FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 28, 1987
vs.	)	**188**
DAVID BENJAMIN MILLS, JR.,	)	6-465 85-1651
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Marshall County (No. 6721) Carl D. Baker, Judge.

The defendant appeals from his conviction, following a jury trial, of sexual abuse in the third degree, contending that the trial court erred in refusing to exclude certain prior bad act testimony where such testimony did not fit under any of the exceptions to Iowa Rule of Evidence 404(b) and in denying his motion for new trial based on newly-discovered evidence. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Susan S. Klaessy, Assistant Marshall County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

PER CURIAM **189**

On July 27, 1984, the appellant, David Benjamin Mills, Jr., was charged by trial information with sexual abuse in the third degree. This charge stemmed from allegations of Mills' sexual contact with his minor niece. Mills' first two trials, commencing on July 16, 1985, and July 23, 1985, ended in mistrials due to deadlocked juries. His third trial commenced on October 15, 1985. Prior to his third trial, Mills filed a motion in limine seeking to exclude testimony of alleged sexual acts between himself and his minor stepdaughter which allegedly occurred approximately four years prior to the current charge. The district court overruled the motion in limine and, following trial, Mills was found guilty as charged. Mills' motion for a new trial was overruled following a hearing and, on November 8, 1985, he was sentenced to a ten-year period of incarceration. This appeal followed.

Mills' first contention is that the district court erred in overruling his motion in limine and allowing testimony pertaining to earlier incidents of alleged sexual contact between himself and his stepdaughter. As a threshold matter, the State contends this issue was not preserved for appeal because Mills failed to object to this testimony during trial. We disagree. While the general rule is that a ruling on a motion in limine which only grants or denies protection from prejudicial references to the challenged evidence does not preserve the inadmissibility issue for review, State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979), where the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it constitutes a final ruling and need not again be raised at trial. Id. See also State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982). In the present case, the district court, in its ruling on defendant's motion, reached the ultimate issue and found the testimony admissible. Mills was not required to renew his

objection during trial in order to preserve error. Accordingly, we turn to the merits of Mills' argument.

The testimony at issue, elicited from Mills' stepdaughter, was that Mills had grabbed at and touched her breasts while giving her a hug and had attempted to touch her breasts underneath her clothes approximately four years prior to trial. The district court found this testimony admissible because it tended "to show a passion or a propensity for illicit sexual relations with the particular person concerned in the crime on trial," and because it tended to show a common scheme or system of criminal activity. On appeal, the State abandons these rationales in favor of arguments finding the testimony admissible because relevant to Mills' intent in his contact with the victim and because it tends to corroborate the victim's testimony by explaining why the victim failed to complain of Mills' sexual advances until after being placed in a foster home and by making the circumstances of the household situation clearer to the jury. We need not address these arguments individually, however, as we think the testimony admissible for a different purpose. See State v. Baker, 293 N.W.2d 568, 574 (Iowa 1980) (no reversible error if trial court's ruling admitting evidence can be sustained on any ground).

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) (quoting State v. Schlak, 253 Iowa 113, 115, 111 N.W.2d 289, 291 (1961)). The purpose of the rule is to exclude from the jury's consideration evidence which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question. Id. This rule is codified as Iowa Rule of Evidence 404(b). See Iowa R. Evid. 404(b), federal advisory committee's notes. That rule 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.

The exceptions to this rule are based upon the relevancy of certain evidence to the proof of some fact or element in issue other than the defendant's criminal disposition. Cott, 283 N.W.2d at 326. The test of admissibility under an exception to rule 404(b) is two-pronged. First, the evidence must be relevant to one or more of the issues for which exceptions are recognized. State v. Walsh, 318 N.W.2d 184, 185 (Iowa 1982). Second, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Munz, 355 N.W.2d 576, 579 (Iowa 1984).

In addition to those bases for admission specifically enunciated in rule 404(b), the supreme court of this state has recognized an exception applicable in the context of sex crime cases. In State v. Spaulding, 313 N.W.2d 878 (Iowa 1981), that court was presented with a factual situation much like the one which faces us in the case at bar. In Spaulding, the sister of a sexual abuse victim testified to a sex act committed on her by the defendant, father of both the victim and the sister whose testimony was at issue. Although the testimony pertained to sexual contact other than that for which the defendant was being prosecuted, the Iowa Supreme Court held that it had been properly admitted. The court stated that such testimony

> is generally received in the belief "that certain unnatural sex crimes are in themselves so unusual and distinctive that any previous such acts by the accused with anyone are strongly probative of like acts upon the occasion involved in the charge . . . ."

Id. at 881 (quoting McCormick's Handbook on the Law of Evidence, § 190 at 449 (2d Ed. E. Cleary 1972)). We think Spaulding controls the relevancy prong of our analysis. It is clear from Spaulding that among the "unnatural sex crimes"

to which the court refers is included sexual contact between an adult male and a younger female member of his household. Such is precisely the situation in the case at bar. Accordingly, we think the testimony at issue here is relevant to this exception.

Given our determination of the evidence's relevance, we must next consider and decide whether this relevance is substantially outweighed by the danger of unfair prejudice. Munz, 355 N.W.2d at 579. For purposes of this balance, "prejudice" refers to the likelihood of an undue tendency to suggest decision on an improper basis. See Iowa R. Evid. 403, federal advisory committee notes. For us to reverse the district court's decision on this issue as an abuse of discretion, Mills must show that the trial court's action was unreasonable in light of attendant circumstances. Cott, 283 N.W.2d at 329.

With respect to this second prong of our analysis under rule 404(b), Mills contends the testimony concerned an incident so remote in time that any probative value is outweighed by the testimony's prejudicial effect. Remoteness in time is certainly a consideration relevant to this issue. State v. Spargo, 364 N.W.2d 203, 209 (Iowa 1985). We also note that the type of evidence with which we are dealing here is more easily admissible the closer it occurred in point of time to the acts giving rise to the charge. Spaulding, 313 N.W.2d at 881. In the present case, the record discloses that the acts to which Mills' stepdaughter testified occurred approximately two years prior to the date which the victim testified the acts of sexual abuse on her began. This was approximately three years prior to the specific incidences for which Mills was charged and approximately four years prior to trial. In Spargo, similar evidence was admitted even though it had occurred three to seven years prior to trial. Spargo, 364 N.W.2d at 209. As in that case, the stepdaughter's testimony here added credence to the victim's story. Id.; see also Spaulding, 313 N.W.2d at 881-82. In light of

all the attendant circumstances, we cannot say the trial court abused its discretion in allowing the testimony.

Mills next argues that the district court erred in overruling his motion for a new trial which was grounded upon his claim of newly-discovered evidence. This evidence consists of Lisa Culp's testimony that prior to the incident for which Mills was convicted, his niece told Culp that both she, the niece, and Mills' stepdaughter thought Mills was too strict in his disciplining of them and that someday they would get even.

In order to prevail on a motion for new trial on the basis of newly-discovered evidence under Iowa R. Crim. P. 23(2)(b)(8), a defendant must show: (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. State v. Allen, 348 N.W.2d 243, 246 (Iowa 1984). Such motions are not favored, should be closely scrutinized and sparingly granted. State v. Gilroy, 313 N.W.2d 513, 522 (Iowa 1981). The trial judge is vested with wide discretion in passing on the motion, id. Our review convinces us that Mills has met only the first of the four elements which would allow him relief under our rules of criminal procedure and Allen. As a result of this failure, his conviction and sentence stand affirmed.

AFFIRMED.