IN THE COURT OF APPEALS OF IOWA

No. 2-491 / 11-0733
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY DAVID TWIGG,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Larry Twigg appeals his convictions for five counts of lascivious conduct with a minor. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin S. Lies, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Larry Twigg, a long-time teacher at a high school in Waterloo, was convicted of five counts of lascivious conduct with a minor for acts involving one of his students. At his jury trial, the State presented evidence of Twigg's similar conduct with two former students. Twigg appeals, claiming the district court erred in allowing this evidence under Iowa Rule of Evidence 5.404(b). We reverse the judgment of the court and remand for a new trial.

I. Background Facts and Prior Proceedings.

In December 2009, Larry Twigg invited D.W., a seventeen-year-old high school student, to his house. D.W. was behind on some of his assignments for Twigg's computer class. Twigg told him that he could either complete the assignments or play a video game. For each level D.W. beat on the game, he would receive credit for one assignment; for each level he lost, he would have to take off a piece of clothing.

D.W. chose to play the game. He had lost four levels and was wearing only his boxers when Twigg left the room. While he was gone, D.W. searched online to learn how to beat the game. When Twigg returned, he noticed D.W. was doing better. D.W. admitted he cheated, and Twigg told him that he would have to come back.

D.W. returned to Twigg's home in January 2010. The rules of the game were somewhat different. This time, in order to avoid taking off a piece of clothing, D.W. could instead choose an activity from a list Twigg provided. After losing several levels, and articles of clothing, D.W. started picking activities from the list. The first was called "cold change," which required D.W. to go into

Twigg's garage by himself and change from one pair of boxers to another. Another task required D.W. to complete a set of exercises wearing only a towel. At that point, D.W. had beat enough levels on the game to make up his assignments. But he still owed Twigg money for a cell phone bill that Twigg had paid for him. Twigg offered to give D.W. money to deduct from his debt if he completed other items on the list. Those remaining tasks were described by D.W. as follows:

> [S]ix boxers which . . . involve[d] me in only my boxers laying on the bed and receiving six spankings, three whoppers, which would involve me bending over the bed butt naked and getting three spankings. The snow angels, which basically involved me doing two snow angels in my boxers, one on my front and one on my back. And des[s]ert mix, which involved me getting into the bathtub and letting him pour pineapple sauce, chocolate sauce, eggs, flour, milk, and two different kinds of candy on me.

D.W. chose the six boxers, snow angels, and dessert mix. Once he performed those tasks, Twigg drove him home. D.W. told two of his friends what had happened. One of them told the high school principal, and Twigg's conduct was reported to the police.

Twigg was interviewed by a representative from the school district and the police. He admitted to having done everything described by D.W., stating he "thought this was a way to motivate the student to do better." Twigg apologized for his behavior, acknowledging, "This is a stupid thing I did. It was a mistake and I am sorry."

After Twigg's arrest, two of his former students, J.F. and A.W., came forward with similar claims. J.F. stated that in 1995, when he was fifteen years old, Twigg hired him to do some work at his house. Once the work was finished,

Twigg asked him if he would be interested in doubling his money. J.F. said yes. Twigg had J.F. take his clothes off and get into the shower. He then cracked eggs over him and poured chocolate syrup on him. On a second occasion in 1996, Twigg again offered to pay J.F. if he would allow Twigg to pour chocolate syrup on him in the shower. J.F. agreed. He said that both times, Twigg told him that he was trying to teach him "a life lesson in humility."

A.W. said that in the summer of 2009, after his high school graduation, Twigg contacted him. He asked A.W. to come over to his house to make up some points from one of Twigg's classes. A.W. agreed. Like he had with D.W., Twigg told A.W. that he could make up the points by playing a video game. If he lost a level, A.W. would have to take off a piece of clothing or choose from a list of consequences, which included:

> a bunch of different things; things like sit-ups with half dozen eggs, push-ups. Towards the bottom of the list the ones that stood out were a cake mix would be poured on me, that included dry and wet ingredients; I think there's a brownie mix on there; and then the last one on the list said birthday suit.

A.W. removed some clothing and did exercises with eggs in his pockets. He stopped playing the game before he had to take off any more clothes because he became uncomfortable.

Twigg was charged by trial information with six counts of lascivious conduct with a minor. Five of the counts related to his conduct with D.W. The sixth concerned J.F. No charges were filed with respect to A.W. because he was not a minor at the time the acts were performed.

Twigg filed a notice that he intended to rely on the defense of diminished responsibility due to a head injury he had suffered in a car accident that occurred

after his conduct with J.F. Twigg was evaluated by two psychiatrists prior to trial, one of whom opined in a written report that Twigg's acts were not sexually motivated. Before the trial began, the district court granted the State's motion in limine, excluding that opinion and limiting both experts' testimony to their more general opinions that Twigg was capable of forming the requisite specific intent.

The district court also considered Twigg's motion to dismiss the count involving J.F. as barred by the statute of limitations. On that issue, the prosecutor argued:

> My theory on charging that was that this was a continuing crime. There's a pattern of events there. . . . [T]he first that we know of . . . is [J.F.], the victim in Count VI, but that pattern continues. There's two other victims, one was not charged, [A.W.] . . . but he was the year prior to the victim. . . . And all three of them will testify that essentially the same pattern, course of conduct, was undertaken by the defendant; bringing them back to his house, isolating them, having them disrobed or partially disrobed and do these activities which were all identical.

The district court rejected that argument, finding the count with J.F. as the victim was a separate crime that was barred by the statute of limitations. The court nevertheless ruled the State could introduce J.F.'s testimony on the issue of intent based on the State's assertion that Twigg's expert witness was going to attribute Twigg's actions to his head injury. The court reasoned:

> [I]f you weren't going to introduce evidence of the head injury that happened after that earlier victim [J.F.], then I would say that what happened with the earlier victim was more prejudicial than probative because . . . you're not attributing it to that head injury. But if you're going to attribute something to that head injury and he was acting the same way before as after, then it is relevant and probative. Even though it may be prejudicial, it's necessary to undercut that claim.

The State was accordingly allowed to present the testimony of J.F., as well as A.W., whose testimony Twigg did not object to. The jury then heard from Twigg's expert witness during the defense's presentation of evidence. Contrary to the court's expectations, he testified, "I don't think he has a head injury. I think he's cognitively intact."

The jury found Twigg guilty of all five counts of lascivious conduct with D.W. He was sentenced to a total of two years in prison on the convictions.

Twigg appeals. He claims the district court erred in allowing J.F. to testify about Twigg's similar conduct with him.[1]

II. Scope and Standards of Review.

We review a district court's evidentiary rulings regarding the admission of prior bad acts evidence for an abuse of discretion. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009).

III. Discussion.

A. Prior Bad Acts Evidence.

Iowa Rule of Evidence 5.404(b) controls the admissibility of evidence of prior bad acts. That rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other

[1] In an abundance of caution, Twigg alternatively raises this claim under the guise of ineffective assistance of counsel. The State concedes, however, that error was preserved. We accordingly analyze the issue on its merits.

We additionally note that although Twigg raises two ineffective-assistance-of-counsel claims, one of which relates to his attorney's failure to challenge A.W.'s related testimony and the other of which concerns his attorney's cross-examination of the State's expert witness, we need not and do not reach these claims due to our resolution of the issue regarding J.F.'s testimony. Our discussion about that issue, however, is equally applicable to the question of the admissibility of A.W.'s testimony, which may arise on remand.

> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. Evid. 5.404(b).

As the first part of the rule makes clear, evidence of a defendant's past bad acts "is not admissible to demonstrate the defendant has a criminal disposition and was thus more likely to have committed the crime in question." *Reynolds*, 765 N.W.2d at 289. Such a rule is necessary not because character is irrelevant but rather based "'on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.'" *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010) (citations omitted).

However, prior bad acts are admissible if offered for the purpose of establishing a noncharacter theory of relevance. *State v. Sullivan*, 679 N.W.2d 19, 28 (Iowa 2004). A court may accordingly admit evidence of prior bad acts when it determines "(1) the evidence is 'relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts,' and (2) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant." *Cox*, 781 N.W.2d at 761 (citations omitted). We begin with the issue of relevance.

1. Relevance. Taking a somewhat different track than it did at trial,[2] the State argues evidence of Twigg's behavior with his two former students "was

[2] The State acknowledges that the purpose for which the testimony was deemed admissible by the district court before trial—rebutting Twigg's diminished responsibility defense based on his supposed head injury—was not borne out by the evidence that was presented during the trial. *See Cox*, 781 N.W.2d at 768 (noting prior bad acts evidence is admissible to rebut a defense theory). The State accordingly abandons that

relevant to demonstrate his specific intent to arouse or satisfy his or his victim's sexual desires." We disagree.

The jury was instructed that in order to find Twigg guilty of lascivious conduct with a minor, the State was required to prove he "forced, persuaded, or coerced another person, with or without the other person's consent, to disrobe or partially disrobe" with the "specific intent to arouse or satisfy the sexual desires of the defendant or the other person." *See also* Iowa Code § 709.14 (2009). Because Twigg admitted the conduct with D.W. had occurred, the material issue was his intent in engaging in that conduct. *See State v. Christensen*, 414 N.W.2d 843, 845 (Iowa Ct. App. 1987) ("In order to be 'legitimate' within this rule, the issue must be a material one which has been raised concerning one of the exceptions to rule 404(b).").

Twigg argues that because the prior misconduct alleged by the two former students was identical to the conduct with D.W., it does not shed any new light on Twigg's later intent with D.W. The State responds that Twigg's behavior with J.F. was "more overtly sexual in nature" due to J.F.'s nudity and accordingly "relevant in determining his later intent with D.W."

The State's theory of relevance required the jury to draw an intermediate inference as to Twigg's tendency to form a particular intent, thus drawing the jury into improper considerations about Twigg's character. One commentator has explained:

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theory of admissibility on appeal. *See State v. Most*, 578 N.W.2d 250, 253 (Iowa Ct. App. 1998) (noting we will uphold a ruling of the court on the admissibility of evidence on any ground appearing in the record, whether urged below or not).

> The charged offense occurred at one time and place while the uncharged crime ordinarily occurs at a different time and place. To bridge the temporal and spatial gap between the two incidents, the prosecutor must assume the accused's propensity to entertain the same intent in similar situations. That assumption is the inescapable link between the charged and uncharged crimes. The trier of fact can reason from the starting point of the uncharged crime to a conclusion about the mens rea of the charged crime only through an intermediate assumption about the accused's character or propensity.
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> The reliance on an assumption about a person's propensity or tendency to form the same intent creates the possibility that the jury will overvalue the uncharged misconduct evidence. . . . American criminal law operates on the assumption that the typical person possesses cognitive and volitional capacities. The variety of ways in which the person can exercise those capacities makes it difficult to forecast the person's mental state at any given time. Even if the accused entertained a certain intent during a similar, uncharged incident, the accused may not have formed that intent on the charged occasion.

Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 583-84 (1990) [hereinafter Imwinkelried] (footnotes omitted).

We adopted this same reasoning in *Christensen*, 414 N.W.2d at 847, where we rejected the State's argument that evidence of the defendant's past sexual assault of a woman was relevant to establish his intent in a subsequent sexual assault:

> [T]he gap the State seeks to bridge between the [first] relationship and the [second] relationship can be bridged, we think, in only one way: by allowing the jury to infer that [the defendant] acted in conformity with his character as manifested in his earlier acts. Our supreme court, in the context of a sex crime appeal, has stated that such a "focus on the criminal or aberrant disposition of the defendant with regard to various victims is exactly the sort of prejudice which the general rule [prohibiting evidence of prior bad acts] seeks to avoid." In short, we cannot allow "intent" to become a not-so-subtle euphemism for "propensity."

(Citation omitted.) We think that is precisely what happened here. The State's theory is, essentially, that because Twigg possessed a certain intent with J.F., he possessed the same intent fifteen years later with D.W. *See Sullivan*, 679 N.W.2d at 29 (rejecting the State's "inherent argument for admitting the evidence," which was based on the character theory that if the defendant "entertained the intent to deliver during a similar prior incident, he probably harbored the same intent at the time of the charged offense"). Rule 5.404(b) was designed to avoid exactly such general character inferences.

The State alternately asserts the evidence was relevant to show Twigg's "plan to isolate and humiliate his male students for his sexual satisfaction while acting under the guise of teaching lessons in humility." We disagree, as the "test for a common scheme or plan is not simply a pattern of prior bad acts." *Cox*, 781 N.W.2d at 769; *see also State v. Wright*, 191 N.W.2d 638, 641 (Iowa 1971) ("Common scheme or plan means more than the commission of two similar crimes by the same person."). "Evidence of other crimes should never be admitted when it appears the defendant committed them wholly independent of the one for which he is then on trial. There must be some connection between the crimes." *Cox*, 781 N.W.2d at 770 (internal quotations and citations omitted). The State has not provided that connection here. *See id.* (noting mere repetition of sexual behavior is not evidence of a plan or scheme).

For these reasons, we find J.F.'s testimony was not relevant to a legitimate issue in the case other than a general propensity to commit wrongful acts and was thus inadmissible. *See* Iowa R. Evid. 5.402 ("Evidence which is not

relevant is not admissible."). We must next consider whether admission of the evidence was harmless error, as the State contends. *See* Iowa R. Evid. 5.103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .").

2. Harmless Error. In a harmless error analysis where a nonconstitutional error is claimed, "under rule 5.103(a) we presume prejudice—that is, a substantial right of the defendant is affected—and *reverse* unless the record affirmatively establishes otherwise." *Sullivan*, 679 N.W.2d at 30. The record does not affirmatively establish a lack of prejudice.

The use of a defendant's prior bad acts to prove intent is the most widely used basis for admitting uncharged misconduct evidence and, in the view of some commentators, is an exception that threatens to swallow the rule. Imwinkelried, 51 Ohio St. L.J. at 578-79. When prosecutors rely on uncharged conduct to prove intent

> there is a grave risk that the jurors will be tempted to return a guilty verdict on an improper basis. Evidence of the accused's uncharged misconduct is potentially prejudicial because the jurors perceive the uncharged conduct as immoral and consequently react adversely to the accused. For the most part, it is the accused's wrongful intent which gives the conduct its perceived immoral quality. As Shakespeare wrote, "[T]here is nothing either good or bad, but thinking makes it so." . . . Suppose that the jury concludes that the accused has a warped mind inclined to criminal intent. That conclusion can cause the jurors to experience the very type of revulsion which the character evidence prohibition is designed to guard against.

Id. at 583 (footnotes omitted); *see also State v. Castaneda*, 621 N.W.2d 435, 442 (Iowa 2001) (quoting the foregoing passage with approval).

The powerful and inherently prejudicial impact of evidence that the defendant has on earlier occasions committed the same crime as that for which he is on trial is, of course,

> why the prosecution uses such evidence whenever it can. When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered: to suggest that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again."

Castaneda, 621 N.W.2d at 441-42 (citation omitted).

The State encouraged the jury to use the evidence for that very purpose in its closing argument during which, in the midst of discussing what Twigg had done to "these boys," it referred to D.W. as the "primary victim." He was, in fact, the only victim of the crimes with which Twigg was charged. That fact was obscured by the State's assertion to the jury that

> [t]his was a pattern of abuse. These were high school boys, young teenage boys. . . . men. Boys only. Young high school boys. He would isolate them. And he would take them back to his house, alone, where no one else was around, speak to them in private settings in a teachers' lounge, take them to situations where there was no one else that could see what was happening, no one else that could tell or know about what was happening. . . .
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> . . . .
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> . . . And this was a pattern that evolved over time.
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> When he started with [J.F.], it was simply get in the shower and take all your clothes off. Then it became with [A.W.] a video game. Play this video game and take your clothes off. . . .
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> But there were a lot of things that were the same. Even back 15 years ago, the same thing was happening, the same items were being poured on these boys in the shower. They were still being forced to strip down naked in front of the defendant and expose themselves to him for his viewing and his pleasure. . . . This was a pattern that had happened for 15 years. It had taken place multiple times with multiple boys and it culminated in [D.W.]

"If prior-bad-acts evidence is admitted for a permissible purpose, such as motive or intent, it cannot be used by the State for impermissible purposes, such as propensity." *Reynolds*, 765 N.W.2d at 293. Though the State purportedly offered the evidence to show Twigg's intent, it used the evidence to show his propensity towards engaging in lascivious conduct with a minor.

The State's improper use of the evidence invited the jury to punish Twigg not just for his conduct with D.W., but also for his uncharged conduct with the two other students. *See State v. Cott*, 283 N.W.2d 324, 329 (Iowa 1979) (stating a type of prejudice the rule against prior bad acts evidence seeks to avoid is the "'tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offences'" (citation omitted)). That invitation was underscored by J.F.'s emotional testimony as to why he came forward:

> [W]hen it finally broke in the paper that something had happened with [D.W.], I realized that this first time this happened to me was '95, '96 and this just happened with [D.W.] here recently, you know; how many other . . . of us could there be? And that really really made me mad. Because it would have been one thing if it would have happened to me. . . . But the fact that he did it to another person just destroyed all trust and respect that I ever had for this guy and that alone—I'm here flat out for nothing else than to make sure that he doesn't ever teach again because he's taken the trust of every one of these students that ever has gone through there and even any other ones that may not be here and just spat upon it.

The district court's limiting instruction was not sufficient to remove the prejudice inherent with this type of evidence and its improper use by the State. *See Castaneda*, 621 N.W.2d at 442-43 (finding despite a proper instruction limiting the jury's use of prior bad acts evidence to establishing the defendant's intent, the evidence would nevertheless "'leave in the minds of the jurors the

impression of the defendant's proneness to do such things,'" which "'could not be erased by a mere direction on the part of the trial court, when it was determined that such evidence should be held inadmissible'" (citation omitted)).

Compounding the inherently prejudicial nature of the inadmissible bad acts evidence in this case, the properly admitted evidence was far from overwhelming that Twigg's conduct was sexually motivated. *See Christensen*, 414 N.W.2d at 848 (finding error was not harmless in improperly admitting "highly prejudicial" bad acts evidence where the evidence against the defendant was not overwhelming); *accord Most*, 578 N.W.2d at 254-55.

Both expert witnesses testified in response to hypothetical questions that conduct similar to Twigg's would not necessarily be sexually motivated. Twigg's expert witness elaborated that while the "actual behaviors of disrobing are—you would naturally think of them as being sexual," there were "other aspects of the offending behavior that were atypical for the sexual offending behavior." Those aspects included the following:

> One would be that it is very unusual for an individual to go through all of these boundary violations and disrobing and not commit an actual sexual offense. If you're going to do all these inappropriate behaviors, usually a sex offender doesn't stop short and not commit an actual sexual offense. . . . The other thing that's very unusual, if you look at sex offenders, they usually go to great lengths to conceal the offense so they don't get caught. Here there's absolutely no effort on the part of Mr. Twigg to conceal the behavior, to coach the kids. . . . The other thing that's unusual is . . . I didn't see that [D.W.] specifically referred to it as a sexual offense, whereas if you read victim statements of sexual offending behavior, they will say that they were sexually victimized. . . . The other thing that would be unusual is . . . [Twigg's] testing . . . showed low sexual interest not high sexual interest. . . . The other thing that's inconsistent . . . is that he doesn't show an arousal to adolescent males on the Able Screening Test.

Given the foregoing, we do not believe the evidence was so overwhelming that the State would have prevailed even absent the boost it received when the jury heard that Twigg had engaged in similar conduct with two former students.

IV. Conclusion

We conclude the district court abused its discretion in admitting the testimony of Twigg's former student under Iowa Rule of Evidence 5.404(b). Because this admission of prior bad acts evidence was not harmless, we reverse the judgment of the district court and remand for a new trial.

REVERSED AND REMANDED.