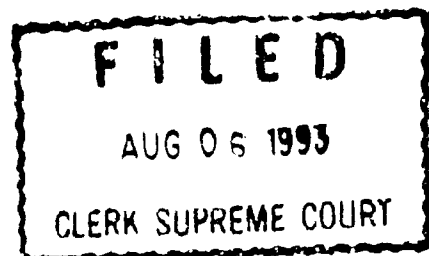


IN THE COURT OF APPEALS OF IOWA

No. 3-294 / 92-514



STATE OF IOWA,

Appellee,

000813

vs.

GREGOR PHILIP HUMPHREY,

Appellant.

Appeal from the Iowa District Court for Woodbury
County, Phillip S. Dandos, Judge.

Gregor Humphrey appeals his conviction, following a
bench trial, of burglary in the second degree and theft in
the first and fifth degrees in violation of Iowa Code
sections 713.5 and 714.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari
Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bridget A.
Chambers, Assistant Attorney General, and Thomas S. Mullin,
County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett,
JJ.

PER CURIAM**000814**

The defendant, Gregor Humphrey, appeals his conviction, following a bench trial, of burglary in the second degree and theft in the first and fifth degrees in violation of Iowa Code sections 713.5 and 714.2 (1991). Humphrey contends: (1) the district court abused its discretion by considering evidence from the counts which were dismissed in rendering its verdict; and (2) the State failed to prove beyond a reasonable doubt that Humphrey committed burglary and theft.

Four car burglaries were committed between February 7 and February 12, 1991. Two of the cars involved, owned by Tim Hatchett and Melissa Drew, were found burned near Sioux City. The third, owned by Ralph Stephan, was found in front of the residence of Juan Hernandez and Henry Porter. The defendant lives near that location. The fourth car, owned by Jason Cottrell, was broken into, and a radar detector was taken.

Humphrey was charged with four counts of second-degree burglary, four counts of theft and two counts of arson in the second degree. At a bench trial, Humphrey was convicted of second-degree burglary of the automobile owned by Jason Cottrell, theft in the fifth degree in connection with the theft of the radar detector from Cottrell's car, and theft in the first degree in connection with the theft of the automobile belonging to Ralph Stephan (referred to as an I-ROC Z Camaro). Humphrey appeals these convictions. We affirm.

Humphrey claims he is entitled to a new trial because the trial court abused its discretion in considering evidence from the counts which were dismissed in rendering its verdict. More specifically, Humphrey apparently complains about the court's consideration of evidence of the defendant's alleged participation in all four of the car burglaries. While Humphrey does not specify that part of the court's verdict where such reliance is made, apparently he refers to the court's ruling in connection with Count I charging the defendant with burglary in the second degree in connection with the February 7, 1991, burglary of the 1978 Buick Regal belonging to Jason Cottrell. The court observed:

The damage to the steering column was like that in the two other similar incidents in which Gregor Humphrey became involved. On February 8, 1991, someone broke into the 1985 Chevrolet I-ROC Z Camaro of Ralph Stephan at the parking lot of the Flamingo Inn in South Sioux City, Nebraska. . . . Humphrey's fingerprints were found on the windshield of the 1985 Chevrolet I-ROC Z Camaro. Humphrey later admitted he drove the 1985 Chevrolet I-ROC Z Camaro knowing it was stolen. . . .

Also on February 8, 1991, someone broke into a 1984 Chevrolet Monte Carlo at the Marina Inn parking lot in South Sioux City, Nebraska and made off with the vehicle. . . . The defendant admitted being with a Juan Hernandez when Hernandez stole the Monte Carlo.

In the court's ruling, it further stated:

The evidence establishes that the Cottrell vehicle was burglarized. It also establishes that Humphrey participated in such burglary. Other similar crimes establish his identity as being involved in the burglary. His pawning a radar detector from the vehicle further shows his involvement in the crime.

The court finds that the probative value of the other similar incidents in identifying the Defendant as the perpetrator of the crime in Count I outweighs any unfair prejudice from such evidence.

(Emphasis added.) Before other bad acts will be admitted in evidence, the State must present clear proof that the defendant was culpable in that act. State v. Johnson, 224 N.W.2d 617, 620 (Iowa 1974).

A thorough review of the record demonstrates that clear proof exists to show that Humphrey was involved in the other crimes that were alluded to by the court. While the evidence was insufficient in the court's mind, as the trier of fact, to convict Humphrey of all counts against him, those counts referred to by the court involved the defendant in some manner. The court was justified in finding that Humphrey either benefited directly from the burglaries and thefts or furthered those crimes by knowingly participating, after the fact, in the division of the proceeds from the crimes.

The scope of review with respect to this issue is whether the court abused its discretion. State v. Emerson, 375 N.W.2d 256, 259-60 (Iowa 1985). We hold the district court did not. We agree with the trial court that the reference to the other acts with which defendant was charged was relevant to the identification of the defendant as the perpetrator of the crimes of which he was convicted. The evidence arising from those other acts was more probative than prejudicial. See Iowa Rule of Evidence

403; State v. Nunz, 355 N.W.2d 576, 579 (Iowa 1984); State v. Richardson, 400 N.W.2d 70, 73 (Iowa App. 1986).

It should also be pointed out that we are not dealing with evidentiary problems. The evidence of other crimes was relevant in this record to the proof of other charges. The evidence was admissible regarding those charges because the evidence referred to property from those thefts or burglaries which had found its way into the possession of the defendant. Evidence of the defendant's possession of the property was in the record. The court's reference to this evidence in support of the court's decision on the charges for which the defendant was found guilty, while not a reference to other criminal acts of which defendant was found guilty, was a reference to evidence appropriately in the record. The evidence was admitted without objection, and no complaint was made that evidence concerning other acts was improper. The court's use of the evidence at issue to identify the defendant was proper.

Next, the defendant claims a lack of sufficient evidence existed in the record to convict him of Counts I, II, and VII. Having fully reviewed the record, we find the evidence was sufficient to support the convictions on those charges, and we find the defendant's claim to be without merit.

Accordingly, we affirm the trial court in toto.

AFFIRMED.