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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RICKY LEE GRANDSTAFF,

Defendant-Appellant.

Filed February 5, 1980

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Appeal from Jasper District Court - Dale S. Missildine, Judge.

Defendant appeals jury conviction of possession of a Schedule II Controlled Substance, amphetamines, with intent to deliver in violation of section 204.401(1)(b), The Code 1977, alleging trial court erred in overruling his motions: 1) to suppress evidence; 2) in limine; 3) to dismiss; 4) for directed verdict; 5) in arrest of judgment; and 6) for a new trial. He further asserts trial court's comments before the jury infringed upon his right against self-incrimination. Reversed and remanded for new trial due to trial court's error in admitting evidence of defendant's prior felony convictions. REVERSED AND REMANDED.

Eugene Knopf of Diehl, Clayton, Cleverley & Knopf, Newton, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Jeanine Freeman, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Defendant, Ricky Lee Grandstaff, appeals jury conviction of possession of a Schedule II Controlled Substance, amphetamines, with intent to deliver in violation of section 204.401(1)(b), The Code 1977. He alleges trial court erred in overruling his motions: 1) to suppress evidence; 2) in limine; 3) to dismiss; 4) for directed verdict; 5) in arrest of judgment; and 6) for a new trial. He further asserts trial court's comments before the jury infringed upon his right against self-incrimination. We reverse.

Based on information provided by an undercover officer, an informant, and other law enforcement agencies, the Newton police force, on November 22, 1977, obtained a warrant to search a rural residence leased by defendant. Upon execution of the warrant, officers found $206 in cash on defendant's person. A gram scale and a notebook listing names and monetary amounts were seized from defendant's house. From a barn located approximately 50-60 yards from the house,[1] officers seized a brown pitcher containing 17,000 tablets, later tested and found to be amphetamines. A county attorney's information was filed December 9, 1977, charging defendant with possession with intent to deliver a Schedule II Controlled Substance. Trial was held March 30, 1978. The jury returned a verdict of guilty against defendant March 31, 1978.

I. Motion to Suppress. Prior to trial, defendant sought to suppress introduction of the seized items. Trial court overruled defendant's motion. On appeal, defendant alleges trial court erred in finding the warrant was supported by probable cause. While not specifically stated, defendant's assertion attacks the validity of the search warrant due to its failure to meet the two pronged test of Aguilar v. Texas, 378 U.S. 108, 114-15, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723, 729 (1964). Our independent examination of the facts and findings, however, support trial court's determination probable cause existed for issuance of the search warrant. State v. Iowa District Court In and For Johnson County, 247 N.W.2d 241, 245 (Iowa 1976).

Probable cause for issuance of a warrant exists if "the facts and circumstances presented to the judicial officer are sufficient to justify the belief of a person of reasonable caution that an offense has been or is being committed." State v. Rydel, 262 N.W.2d 598, 600 (Iowa 1978). To make this determination, we examine the facts recited in the affidavits and abstracts of oral testimony endorsed on the application for the

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[1] The barn was not leased by defendant.

warrant. Id. When the affiant relies on information supplied by an informant, the judicial officer must be apprised of the underlying facts and circumstances 1) from which the informant reached his or her conclusions, and 2) from which the affiant concluded the informant was reliable. State v. Kaufman, 265 N.W.2d 610, 616 (Iowa 1978).

In this case, the information supplied to the officer requesting the warrant (the affiant) came from two main sources: 1) an undercover narcotics police officer; and 2) an informant to this undercover officer who did not know he was supplying information to the police. From our examination of the record, we conclude the magistrate had sufficient facts from which to conclude both the information supplied to affiant by the officer, and the officer himself, were reliable.

"[O]bservations of fellow officers in a common investigation are plainly a basis for a warrant applied for by one of their number." State v. Hall, 259 Iowa 147, 152, 143 N.W.2d 318, 321 (1966). The undercover officer had no motive for falsifying information and provided the affiant with the following underlying facts and circumstances. The undercover officer stated his informant insinuated defendant was the informant's source of supply for drugs; the informant was supposed to set up a drug buy wherein the undercover officer was to purchase drugs from defendant; directions to defendant's residence were given to the undercover officer by his informant.

Information supplied by the informant was similarly reliable. The informant did not know he was supplying information to an undercover agent. He believed he was setting up a drug buy for a fellow drug user. His statements to the undercover officer thus amounted to a statement against his penal interests and make his information reliable. State v. Moehlis, 250 N.W.2d 42, 45 (Iowa 1977).

Based on these facts, we conclude trial court correctly found probable cause existed for issuance of the search warrant and properly denied defendant's motion to suppress.

II. Motion in Limine. By a pretrial motion in limine, defendant sought to prevent the State from introducing evidence of his 1972 and 1973 convictions of possession of a controlled substance (marijuana). Trial court, however, overruled defendant's motion, reasoning the convictions were relevant to establish defendant's intent to commit the present offense.

Generally, evidence of other criminal acts committed by an accused is inadmissible. State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979). Recognized exceptions to this rule permit admission of evidence of similar crimes to establish motive, intent, absence of mistake or accident, a common scheme, or identity of the perpetrator. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979); O'Connell, 275 N.W.2d at 202. "There must be some factual issue raised to permit evidence of other crimes under the noted exceptions. If no such issue exists, then the evidence is unnecessary and the exception may not be relied upon." State v. Zuch, 267 N.W.2d 52, 54-55 (Iowa 1978) (quoting State v. Wright, 191 N.W.2d 638, 640 (Iowa 1971)). Where guilty knowledge or intent is a material issue in the prosecution, proof of other similar offenses, especially where closely connected in time and circumstances to the offense under prosecution, is admissible. State v. Davis, 212 Iowa 582, 591, 234 N.W. 852, 862 (1931). In a prosecution for unlawful possession of a controlled substance, "the State must establish beyond a reasonable doubt that the accused knew of the presence of such substances on premises occupied and controlled by him, either exclusively or jointly with others[,] and the nature of the material." State v. Reeves, 209 N.W.2d 18, 23 (Iowa 1973). Proof of knowledge of the presence of the substances on the premises may consist either of evidence establishing actual knowledge by the accused, evidence of incriminating statements, or circumstances from which a jury could lawfully infer knowledge of the presence of the substances by the accused. Id.

In the present case, while it is possible to argue defendant's prior convictions had probative value, in that one could infer from previous possession of marijuana he more likely knew the amphetamines located in the barn were illegal drugs, we believe this inference is far too tenuous. Trial court "must exercise discretion to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978). Considering the types of prejudice the exclusionary rule seeks to avoid, we conclude the probative value of the admitted evidence is substantially outweighed by the danger of unfair prejudice in this case. See Cott, 283 N.W.2d at 329-30. Introduction of defendant's prior felony convictions constitutes prejudicial error mandating reversal.

III. Comments on Defendant's Right Against Self-Incrimination. During trial, the court admonished defendant to speak to his counsel in "a voice that cannot be heard across the table." Trial court further instructed defendant on his opportunity to testify under oath, if he so desired.

Defendant alleges these remarks abridged his right against self-incrimination. We find, however, defendant's failure to object to these comments at trial by requesting the court admonish the jury to disregard them or to raise the matter in a post-trial motion precludes raising the issue on appeal. State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978).

V. Motion for Directed Verdict. At the close of the State's evidence, and again at the end of trial, defendant moved for a directed verdict alleging the evidence was insufficient to support the charge. Reviewing the evidence in a light most favorable to the State, we find no trial court error in denying defendant's motion. The amphetamines were found in a barn only 60 yards from defendant's house. There is substantial evidence defendant had exclusive control of the premises from which the drugs were seized, although he leased only the farm house. Tracks led from the barn towards the house. Defendant had a notebook of names, one of which a police officer identified as a known drug user, with corresponding monetary figures beside them. Although defendant was unemployed, he had $206 in cash on his person. These facts are sufficient to raise a jury question and, but for prejudicial error, would bind us on appeal. See State v. York, 256 N.W.2d 922, 927 (Iowa 1977); State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976).

V. Motions in Arrest of Judgment and for New Trial. After the jury returned a verdict of guilty, defendant made motions in arrest of judgment and for new trial, both of which trial court overruled. On appeal, defendant alleged trial court erred because (1) the evidence raised no more than a suspicion of defendant's guilt; (2) a juror was removed over defendant's objection; (3) the evidence did not reflect defendant had control of the barn where the amphetamines were found; (4) no actual or circumstantial evidence was introduced that defendant had ever sold or attempted to sell amphetamines for a profit; and (5) the evidence presented for issuance of the search warrant was not correct. We will address only defendant's allegation regarding removal of the juror, because the defendant's other challenges have been addressed above.

After all the evidence was presented, the State raised objection to one of the jurors who had failed to respond accurately to questions on voir dire. Trial court found the State had a right to correct information regarding this juror prior to commencement of trial, although there was no basis to challenge the juror for cause, and reopened voir dire. Consequently, the juror was removed and replaced by an alternate over defendant's objections.

Defendant alleges trial court abused its discretion in reopening voir dire and removing the juror. Although this circumstance is unlikely to recur on any retrial of the case, we believe the issue warrants comment.

While reopening of voir dire is within trial court's discretion, Moser v. Brown, 249 N.W.2d 612, 615 (Iowa 1977), Iowa R. Civ. P. 187 provides "[c]hallenge to an individual juror . . . must be made before the jury is sworn to try the case . . . ." Peremptory challenges in a criminal trial are exercised in the same manner as in a civil trial. Iowa R. Crim. P. 17(9). See State v. Brown, 253 Iowa 658, 113 N.W.2d 286 (1962). The effect of trial court's ruling in removing the juror was to give the State an unauthorized peremptory challenge. However, absent a showing of prejudice, we would not find this constitutes reversible error.

VI. Error in Trial Court's Instruction. Defendant further asserts trial court's instruction number eight, which stated, in part, "[t]he law warrants an inference that when a person intentionally commits an act, he intends the natural results or consequences to follow which ordinarily do follow such acts[,]" unconstitutionally shifted the burden to defendant of disproving an essential element of the crime (specific intent). Sandstrom v. Montana, ___ U.S. ___, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). We are unable to distinguish the language in this instruction from that upheld in State v. Rinehart, 283 N.W.2d 319, 321 (Iowa 1979), and consequently find trial court committed no error in its instruction.

Trial court's judgment is reversed and we remand this case for new trial due to trial court's error in admitting evidence of defendant's prior felony convictions.

REVERSED AND REMANDED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent from Division II of the majority opinion because I believe the trial court correctly admitted evidence of defendant's prior convictions for possession of a controlled substance. A recognized exception to the general prohibition against admitting evidence of prior crimes is when the evidence concerns crimes similar to the one charged and is used to show intent. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979); State v. Davies, 212 Iowa 582, 591, 234 N.W. 852, 862 (1931). The majority concedes this evidence is relevant to the issue of intent, but views its probative value to be outweighed by the danger of unfair prejudice.

Balancing probative value against prejudicial effect "calls for a large measure of individual judgment about the relative gravity of imponderables." Cott, 283 N.W.2d at 329 (quoting State v. Johnson, 224 N.W.2d 617, 621 (Iowa 1974) (quoting McCormick's Handbook of the Law of Evidence §190, at 453 (2d ed. E. Cleary 1972))). Before this court can hold the trial court abused its discretion in the balancing process, the complaining party must establish the trial court's action was unreasonable under the circumstances. Cott, 283 N.W.2d at 329; see State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978); State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978). I do not believe defendant met this burden. Cf. People v. McCarver, 403 Mich. 376, 380, 269 N.W.2d 186, 188 (1978) (where defendant is charged with possession of amphetamines, evidence of defendant's simultaneous possession of marijuana is relevant and admissible to prove intent). Defendant's prior convictions for possession of a controlled substance were relevant to the issue of intent and he failed to prove any prejudice that would not ordinarily and properly arise from introduction of such evidence. See id. at 381, 269 N.W.2d at 189.