions" in addition to the court's directive that the defendant would be required to defend only the charge of the act which occurred on September 12, 1986, to be a means of informing the defendant. These actions make a bill of particulars unnecessary in this instance. We fail to find an abuse of discretion in the denial of defendant's motion for a bill of particulars.

III.

Defendant also claims the trial court erred in overruling his motion for discovery. Defendant requested such items as statements, transcripts, and voice recordings of the defendant; any items seized by the State; any tangible

objects material to the case; results or reports of any examinations; any statements by the State's witnesses.

The State called two witnesses, the wife and the daughter of the defendant. Electronic voice identification was unnecessary as the victim, having heard the defendant's voice for twenty-five years, was able to testify to the recognition of the defendant's voice. Further, as the complaint was made directly to the county attorney, there does not appear to be a police record.

Matters of discovery are within the discretion of the trial court. State v. Gates, 306 N.W.2d 720, 725 (Iowa 1981). Errors in administration of discovery rules is not reversible absent a demonstration that the substantial rights of the defendant were prejudiced. State v. Wagner, 410 N.W.2d 207, 213 (Iowa 1987). As there is no indication the information or material sought by the defendant through discovery existed, the substantial rights of the defendant were not prejudiced. We find no abuse of discretion in the denial of defendant's motion for discovery.

IV.

The defendant also contends the trial court erred in overruling the defendant's motion for a judgment of acquittal at the close of the State's case. We find this assignment of error to be without merit. Error cannot be predicated on failure to grant a motion for directed verdict

made at the close of the State's evidence. ³¹¹State v. Rinehart, 283 N.W.2d 319, 320 (Iowa 1979).

Defendant also assigns error to the trial court for overruling his motion for a judgment of acquittal at the close of all evidence citing insufficiency of evidence. When reviewing a motion for a judgment of acquittal based upon insufficiency of evidence in a criminal case, we view the evidence in a light most favorable to the State. See State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

The defendant admits to making the phone call on the date in question but claims it was for the legitimate purpose of trying to locate his daughter. Defendant relies on his friendly greeting "Good morning, dear," as evidence of his innocent intent. However, the victim's testimony revealed such seemingly amicable greetings in the past had been followed by threats and intimidating remarks. The complainant further testified: "[w]hen he called me on the 12th of September, and addressed me as 'Honey' or 'Dear,' I knew he was off on another one of those calls and I hung up."

We find substantial evidence to support the magistrate's conclusion and the district court's affirmation that the defendant phoned Joyce Bigger on September 12, 1986, with the intent to intimidate, annoy or alarm and without a legitimate purpose.

We affirm the conviction.

AFFIRMED.