IN THE COURT OF APPEALS OF IOWA

No. 5-600 / 95-0108

FILED
DEC 22 1995
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

DANIEL JOHN HOLTZ,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, J. G. Johnson, District Associate Judge.

Daniel Holtz appeals his conviction of indecent exposure. **AFFIRMED.**

Robert L. Rausch of Rausch Law Firm, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas G. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Daniel Jon Holtz appeals his conviction of indecent exposure. We affirm

Holtz was charged with this offense based on allegations he exposed his penis to a twelve-year-old girl in Hudson, Iowa, in February 1994. There is evidence indicating Holtz drove by this child several times while she was walking alone in a residential area. The child testified Holtz said, "Hey baby," when he passed her a second time. According to the child's version, Holtz then stopped his truck, got out, bent over the seat, turned towards her, dropped his pants, and urinated in front of her. She then turned away and ran to a friend's house.

Holtz admits he was in Hudson driving near the scene of this offense on the day the complaint was made. He also testified he could have been wearing white tights and flowered underwear that day. He has denied exposing himself to the child.

The State's case included prior bad act evidence offered "to help the jury decide what was going on in his [Holtz's] mind, whether this was an accident or [a] mistake." The district court overruled Holtz's motion in limine seeking to exclude this evidence and subsequent objections at trial.

The prior bad acts evidence included an earlier incident in February where young girls saw the defendant bent over the seat of his truck with his pants down wearing blue, pink, and green bikini underwear. Another child testified she saw Holtz

in a grocery store parking lot bent over his seat wearing white tights over girls' bikini underwear.

The third prior bad act involved a 1976 incident resulting in Holtz's confession to indecent exposure. Holtz's eighteen-year-old confession provided:

> 3-15 of 76, I was in the area of Valley Park School. I was driving down a street, stopping at driveways. When I pulled into the driveways, there were girls standing on the sidewalk by the driveways. I had my jeans and my underwear pulled down so that if they looked they could see my privates. I think all together there were two different groups of girls with a total of about six girls that I exposed myself to. I don't know why I do it, but I think it's because there's nothing else to do. I get some kind of neat reaction sometimes. Awhile back I was in the area of Ron's Super Value in College Square. I was in my car when two girls walked up past my car. I had both my jeans and my underwear pulled down as the girls walked past. I was in a position that they could see me if they wanted to.

The district court instructed the jury that prior bad acts evidence was admitted for a limited purpose. Jury instruction No. 12 provided:

> If you find other wrongful acts (1) occurred; (2) were sufficiently connected in time; and (3) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing motive, intent, or absence of mistake or accident.

This instruction is the same as Iowa Criminal Instruction 200.34 except for the language "sufficiently connected in time" which was substituted for "closely connected in time" as provided in the uniform instruction.

The jury found Holtz guilty of indecent exposure. He was sentenced to a one-year term in the county jail and fined $1500.

On appeal Holtz contends the district court erred in admitting his 1976 confession. He also claims jury instruction No 12 misinformed the jury of the law regarding evidence of prior bad acts

Our scope of review is for errors of law. Iowa R. App. P. 4. On evidentiary issues, we review for an abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985).

Evidence of a defendant's prior bad acts that is offered to show the defendant is a bad person likely to have committed the offense charged is inadmissible. Iowa R. Evid. 404(2); *see, e.g., State v. Cott*. 283 N.W.2d 324, 326 (Iowa 1979). Evidence of prior bad acts, however, is admissible to prove intent, motive, absence of mistake or accident, or a common scheme of criminal activity. Iowa R. Evid. 404(b); *State v. Conner*, 314 N.W.2d 427, 429 (Iowa 1982). If this evidence is found to be relevant, the court must then determine whether its probative value is outweighed by its prejudicial effect. Iowa R. Evid. 403; *Conner*, 314 N.W.2d at 429.

Holtz first contends his 1976 confession was too remote to be relevant. Remoteness may render prior bad acts irrelevant "where the time elapsed is so great to negate all rational or logical connections between the fact sought to be proved and the remote evidence offered in proof thereof." *State v. Maestas*, 224 N.W.2d 248, 251 (Iowa 1974) (quoting *State v. Engeman*, 217 N.W.2d 638, 639 (Iowa 1974)). Remoteness in time is a matter of evidentiary weight rather than admissibility. *Id.*

In this case, the State was required to prove Holtz specifically intended to arouse or satisfy his sexual desire or that of the complaining witness. Iowa Code § 709.9(1) The 1976 confession expressly states Holtz exposed himself to children because "I get some kind of neat reaction sometimes." We accordingly find this evidence relevant to Holtz's specific intent at the time of the events resulting in these allegations. We are also unable to find the remoteness in time has negated any connection between Holtz's reasons for exposing himself to children and the inference that he would do so again for the same reason. The district court correctly determined the eighteen-year-old confession was relevant.

Holtz next contends the probative value of this evidence is outweighed by its prejudicial effect. In order for prejudice to outweigh probative value, the evidence must be of a nature that it extends beyond its tendency to establish an element of the offense. *See State v. Gordon*, 354 N.W.2d 783, 784 (Iowa 1984).

This rule does not require exclusion of all evidence that is prejudicial. Only evidence that is unfairly prejudicial is excluded. *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988). We do not believe the defendant was unfairly prejudiced by this evidence. As stated earlier, this confession was needed to establish the defendant's specific intent. *State v. Bauer*, 337 N.W.2d 209, 211-12 (Iowa 1983) (urinating or undressing in public, although offensive to an unwilling viewer, did not necessarily satisfy the specific intent requirement of section 709.9(1)). Moreover, the extent of the resulting

prejudice was minimized by the court's express instructions to the jury regarding its limited purpose. The district court expressly applied the balancing test required by Iowa Rule of Evidence 403, and we are unable to find any abuse of discretion in its decision to admit this evidence.

Finally, Holtz's claims the district court incorrectly instructed the jury by its revision of Iowa Criminal Jury Instruction 200.34. We disagree.

Our review of jury instructions is for errors at law. *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992). Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proved at trial. *State v. Freeman*, 267 N.W.2d 69, 71 (Iowa 1978). The district court has a duty to insure the jury understands the issues it must decide and the law it must apply. *Sanders v. Ghrist*, 421 N.W.2d 520, 522 (Iowa 1988). The district court is free to phrase instructions in its own words so long as the instructions fully and fairly inform the jury of the issues and applicable law. *Clinton Land Co. v. M/S Assoc., Inc.*, 340 N.W.2d 232, 234 (Iowa 1983). "That an instruction may be worded better does not make it bad." *Hardy v. Rynell*, 282 N.W.2d 134, 137 (Iowa 1979). We read all of the instructions together, not piecemeal. *Id.* We must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law. *Id.*

We do find the district court's use of "sufficiently" instead of "closely" as provided in the instruction appreciably changes the message intended for the jury. The

instruction as given was adequate to inform the jury of the limited purpose of any prior bad act evidence. The jury was adequately instructed that the weight to be given this evidence was for them to decide. We do note, however, our earlier suggestions that trial courts should generally adhere to the uniform instructions. *See, e.g., State v. Hatter*, 414 N.W.2d 333, 336 (Iowa 1987).

The judgment of the district court is affirmed.

AFFIRMED.