

IN THE COURT OF APPEALS OF IOWA

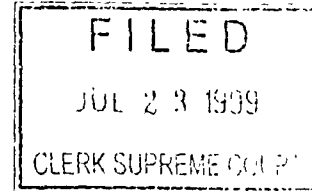
No. 9-312 / 98-0343

Filed July 23, 1999

STATE OF IOWA,
Appellee,

vs.

WILLIAM JAMES HANNAN,
Appellant.



Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

William Hannan appeals following his conviction for second-degree sexual abuse in violation of Iowa Code section 709.3(1) (1995). **AFFIRMED.**

Denis D. Faber, Jr., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Fred H. McCaw, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

William Hannan appeals his conviction for second-degree sexual abuse alleging the trial court abused its discretion in excluding certain evidence and in denying his motion for mistrial based on a typographical error in the verdict form. Because we find the court did not abuse its discretion in excluding the proffered evidence and Hannan was not prejudiced by the error in the verdict form, we affirm.

I. Background Facts & Proceedings.

Hannan and Diane Moyer lived together and were romantically involved for several years. On December 19, 1996, the State charged Hannan with second-degree sexual abuse against Moyer.

The following facts were alleged by the State at trial. On December 12, Hannan came home after drinking at a bar. Moyer was sleeping. He awoke her, and they argued about his late arrival and about Moyer's belief Hannan was having an affair. Moyer pushed past Hannan to get into the bathroom; and after using the bathroom, returned to her bedroom and locked the door behind her. Hannan forced his way into the bedroom and tore off Moyer's clothes. He attempted to have anal sex with her and spanked her. He left the room, returned with an extension cord, and tried to tie her up. He also gagged her with a bandana and attempted anal intercourse. He left the room again and returned with a kitchen knife and threatened her, forcing her to perform oral sex. Finally, Hannan passed out and Moyer was able to escape and report the night's events to the police.

Hannan represented himself at trial. His defense was that the confrontation resulted in a mutual assault which was not sexual in nature. Hannan attempted to introduce three categories of evidence excluded by the court: first, alleged acts of domestic violence Moyer committed against him; second, evidence of Moyer's drug use; and third, evidence of Moyer's past sexual behavior. When the jury was given the verdict form, one instruction was misprinted. On this ground, Hannan motioned for a mistrial. The trial court denied the motion. The jury found Hannan guilty of second-degree sexual assault in violation of Iowa Code section 709.3(1) (1995). Hannan appeals.

II. Evidentiary Issues.

The determination to admit or to refuse to admit evidence rests in the discretion of the trial court. *State v. McGhee*, 280 N.W.2d 436, 440-41 (Iowa 1979). Review of evidentiary issues is for abuse of discretion. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). In order to show an abuse of discretion, one must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Sackett*, 499 N.W.2d 312, 313 (Iowa App. 1993) (quoting *Weeks v. Burnor*, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

A. Evidence of Moyer's Alleged Violent Acts.

Hannan contends the trial court erred in excluding evidence of Moyer's alleged violent acts committed towards him.

Character evidence is generally not admissible under Iowa Rule of Evidence 404(a); however, evidence of character or traits of character is admissible when it is an essential element of a defense. Iowa R. Evid. 405(b). In such cases, character or traits of character may be proven by testimony as to reputation, testimony in the form of an opinion, or by specific instances of conduct. Iowa R. Evid. 405(a), (b). In applying these rules, our supreme court has allowed evidence of the victim's violent conduct which occurred prior to and subsequent to the incident for which the defendant was charged. *See i.e., State v. Clay*, 455 N.W.2d 272, 274 (Iowa App. 1990) (victim's prior threats toward defendant and specific instances of victim's prior conduct made defendant reasonably fear for his safety and thus was essential element of defense); *State v. Blanks*, 479 N.W.2d 601, 606 (Iowa App. 1991) (victim's prior assaults upon defendant and his girlfriend helped prove essential element of defendant's claim of self-defense).

The proffered evidence of Moyer's violent acts, in this case, was not material to Hannan's defense. (These prior incidents were not offered on the issue of credibility.) For this reason, the trial court was proper in excluding the evidence. This is not a case like *Dunson*, where evidence of a victim's violent acts subsequent to the incident proved the defendant's allegation the victim had been violent earlier in the evening and forced him to defend himself. *State v. Dunson*, 433 N.W.2d 676, 681 (Iowa 1988). Hannan did not raise the claim of self-defense. Rather, he alleged he and Moyer were involved in mutually assaultive behavior. Violent conduct was

allegedly a way of life between Hannan and Moyer. However, settling domestic disputes through violence is different in character from the incident of sexual assault with which Hannan was charged. *See id.* Sexual assault was not consistent with the violent behavior Hannan alleged went on between the couple at other times. The trial court did not abuse its discretion in finding evidence of prior violent acts by Moyer against Hannan relevant to the issue of whether Hannan sexually abused Moyer.

B. Evidence of Moyer's Alleged Drug Use.

Hannan contends the trial court erred in excluding evidence Moyer removed drug paraphernalia from the couple's residence. Such character evidence, offered through instances of specific conduct, is admissible to prove the character of a victim when the evidence is "of a pertinent trait of character of the victim"; *See* Iowa R. Evid. 404 (a)(2)(A) and admissible to prove the character of a witness when probative of "truthfulness or untruthfulness." *See* Iowa R. Evid. 608(a). We find the trial court well within its discretion in determining the insinuation Moyer was a drug user and was untruthful about the fact was not a pertinent trait under rule 404(a)(2)(A). Further, even if probative of Moyer's truthfulness, we find the probative value of the evidence outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 403. The exclusion of the evidence was not an abuse of discretion.

C. Evidence of Moyer's Past Sexual Behavior.

Hannan argues the trial court erred in excluding evidence of Moyer's past sexual behavior pursuant to Rule of Evidence 412.¹ Specifically, Hannan sought to introduce evidence Moyer was married when they started dating; had an affair while dating Hannan; lied about having an affair with her ex-husband's brother; and, that Moyer had sex with her husband and a neighbor at the same time.

Rule 412, Iowa's "rape shield" law, is an exception to the general rule that relevant evidence is admissible. *State v. Clarke*, 343 N.W.2d 158, 160-61 (Iowa 1984). The rape shield law and the general rules of relevancy require a balancing of the probative value of the information weighed against the victim's privacy, and

¹ Iowa Rule of Evidence 412 provides:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual abuse is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) . . . constitutionally required to be admitted; or

(2) admitted in accordance with subdivision "c" and is evidence of:

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) . . . upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual abuse is alleged.

...

(c)(3) If the court determines on the basis of [a rule 412 hearing] that the evidence which the accused seeks to offer is relevant and the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which sexual abuse is alleged.

policies behind the rule.² Evidence under the purview of the rule is admissible only if it fits under one of the conditions for admissibility defined in the rule. Iowa R. Evid. 412. Hannan disputes the application of Iowa Rule of Criminal Procedure 412 to this evidence arguing the evidence goes to Moyer's credibility, not the sexual nature of the activities.

There is no merit to Hannan's contention. Each piece of evidence sought to be introduced by Hannan regarding Moyer's sexual behavior is clearly encompassed within rule 412 and does not fit under one of the conditions for admissibility defined in the rule. The district court correctly conducted a relevancy analysis under Rule 412 and decided the disputed evidence was not relevant. 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 probable or less probable than it would be without the evidence." Iowa R. Evid. 401. The test of relevancy is "whether the evidence offered would render the desired inference more probable than it would without such evidence." *State v. Alvey*, 458 N.W.2d 850, 852 (Iowa 1990) (citing *State v. Mark*, 286 N.W.2d 396, 410 (Iowa 1979)). The sexual conduct Hannan sought to introduce had little probative value in establishing the elements of the case or Moyer's credibility about the incident. The probative value did not outweigh the unfair prejudice to Moyer or warrant an invasion of her privacy.

² The purposes behind the rule are to encourage the reporting and prosecution of sex offenses, and prevent the parties from delving into distractive, irrelevant matters. *State v. Clarke*, 343 N.W.2d 158, 161-62 (Iowa 1984).

Hannan argues the fact Moyer lied to Hannan about having an affair the night of the incident shows that Moyer had motive to lie about Hannan sexually assaulting her. We agree with the trial court that the sexual conduct Hannan seeks to introduce only remotely establishes a motive by Moyer to retaliate against him by alleging sexual abuse. The evidence at issue is exactly the kind Rule 412 is meant to exclude. The trial court did not abuse its discretion in doing so.

III. Mistrial Based on Misprinted Jury Instruction.

Hannan contends the trial court erred in refusing his motion for mistrial based on the verdict form initially submitted to the jury which contained a typographical error. The form initially stated: "We, the jury, find the Defendant, William James Hannan, not guilty of Assault With Intent to Commit Sexual Abuse." The sentence should have contained the phrase "guilty" rather than the phrase "not guilty." The court immediately corrected the error after inquiry from the jury.

We review a district court's denial of a request for a mistrial for errors of law. Iowa R. App. P. 4; *see State v. Voelkers*, 547 N.W.2d 625, 631 (Iowa App. 1996). Trial courts have considerable discretion in passing on mistrial motions, and reversal is proper only upon a showing that discretion was abused. *State v. Ware*, 205 N.W.2d 700, 702 (Iowa 1973); *State v. Lawrence*, 559 N.W.2d 292, 294 (Iowa App. 1996). When the trial court responds quickly to objectionable evidence, the defendant bears a heavy burden of demonstrating a clear abuse of discretion on the part of the trial court. *State v. Keys*, 535 N.W.2d 783, 786 (Iowa App. 1995); *Mahoney*, 515

N.W.2d at 51. An error in instructing the jury does not necessitate reversal unless the defendant has been prejudiced by the error. *State v. Gibb*, 303 N.W.2d 673, 686 (Iowa 1981).

Hannan was not prejudiced by the error in the instruction initially submitted to the jury. The only effect the error could have had on the jury's deliberations would be to foreclose the jury from finding Hannan guilty of the properly submitted lesser offense of third-degree sexual abuse. By removing the phrase "not guilty," this option was no longer foreclosed. The trial court did not err in denying Hannan's motion for mistrial based on this issue.

For these reasons, we affirm the trial court on all issues.

AFFIRMED.