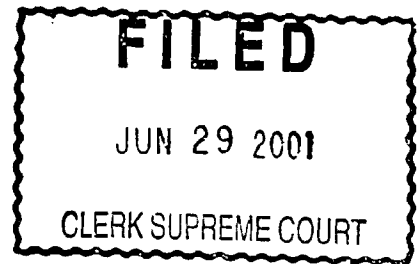


IN THE COURT OF APPEALS OF IOWA

No. 0-409 / 99-1321
Filed June 29, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

GEORGE MELBERN BENNETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

George Bennett appeals the judgment and sentence entered upon his convictions after jury trial for second-degree sexual abuse in violation of Iowa Code section 709.3 (1997) and the enhancement under Iowa Code section 901A.2 (Supp. 1998). **JUDGMENT OF CONVICTION AFFIRMED; SENTENCE VACATED; AND CASE REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

I. Background and Proceedings.

Bennett was charged with sexual abuse in the second degree based on allegations of sexual contact with his five-year-old grandson, C.B. Bennett denied any sexual contact with C.B. and in a statement to investigators attributed C.B.'s allegations to otherwise innocent nonsexual contact with C.B. and a personal vendetta against him by C.B.'s father.

In addition to C.B.'s testimony, the State's case included evidence Bennett had similarly abused another grandson, K.B., in 1990. Bennett filed a motion in limine seeking exclusion of K.B.'s testimony arguing the prejudice inherent in such evidence outweighed its probative value. The State argued K.B.'s testimony was relevant to show "the same type of sexual deviancy that we're dealing with here." The State also claimed the probative value of K.B.'s testimony was high because it was necessary to bolster C.B.'s credibility and to corroborate C.B.'s testimony, given that there were no eyewitnesses.

Before ruling on Bennett's motion the district court confirmed the State's intentions to offer Bennett's statement attributing C.B.'s allegations to nonsexual contact. The court's ruling provides:

A review of the cases and Rule 404(b) causes me to conclude that it is admissible under 404(b) on the issues of opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. All of those would apply here. The concern that I talked about on the record yesterday was that, even though I saw it admissible under 404(b), I was concerned in balancing the potential prejudicial impact against the probative value of that evidence. On balance, I believe it is more probative than prejudicial to the defendant

Bennett was convicted as charged. The district court sentenced Bennett to an indeterminate term of incarceration not to exceed twenty-five years. Because Bennett had been previously convicted of a sexually predatory offense, the court imposed an enhanced sentence requiring Bennett to serve twice the maximum period of incarceration.

On appeal Bennett challenges the district court's ruling admitting K.B.'s testimony. He also argues the sentencing enhancement imposed by the district court is inapplicable in this case.

II. Standard of Review.

On evidentiary issues we review for an abuse of discretion. *State v. Aricivia*, 495 N.W.2d 364, 367 (Iowa Ct. App. 1992). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

III. The Merits.

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 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.

This rule is a codification of our common law rule that one crime cannot be proved by proof of another. *State v. Castaneda*, 621 N.W.2d 435, 439 (Iowa 2001). The purpose of the rule is to exclude from the jury's consideration evidence that has no relevancy except to show that the defendant is a bad

person and thus likely committed the crime in question. *State v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979).

In determining whether the challenged evidence is admissible, we employ a two-step analysis. First, the evidence must be determined to be relevant to a factual issue raised in the case. Iowa R. Evid. 402. Second, if found relevant, the court must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403.

Here, as the trial court's ruling indicates, K.B.'s testimony was admissible for several reasons. We find it sufficient to note K.B.'s testimony was relevant to Bennett's claim that C.B.'s allegations were based on otherwise innocent nonsexual contact, thereby implicating the absence of mistake or accident exception contained in rule 404(b).

The dispositive question is whether the probative value of K.B.'s testimony is outweighed by the danger of unfair prejudice. In balancing the probative value of evidence against the danger of unfair prejudice, we examine:

the actual need for the other-crimes evidence in light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, . . . the strength or weakness of the other crimes evidence in supporting the issue, and . . . the degree to which the jury will probably be roused by the evidence to overmastering hostility.

State v. Plaster, 424 N.W.2d 226, 232 (Iowa 1988); see also *State v. Most*, 578 N.W.2d 250, 254 (Iowa Ct. App. 1998).

We, like the trial court, find K.B.'s testimony highly probative. As the record indicates, the State anticipated Bennett's testimony that any hand-to-

genital or genital-to-genital contact with C.B. was innocent and without a sexual purpose. The State had no evidence other than K.B.'s testimony to contradict this contention. We find the State's need for this evidence, combined with the similarity of K.B.'s and C.B.'s sexual experiences with Bennett, add enough weight to the probative value of K.B.'s testimony to justify its admission. Moreover, the risk of prejudice was minimized by the court's jury instruction limiting the purpose for which this evidence could be considered. Because we find no abuse of discretion in the admission of K.B.'s testimony, we affirm on this issue.

IV. Sentencing.

In cases involving statutory questions our standard of review is correction of errors at law. *State v. Sullins*, 509 N.W.2d 483, 485 (Iowa 1993).

Bennett also contends the district court erred by enhancing his sexual abuse sentence pursuant to Iowa Code chapter 901A. Iowa Code section 901A.2(3) provides:

[A] person convicted of a sexually predatory offense which is a felony, who has a prior conviction for a sexually predatory offense, shall be sentenced to and shall serve twice the maximum period of incarceration for the offense, or twenty-five years, whichever is greater, notwithstanding any other provision of the Code to the contrary. A person sentenced under this subsection shall not have the person's sentence reduced under chapter 903A or otherwise by more than fifteen percent.

Iowa Code § 901A.2(3) (1997).

Bennett had been previously convicted of the sexual abuse of his daughter in 1984. He argues the enhancement provisions of Iowa Code chapter 901A apply only if the conviction occurred after July 1, 1996. In *State v.*

Tomquist, 600 N.W.2d 301 (Iowa 1999), it was determined the enhancement provisions of section 901A.2 may not be applied retroactively so as to allow use of convictions occurring before that section's effective date to enhance a sentence for a later conviction. *Id.* at 307; *see also State v. DeCamp*, 622 N.W.2d 290, 293 (Iowa 2001) (approving *Tomquist's* conclusion that section 901A.2's enhanced punishment provisions apply only to prior convictions occurring after the statute's effective date).

The trial court improperly relied on Bennett's pre-1996 conviction to enhance his sentence. Bennett's sentence is accordingly vacated, and this matter is remanded for resentencing.

**JUDGMENT OF CONVICTION AFFIRMED; SENTENCE VACATED;
AND CASE REMANDED FOR RESENTENCING.**