IN THE COURT OF APPEALS OF IOWA

No. 0-310 / 99-0660
Filed November 20, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN NELL MITCHELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, David E. Schoenthaler (trial), Mark Cleve (motion), Judges.

Defendant appeals from the judgment and sentence entered upon two jury verdicts finding him guilty of three counts of second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3 (1997) (Trial 1) and one count of indecent contact with a child in violation of section 709.12 (Trial 2). He contends the trial court erred in admitting evidence of other crimes. The defendant, in a document which he has filed in addition to the brief filed by his court-appointed counsel, makes numerous claims and arguments all but one of which are different than and in addition to the claim of error raised by court-appointed counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Dennis D. Hendrickson, Assistant State Appellate Defender, and John Nell Mitchell, pro se, Anamosa, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, William E. Davis, County Attorney, and Michael J. Walton, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Defendant John Mitchell appeals his convictions, following jury trial, of three counts of Sexual Abuse in the Second Degree, contending evidence of sexual acts with children other than the victim was admitted in violation of Iowa Rules of Evidence 404(b). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Mitchell was charged in a single trial information with three counts of Sexual Abuse in the Second Degree, which referenced A.E., who was twelve years of age at trial, as the victim (Counts I-III); and three counts of Indecent Contact with a Child, with S.F., who was nine years of age at trial, and her sister K.F., who was fourteen years of age at trial, referenced as victims in Counts IV and V respectively, and a fourth victim, S.B., referenced as the victim in Count VI. Counts I-III were alleged to have occurred between January and September 1997, when A.E. would have been ten and eleven years of age; Counts IV and V were alleged to have occurred in the fall of 1997, when S.F. and K.F. would have been eight and thirteen years of age respectively; and Count VI was alleged to have occurred in "the calendar year 1996." Mitchell filed a motion to sever Counts I-III from Counts IV-VI. The court initially denied the motion, but on reconsideration, severed the trials as follows: Counts I-III remained joined (Trial 1), Counts IV and V were severed for a separate trial (Trial 2), and Count VI was severed for a third trial (Trial 3). Mitchell then filed a motion in limine, seeking to exclude in Trial 1 the testimony of the two victims whose complaints were to be tried in Trial 2. The court deferred ruling until those victims' testimony was offered, and ultimately allowed the testimony, now challenged on appeal.

Following jury trial, Mitchell was found guilty of all three counts in Trial 1. Following Trial 2 to the jury, Mitchell was found not guilty of Count IV and guilty of Count V. Count VI was dismissed. Mitchell requested court-appointed counsel for appeal. The trial court appointed the State Appellate Defender, who represents Mitchell on appeal, filed a brief, and orally argued the appeal. The issue raised in that brief and pursued in oral argument relates solely to Trial 1.

The following evidence was presented to the jury during Trial 1. Between January and September 1997, the victim, A.E., who at the time was a ten-year-old girl, lived with her mother and her mother's boyfriend, Mitchell. During this time period, A.E. testified Mitchell touched her on her breasts once or twice while her clothes were on, and between her legs while her clothes were on a few times as well. A.E. then testified as time passed, Mitchell started going underneath her clothing, at first using his hand to touch her bare breasts and vagina, and eventually touching her vagina with his penis and inserting his penis "about three times." A.E. stated she was mad at Mitchell because he was her mother's boyfriend, but was not fabricating her testimony so she could live with her father.

Dr. Ozaki examined A.E. on June 17, 1997. She observed no physical trauma to her vaginal area and that A.E.'s hymen was normal. A.E. testified she was "pretty sure" Mitchell's touching of her came before the exam with Dr. Ozaki.

Dr. Hartmann also examined A.E., about three weeks before Dr. Ozaki did. He testified he observed minor scratches in A.E.'s vaginal area that could have healed in a matter of days. Although he did not believe A.E.'s hymen was intact, he deferred to Dr. Ozaki's expertise in the matter. During Dr. Hartmann's

examination of A.E., he asked her if she had been sexually active, and she replied in the negative.

During trial the court overruled Mitchell's motion in limine, and the two sisters whose complaints were to be tried in Trial 2 testified as to physical contact he had with them. K.F., a friend of A.E.'s, testified that on one occasion, while A.E.'s mother was in the kitchen and they were in another room, Mitchell touched her clothed breasts. S.F. testified that one time Mitchell put his hands on her breasts, both over her clothing and underneath her clothing, while she was staying overnight at Mitchell's apartment and sleeping in the same bed as him. S.F.'s testimony was very brief. Although K.F.'s testimony lasted somewhat longer, the two girls' combined testimony as to the alleged acts took no more than three pages of trial transcript.

Mitchell denied the alleged incidents occurred. He claims the trial court erred in admitting K.F. and S.F.'s testimony.

II. SCOPE AND STANDARD OF REVIEW

Our scope of review is for correction of errors of law. Iowa R. App. P. 4. Our standard of review in analyzing challenges to the admission of evidence of prior bad acts is for abuse of discretion. *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997); *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). The trial court must exercise its sound discretion and apply the same two-step analysis we will apply here in deciding whether to admit such evidence. *Brown*, 569 N.W.2d at 116. We will reverse the trial court's decision only upon a showing that the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997).

"Even if an abuse of discretion is found, reversal is required only when the abuse is prejudicial." *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999).

III. MERITS

The issue here is controlled by Iowa Rule of Evidence 404(b), which 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.

The list of admissible "other purposes" in this rule is not exclusive. *Brown*, 569 N.W.2d at 116.

> The key is whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts. If the evidence meets this litmus test, it is prima facie admissible, notwithstanding its tendency to demonstrate the accused's bad character.

Plaster, 424 N.W.2d at 229 (quoting *State v. Barrett*, 401 N.W.2d 184, 187 (Iowa 1986) (internal citations and quotations omitted)).

In determining whether the challenged evidence is admissible, the trial court must employ a two-step analysis. *Id.* It must first decide whether the evidence is relevant for a purpose other than to show that the defendant acted in conformity with his or her propensity to commit the wrongful act. *Brown*, 569 N.W.2d at 116. There is a presupposition that relevant evidence is admissible. Iowa R. Evid. 402; *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997). If the evidence is relevant for a legitimate purpose, we move to the second step and decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403; *Plaster*, 424 N.W.2d at 229. "An

affirmation finding in this balancing process precludes admissibility of even relevant evidence." *Plaster*, 424 N.W.2d at 231; *See also* Iowa R. Evid. 403.

It is worth noting in regard to this two-part test that several federal courts have interpreted the Federal Rules of Evidence 413-415 as doing away with the first prong of the test. Federal Rule 414 provides in relevant part:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

See also Fed.R.Evid. 415 (providing similar rule in civil cases dealing with sexual assault or child molestation). "This rule . . . provides a specific admissibility standard in sexual assault cases, replacing Fed.R.Evid. 404(b)'s general criteria. It supercede[s] in sex offenses the restrictive aspects of Rule 404(b)." *U.S. v. Meacham*, 115 F.3d 1488, 1491 (10th Cir. 1997) (internal citations and quotations omitted).

> The practical effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission. The underlying legislative judgment is that the evidence admissible pursuant to the rules is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects.

U.S. v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (quoting sponsor's statements from Congressional Record). Therefore, under the federal rules the presumption is that evidence of prior sexual abuse or molestation is always relevant. Federal courts thus need only decide if its probative value is substantially outweighed by the risk of unfair prejudice, and generally the probative value will outweigh any such risk. Other cases that interpret and apply related Federal rules of evidence

include *U.S. v. Mound*, 149 F.3d 799 (8th Cir. 1998), *Cleveland v. KFC Nat'l Management Co.*, 948 F.Supp. 62 (N.D. Ga. 1996), and *Frank v. County of Hudson*, 924 F.Supp. 620 (D. N.J. 1996).

A. Relevancy

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 is 'whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence.'" *Plaster*, 424 N.W.2d at 229 (quoting J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[07], at 401-48 (1986)).

In the recent case of *State v. Castenada* our supreme court set forth certain principles concerning Iowa Rule of Evidence 404(b). Concerning relevance, it stated

> Under rule 404(b), we continue to recognize that there must be some factual issue raised to permit evidence of other crimes, wrongs, or acts under the noted exceptions. *See State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1998). If the evidence meets this test, it is prima facie admissible, even though the evidence's tendency is to demonstrate the defendant's bad character. *Plaster*, 424 N.W.2d at 229.

State v. Castenada, _____ N.W.2d _____, _____ (Iowa 2000).

The district court determined that there was a substantial factual issue concerning whether the victim, A.E., was credible and her testimony truthful because the defense had tried to impeach her by implying during cross-examination that she had fabricated the accusations in order to cause her mother to leave Mitchell. A.E. did, in fact, testify during cross-examination that she was

very angry with her mother for leaving her father, that her father wanted her to say that John Mitchell did these things to her, and that she did not feel her mother cared about her or spent as much time with her when she was living with Mitchell. The only substantial evidence that Mitchell had sexually abused A.E. was A.E.'s testimony. There was no physical evidence, and the medical testimony offered by the State was at best inconclusive on the question of whether any sexual abuse had occurred.

After A.E.'s testimony the trial court ruled on Mitchell's motion in limine concerning the testimony of S.F. and K.F. The trial court ruled that "there is no question but that the evidence is relevant." Prior to the witnesses actually testifying, the trial court instructed the jury that it was about to hear some evidence that was "offered for a very limited purpose." The court's instruction further provided, in relevant part, that the evidence

> is not being admitted as proof that the Defendant did or did not commit the acts the Plaintiff alleges in this case and you must not convict based on this evidence. It is offered and may only be considered for the limited purpose of proving the truth or falsity of [A.E.'s] testimony.

Iowa Rule of Evidence 401 is the same as Federal Rule of Evidence 401. Federal Rule of Evidence 401 is the same as the Iowa common law definition of "relevant evidence." Iowa R. of Evid. 401 committee comment. Therefore, Iowa Rule of Evidence 401 is the same as the Iowa common law definition of "relevant evidence."

"The Iowa common law definition of relevance includes the concept of 'materiality' . . . ." Iowa R. of Evid. 401 committee comment. "Materiality" relates to not only the pertinency of offered evidence to an issue in dispute, but also to

the issue of credibility. *See State v. Clay*, 213 N.W.2d 473, 477 (Iowa 1973). Therefore, the Iowa common law definition of relevance includes issues of credibility. Because Iowa Rule of Evidence 401 is the same as the Iowa common law definition of relevant evidence, Iowa Rule of Evidence 401 therefore includes issues of credibility.

We conclude that the challenged evidence meets rule 401's definition of relevant evidence because it is material and relevant to a legitimate issue other than Mitchell's general propensity to commit wrongful acts, A.E.'s credibility and the truthfulness of her testimony. Mitchell expresses a concern that allowing evidence of the type allowed in this case results in a "slippery slope" because a defendant would open the door to "other crimes" evidence by merely attacking or trying to attack the credibility of the complaining witness. Mitchell's concern is reasonable, because witnesses place their credibility in issue by testifying. *See State v. Martin*, 385 N.W.2d 549, 552 (Iowa 1986). We agree that an unrestricted rule allowing evidence of a defendant's other crimes, wrongs, or acts to support a witness's credibility would lead to evisceration of the general rule against admissibility of such evidence. However, for numerous reasons, several of which are related directly to the particular facts of this case, we conclude the trial court was correct in finding the evidence relevant and admissible in this case.

First, leading commentators on evidence have noted that cases show signs of lowering the barrier to admissibility of evidence of other similar sex crimes by the defendant against the victim or other persons. *See McCormick's*

Handbook of the Law of Evidence § 190, at 449-50 (2d ed. 1972) (cited in dissenting opinion in *State v. Spaulding*, 313 N.W.2d 878, 883 (Iowa 1981)).

Congress's adoption of Federal Rules of Evidence 413, 414 and 415 in 1994 appears to be consistent with and a recognition of that trend. Together, those rules make admissible in a criminal case in which a defendant is accused of sexual assault or child molestation, and in a civil case in which a claim for damages is predicated upon conduct constituting an offense of sexual assault or child molestation, evidence of another such offense or offenses by the defendant or party. The case before us is of the type discussed in *McCormick* and addressed by the Federal Rules of Evidence.

Second, in very recent years many appellate courts, in cases similar to this case, have allowed evidence such as that allowed in this case. Some have done so under "other purposes" listed in rules such as our rule 404(b), some have done so under "other purposes" not listed in the non-exclusive list in that state's version of rule 404(b), and some have done so with no reference to a rule such as rule 404(b). *See, e.g., Register v. State,* 640 So.2d 3 (Ala. App. 1993); *State v. McAnulty*, 184 Ariz. 399, 909 P.2d 466 (Ariz. App. Div. 1 1995); *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998); *Rowland v. State*, 680 So.2d 502 (Fla. Dist. Ct. App. 1st Dist. 1996); *Perkins v. State*, 224 Ga. App. 63, 479 S.E.2d 471 (1996); *State v. Miller*, 718 So.2d 960 (La. 1998); *State v. Boudreaux*, 662 So.2d 22 (La. App. 5th Cir. 1995); *State v. Morey*, 722 A.2d 1185 (R.I. 1999); *Rigler v. State*, 941 P.2d 734 (Wyo. 1997); *Daniel v. State*, 923 P.2d 728 (Wyo. 1996).

Third, Iowa cases from after as well as before the 1983 adoption of our rules of evidence have recognized the relevance of evidence of similar sexual offenses against the victim and others to support the credibility and truthfulness of a testifying victim. *See State v. Plaster*, 424 N.W.2d 226, 230 (Iowa 1988) (stating, in holding evidence of uncharged sexual conduct towards another admissible in sexual abuse trial, that the similar, peculiar conduct involved in the two incidents "makes it more probable that [the victim] was telling the truth. [Defendant's] behavior pattern tends to rebut his consent theory of defense."); *State v. Spaulding*, 313 N.W.2d 878, 881 (Iowa 1981) (holding that testimony of victim concerning uncharged acts, and testimony of victim's sister concerning an uncharged act, were properly admitted, and noting that victim's sister's testimony "gave considerable credence to the victim's story, and tended to contradict the defendant's claim that the victim may have dreamed the occurrence".). Recent cases from other jurisdictions have also found such evidence to be relevant and admissible on the issue of the defendant's credibility. *See, e.g., Rigler v. State*, 941 P.2d 734 (Wyo. 1997) (stating, in holding testimony of victim of uncharged sexual offense admissible, that such evidence "was also important to the issue of whether the other witnesses were credible . . . .")

Fourth, in cases from both Iowa and other jurisdictions similarity of surrounding circumstances, similarity of events and actions, and proximity in time have been seen as factors enhancing relevance and supporting admissibility of evidence such as the evidence challenged in this case. *See e.g., Spaulding*, 313 N.W.2d at 879 (noting similarity in surrounding circumstances and proximity in time); *Register*, 640 So.2d at 8 (noting similarity in surrounding circumstances);

Rowland, 680 So.2d at 503-04 (noting similarity in surrounding circumstances and events); *Perkins*, 479 S.E.2d at 474 (noting similarity of events); *Boudreaux*, 662 So.2d at 27 (noting similarity in surrounding circumstances and events, and proximity in time). The rationale appears to be that the relevance (and probative value) of evidence of other criminal sexual conduct is greater, and any danger of such evidence being used for an improper purpose is minimized, when the circumstances surrounding the acts and events are similar to those in the charged crime, the acts and events themselves are similar to those in the charged crime, and the acts and events are close in time to those in the charged crime. In this case the challenged evidence concerns events occurring in the same general time frame as those in the charged crimes, involves the same type of acts as most of those perpetrated upon the victim of the charged crimes, and involves surrounding circumstances that were generally the same as those in the charged crimes.

Fifth, although the general issue credibility that arises whenever a witness testifies cannot alone justify admitting evidence of a defendant's other crimes, wrongs, or acts to bolster the witness's credibility, cases from both Iowa and other jurisdictions have found evidence such as the challenged evidence to be particularly relevant for that purpose when the victim's credibility is directly attacked by the defendant. *See, e.g., Plaster*, 424 N.W.2d at 230 (noting, in a case where defendant claimed that victim was being untruthful in testifying that she did not consent to sexual intercourse, that defendant's prior, similar sexual conduct with another made it more probable the victim was telling the truth and tended to rebut the defendant's consent theory of defense); *Spaulding*, 313

N.W.2d at 881-82 (stating that the victim's testimony concerning prior acts was important in view of the defendant's claim that the victim may have dreamed the charged act, and that the victim's sister's testimony concerning an uncharged act "gave considerable credence to the victim's story, and tended to contradict the defendant's claim that the victim may have dreamed the occurrence."); *Rigler*, 941 P.2d at 738 (stating that evidence of uncharged acts with another minor female "was also important to the issue of whether the other witnesses were credible, especially in light of [defendant's] contention that the other victims fabricated their claims."). Here, Mitchell directly attacked A.E.'s credibility by suggesting she had fabricated her claims for ulterior motives. Under such circumstances, the cited cases support the relevancy and admissibility of the challenged evidence.

To summarize, the challenged evidence was relevant to a material issue, A.E.'s credibility; leading commentators on evidence have noted the lowering of the barrier to admissibility of such evidence, and recent changes in the federal rules of evidence are consistent with and a recognition of that trend; Iowa cases from after as well as before the adoption of our rules of evidence have recognized the relevance of such evidence to support the credibility and truthfulness of a testifying victim; cases from Iowa and other jurisdictions have recognized similarity of surrounding circumstances, similarity of events and actions, and proximity in time as factors enhancing relevance and supporting admissibility, and the challenged evidence in this case meets all of those criteria; and cases from Iowa and other jurisdictions have found evidence such as the challenged evidence to be particularly relevant to a victim's credibility when the

victim's credibility is directly attacked by the defendant, the exact situation in this case where the defendant suggests the victim fabricated her claims.

We do not hold or suggest that evidence of similar crimes, wrongs, or acts is admissible merely because a witness, including a testifying victim, puts credibility in issue by testifying. We do, however, conclude that under the cited cases and the facts of this case the trial judge was correct in determining that the challenged evidence was relevant to a material issue, A.E.'s credibility.

B. Unfair Prejudice

Having concluded the testimony of S.F. and K.F. was relevant, we must now decide whether the trial court abused its discretion in determining the probative value of such testimony was not substantially outweighed by the danger of unfair prejudice. Iowa Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Relevancy is the tendency to make a consequential fact more or less probable, while probative value gauges the strength and force of that tendency. *Plaster*, 424 N.W.2d at 231 (citing 1 G.P. Joseph & S.A. Saltzburg, *Evidence in America* ch. 13, at 2 (1987)).

However, as the purpose of all evidence is to sway the fact finder, rule 403 does not preclude the admission of all prejudicial evidence but only that which is *unfairly* prejudicial. Unfairly prejudicial evidence is that which

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was

> offered was designed to elicit a response from the jurors not justified by the evidence.

Id. at 231-32 (quoting 1 *Weinstein* ¶ 403 [03], at 403-33-40). In making the probative value versus danger of unfair prejudice analysis the court considers four factors:

> (1) the actual need for the evidence in view of the issues and the other available evidence; (2) the strength of the evidence showing that the prior bad acts were committed by the accused; (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven; and (4) the degree to which the jury will probably be roused by the evidence improperly.

State v. Most, 578 N.W.2d 250, 254 (Iowa App. 1998) (citations omitted).

The first three factors help determine the probative value of the evidence, i.e. the strength of the evidence's relevance, whereas the fourth factor gauges the degree of prejudice in the evidence.

The State argues the probative value of the testimony of Mitchell's prior bad acts was enhanced by its relevancy to the issue of A.E.'s credibility and truthfulness. The State contends: (1) there was great need for the evidence in light of the issues and the other available evidence; (2) the evidence was strong in showing the other bad acts were committed by Mitchell; and (3) the other acts well support the credibility of the victim, the issue sought to be proven.

There was a need for such evidence based on the defense asserted by Mitchell and the dearth of other evidence available to the prosecution. Mitchell denied that he had committed any of the charged crimes and asserted that A.E. had in fact fabricated all of the incidents, at her father's request, because she was mad at her mother and Mitchell and wanted to get Mitchell in trouble and out of the picture so her mother and father might get back together. A.E. conceded

on cross-examination that she was very angry with her mother for leaving her father, that her father wanted her to say that John Mitchell did these things to her, and that she did not feel her mother cared about her or spent as much time with her when she was living with Mr. Mitchell. A.E.'s testimony was the only substantial evidence available to the State and her testimony was strained at best. It is evident from the trial transcript that A.E. had considerable difficulty testifying. There were several questions that elicited only one-word responses and then only after considerable leading from the prosecutor. Other questions went unanswered altogether. Eventually, the court had to take a break for A.E. to regain her composure and again attempt to answer questions. The trial judge noted specifically in his oral ruling on the motion in limine that the victim "had a difficult time testifying."

The evidence showing Mitchell had committed the other acts was strong. There was no uncertainty in the testimony of either S.F. or K.F. as to the acts that had been perpetrated upon them. They were both familiar with Mitchell and clearly identified him as the perpetrator of the abuse.

The other bad acts evidence very strongly supports the issue sought to be proven. As described above, the circumstances surrounding the prior acts were closely similar to those in the charged crimes, the defendant's actions were essentially the same as his initial actions toward A.E., and the other acts occurred in the same time frame. These similarities supported A.E.'s credibility by making it more likely she was telling the truth, and also were material and relevant to rebutting Mitchell's defense that A.E. had fabricated the incidents.

That leaves us to consider the degree to which the jury might be roused improperly by the evidence. "Without question the level of prejudice inherent in this type of evidence is high. It is nevertheless admissible if its value in searching out the truth of the charges becomes or remains relatively high." *Spaulding*, 313 N.W.2d at 881. This is a judgment call on the part of the trial court and making such judgment calls is what that court does in exercising its discretion. *Plaster*, 424 N.W.2d at 222. *See also Cott*, 283 N.W.2d at 329. Here the district court not only gave the limiting instruction set forth above to the jury prior to allowing the challenged testimony, but also gave a second limiting instruction when the case was submitted. It stated:

> You have heard evidence that the defendant allegedly committed other acts with [S.F.] and [K.F.] near the date of the offense charged. If you decide the defendant committed these other acts, you may consider those acts only for the limited purpose of helping determine the truth or falsity of [A.E.'s] testimony. You may not consider these other acts as proof that the defendant actually committed the acts charged in this case.

Any danger that the jury would use the testimony improperly was significantly lessened by the trial court's cautionary instructions. *See State v. Howell*, 557 N.W.2d 908, 912 (Iowa App. 1996). It is only in extreme cases that such instructions are insufficient to nullify danger of unfair prejudice. *Plaster*, 424 N.W.2d at 232 (citing *State v. Connor*, 314 N.W.2d 427, 429 (Iowa 1982)). We do not think this was one of those extraordinary cases. We may assume the jury followed the court's instructions. *State v. Proctor*, 585 N.W.2d 841, 845 (Iowa 1998). We conclude that the trial court made reasonable and adequate efforts to avoid any danger of unfair prejudice.

Finally, it is of substantial significance that while the other acts involved the same touching that was initially involved in A.E.'s case, they did not involve sexual intercourse as in A.E.'s case. This fact minimized the potential for the jury to be improperly roused by the challenged evidence.

We conclude that the trial court did not err in determining that the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice.

We note Mitchell's mention of the fact that the charges concerning S.F. and K.F. had been severed from the charges concerning A.E. prior to the first trial. However, as Mitchell points out, the analysis for rule 404(b) in not the same as for Iowa Rule of Criminal Procedure 6(1). Rule 404(b) is an evidentiary rule that

> deals with what evidence is properly admissible to prove the crime charged. The joinder of offenses rule deals with the more basic question of what crimes can be charged and tried in a single proceeding. . . . "The two rules deal with different questions, making the wholesale importation of the evidentiary rule into the law dealing with joinder of offenses inappropriate."

State v. Lam, 391 N.W.2d 245, 250 (Iowa 1986) (citations omitted). *See also State v. Smith*, 576 N.W.2d 634, 637 (Iowa App. 1998) ("A Rule 6(1) determination is distinguished from an evidentiary ruling by its concern for which offenses may be properly joined for prosecution in a single trial and not crimes which are admissible as evidence to prove the offense charged. . . . Our severance rules are also distinguished from the rules of evidence by the consideration of judicial economy as opposed to evidentiary concerns for the probative value of a defendant's criminal history.").

Therefore, the fact that the charges concerning the incidents involved in the challenged testimony had been previously severed from the charges concerning A.E. is irrelevant to our considerations under rule 404(b).

IV. MITCHELL'S SEPARATE "BRIEF" AND "MOTION"

Mitchell has filed a document titled "Brief Argument." In it he makes numerous claims and arguments all but one of which are different than and in addition to the claim of error raised by court-appointed appellate counsel. Nothing indicates that Mitchell served a copy of the document on his attorney or provided a copy to his attorney.

Mitchell has also later filed a document titled "Motion to Amend." It contains no indication of what he seeks to amend, but concludes. "WHEREFORE, the Appellant herein prays the Court to REVIEW his arguments in the following pages and Review De Novo the Entire Case." There are no 'following pages." Nothing indicates that Mitchell served a copy of the document on anyone or provided a copy to anyone.

Selecting issues to assign as error on appeal is a professional judgment call. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). It involves a heavy professional responsibility. *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987). "Highly competent appellate lawyers generally assign only the strongest points. . . ," and most experienced appellate lawyers and judges consider it a serious and often devastating blunder to assign all conceivable complaints. *Id.* Ordinarily, except for certain basic decisions, an accused is bound by tactical and strategic decisions made by counsel, even decisions of constitutional dimension. *Sims v. State*, 295 N.W.2d 420, 425 (Iowa 1980); *see also State v. Troah,* 220 Iowa 840,

263 N.W. 525, 528 (1935) (stating, in holding that defendant was bound by his attorney's acceptance of notice of additional witness for the State, that by his employment an attorney is authorized to make certain choices and the client is bound by those decisions).

Cases from other jurisdictions, both civil and criminal, point out the conflict and incompatibility of representation by counsel and self-representation. A few are sufficient to establish the point. Even an attorney has no right to self-representation when represented by retained counsel. *Frank M. McDermott, Ltd. v. Moretz*, 898 F.2d 418, 422 (4th Cir. 1990). The rights of self-representation and representation by counsel may not both be exercised at the same time. *Lanigan v. LaSalle Nat. Bank,* 609 F. Supp. 1000, 1002 (N.D. Ill. 1985). Ordinarily, a court will not consider submissions from a party when that party is represented by counsel. *Non-Punitive Segregation Inmates v. Kelly*, 589 F. Supp. 1330, 1335 (E.D. Pa. 1984). "A person who is represented by counsel in litigation has no right to personally conduct any aspect of the litigation except through counsel." *Lincoln v. Lincoln*, 155 Ariz. 272, 746 P.2d 13 (Ct. App. 1987). An attorney representing a party has the exclusive management and control of the case and all steps and proceedings to enforce the party's rights and remedies. *Waite v. Wellington Boats, Inc.*, 459 So.2d 431, 432 (Fla. Dist. Ct. App. 1984). Under the Georgia Constitution, a non-lawyer does not have the right to self-representation when represented by an attorney. *Seagraves v. State*, 259 Ga. 36, 376 S.E.2d 670, 672 (1989). In general, a defendant must choose between the right to court-appointed counsel and right to conduct the defendant's own defense. *People v. Ramsey*, 89 Mich. App. 260, 280 N.W.2d

840, 842 (1979). Counsel, whether retained or appointed, has no duty to submit every non-frivolous issue requested by the client, good appellate practice may require otherwise, and the rule that a defendant has no right to self-representation when represented by counsel applies to appellate proceedings as well as trial proceedings. *People v. White*, 539 N.E.2d 577, 579 (N.Y. 1989).

Mitchell is, at his request, represented on appeal by court-appointed counsel, the State Appellate Defender. He has not sought or secured an order allowing him to also represent himself on appeal. He has filed nothing complaining of the performance of appellate counsel or seeking to have appellate counsel removed. Appellate counsel has presented a close, non-frivolous issue on appeal, provided a clear and well-reasoned brief on that issue, and forcefully argued the issue at oral argument. Under such circumstances we have no obligation or reason to consider additional claims or different arguments by Mitchell. To the extent we have discretion to do so, after reviewing those claims and arguments, we exercise that discretion in favor of declining to further consider them.

VI. CONCLUSION

We conclude the trial court did not err in determining the testimony of S.F. and K.F. was relevant to a legitimate issue other than a general propensity to commit wrongful acts and that the danger of unfair prejudice from such evidence did not substantially outweigh its probative value. We therefore conclude the trial court did not abuse its discretion in admitting that evidence.

AFFIRMED.