IN THE COURT OF APPEALS OF IOWA

No. 1-66 / 90-922

FILED
MAY 28 1991
CLERK SUPREME COURT

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IN THE INTEREST OF

E.B., A Child,

Appellant.

Appeal from the Iowa District Court for Louisa County Thomas R. Brown, District Associate Judge.

E.B. appeals from the delinquency adjudication and from the resulting dispositional order. **AFFIRMED.**

John P. Messina, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Gordon E. Allen, Deputy Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

SACKETT, J.

Appellant E.B., a male child, was determined to be a delinquent child because he was found guilty of second degree sexual abuse against a female child in violation of Iowa Code section 709.3 (1989).

E.B. appeals, contending the trial court erred in allowing the State to introduce evidence he had previously sexually abused his six-year-old male cousin, and in considering the evidence to arrive at its conclusion that he was the perpetrator of the abuse. We agree with E.B. that under this record the prior acts evidence should not be used to determine his guilt. We find beyond a reasonable doubt from the remaining evidence E.B. was guilty of sexual abuse. We affirm.

The record developed by the State in support of its use of the prior bad act evidence was testimony that E.B. had previously "admitted" to "sexually abusing" his six-year-old cousin, Jonathon. The facts of what constituted the sexual abuse and the date they happened are not in the record. The trial court's finding indicates the court found other evidence supported a finding the victim had been sexually abused, but accepted the prior bad acts of E.B. to determine he was the perpetrator.

Evidence of crimes other than the one for which a defendant is on trial is generally inadmissible. The general rule is that one crime cannot be proved by proof of

another. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979); State v. Christensen, 414 N.W.2d 843, 844 (Iowa App. 1987). Iowa R. of Evid. 404(b) reads as follows:

> 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.

Exceptions to the rule are based upon the relevancy of evidence to the proof of a fact or element in issue other than the defendant's criminal disposition. See Cott, 283 N.W.2d at 326.

Unless evidence of other crimes, wrongs, or acts has probative value under a recognized exception to the general prohibition of such evidence, a district court has no discretion to admit it. See State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980). Second, even if the proffered evidence is relevant to a material issue, its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See State v. Munz, 355 N.W.2d 576, 579 (Iowa 1984).

The trial court admitted the evidence against the child as relevant to prove "identity" or absence of "mistake or accident." There was no claim by E.B. of mistake or accident nor would these defenses be recognized as a defense to the charge against E.B. See Christensen, 414 N.W.2d at 845-46.

Some leeway to use prior bad act evidence in child sexual abuse cases has been given where probative of a "lewd disposition," but this has been allowed only in cases where the acts in question had a compelling factual line -- a link that gives rise to a fair and legitimate inference of probability. See State v. Spargo, 364 N.W.2d 203, 209 (Iowa 1985) (admitting testimony of accused's "certain pattern of conduct with boys, including offering 'sex lessons' . . ."); State v. Munz, 355 N.W.2d 576, 579 (Iowa 1984) (admitting evidence of sexual relations with same victim over a period of several years); State v. Spaulding, 313 N.W.2d 878, 881 (Iowa 1981) (admitting evidence of separate sex act, on following day, against victim's sister, who, like victim, was natural daughter of accused); State v. Maestas, 224 N.W.2d 248, 251-52 (Iowa 1974) (admitting evidence of sexual relations against victim's two older sisters--all daughters of defendant); State v. Kinkade, 241 Iowa 1259, 1261, 43 N.W.2d 736 (1950) (admitting evidence of other lewd acts with same child the "week before" and on several other occasions); State v. Beltz, 225 Iowa 155, 159, 279 N.W. 386, 388-89 (1938) (admitting evidence of separate act of intercourse with same child); State v. Rounds, 216 Iowa 131, 133, 248 N.W. 500, 501 (1933) (admitting evidence of lascivious acts with victim's sister at same place, on same day); State v. Neubauer, 145 Iowa 337, 344, 124 N.W. 312, 315 (1910)

(admitting evidence of prior lascivious acts against same male child); State v. Sheets, 127 Iowa 73, 76, 102 N.W. 415, 416-17 (1905) (admitting evidence of teacher's several "lecherous" assaults and "obscene" notes to various female pupils); State v. King, 117 Iowa 484, 489, 91 N.W. 768, 770 (1902) (admitting evidence of separate act of intercourse with same child in same location); see also State v. Tharp, 372 N.W.2d 280, 281 (Iowa App. 1985) (admitting evidence of prior indecent contact with same child, who was accused's step-daughter) overruled on other grounds, State v. Gabrielson, 464 N.W.2d 434, 437 (Iowa 1990).

E.B. questions the application of the "lewd disposition" doctrine in this case because he is a juvenile. The Iowa courts have not considered whether the "lewd disposition" doctrine should apply equally in the prosecution of juvenile and adult offenders. E.B. suggests the doctrine should be applied with greater care in the juvenile justice context. Iowa Code section 232.47(5) (1989) provides only evidence admissible under the rules of evidence applicable to the trial of criminal cases shall be admitted at a juvenile delinquency hearing.

E.B. suggests the lewd disposition doctrine has its greatest credibility when applied to adult behavior of a plainly consistent pattern. He argues the State has not demonstrated in this or any other case that the inferences underriding the lewd disposition doctrine are equally valid

with youthful offenders who often are less predictable and more malleable in their behavior. We need not address this issue because we exclude this evidence from our consideration on other grounds.

E.B. contends the State failed to show sufficient similarity between the two alleged acts to prove identity. We agree.

In using evidence of similar crimes in order to establish the same person committed both, the crimes must be "strikingly similar" or of a "unique nature." See State v. Barrett, 401 N.W.2d 184, 189 (Iowa 1987); State v. Walsh, 318 N.W.2d 184, 186 (Iowa 1982). Jonathon is a male. The alleged victim in this case is female. There is no evidence as to where or when the alleged prior sexual abuse took place. Sexual abuse is defined as a sex act performed under certain enumerated circumstances. Iowa Code section 709.1. A sex act is defined under Iowa Code section 702.17 which provides:

> The term "sex act" or "sexual activity" means any sexual contact between two or more persons by penetration of the penis into the vagina or anus; contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person, contact between the finger or hand of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148, 148C, 150, 150A, 151, or 152; or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

The State did not show what type of sex act occurred between the child and his cousin, Jonathon, nor is there any showing that E.B., when he allegedly admitted to sexually abusing Jonathon, understood the meaning of the term sexual abuse. We find no showing of a sufficient similarity between the two sex acts to allow the prior sex act to be considered in determining E.B.'s guilt. We disagree with the trial court's use of the evidence to determine the child committed the crime. On our de novo review, we exclude this evidence from our consideration.

The State next argues even if we exclude this evidence there is evidence in the record from which we should find beyond a reasonable doubt that the child committed the crime with which he was charged. We agree. While our review is de novo, we take note of the trial court's reliance on the bad acts evidence as necessary to support a finding the child was the perpetrator. However, unlike the trial court, we find from the remaining evidence E.B. committed sexual abuse in the second degree in violation of Iowa Code section 709.3 (1989) beyond a reasonable doubt.

The child complained to her mother on the day of the incident E.B. had taken her pants down and touched her with his penis. A medical report of an examination of the child the same day reports physical findings consistent with the child's testimony. E.B. had access to the child. The child testified E.B. did something wrong and touched her

with his peter that looks like a penis (her brother has one) and he pulled her pants down. We affirm the conviction.

AFFIRMED.

Oxberger, C.J., concurs; Hayden, J., specially concurs.

HAYDEN, J. (specially concurring)

I concur in the result only.