FILED
APR 27 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed April 27, 1982

vs.) 216

GREGORY ALLEN SYKES,) 2-79/66212

Defendant-Appellant.)

Appeal from Black Hawk District Court - Peter Van Metre, Judge.

Defendant appeals from his conviction of theft in the first degree in violation of sections 714.1(4) and 714.2, The Code, after trial to the court. AFFIRMED.

Francis J. Hoyt, Jr., Chief Appellate Defender, and Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland, Assistant Attorney General, for plaintiff-appellee.

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

Defendant appeals from his conviction of theft in the first degree in violation of sections 714.1(4) and 714.2, The Code, after trial to the court. He argues that the trial court committed error in admitting evidence of other crimes and admitting hearsay evidence. We affirm the judgment of the trial court.

On September 12, 1980, by trial information, defendant Gregory Allen Sykes and Tina Moore were charged with theft in the first degree in that they exercised control over property worth more than $5,000 that they knew, or had reason to know, was stolen. The particular items over which it was alleged that defendant had control were clothing stolen from two Waterloo stores, DeLorbe's and Les Dolls. The items were discovered, along with several other items stolen from at least four other locations, in a legitimate search of Moore's apartment where defendant also lived, in the Waterloo area. Moore's fingerprints were found at both DeLorbe's and Les Dolls; defendant was never charged with the burglaries of these two or the other four locations.

Prior to trial defendant made a motion in limine to preclude the State from introducing any evidence seized at Moore's apartment that was evidence from break-ins other than DeLorbe's or Les Dolls, arguing that such evidence would be proof of other crimes and therefore inadmissible. The court reserved ruling on defendant's motion; it was renewed at trial, overruled, and the evidence admitted.

Defendant also objected at trial to testimony of a Waterloo police detective who was permitted to testify as to the contents of a conversation with Moore in which she admitted that the instruments used to commit the DeLorbe's and Les Doll's burglaries were located at the apartment she and defendant shared. Moore herself did not testify at defendant's trial; defendant argued that the detective's testimony was hearsay and inadmissible because it did not fall within any of the exceptions to the hearsay rule. On December 16, 1980, the trial court filed its findings, rulings on defendant's motions, and verdict, finding defendant guilty of

theft in the first degree as charged. Our review is for correction of errors of law, and findings of fact in this trial to the court have the effect of a special verdict. Iowa R. App. P. 4.

I. On appeal defendant first argues that the trial court committed error by admitting evidence of crimes other than the offense charged. Defendant is correct that evidence of other crimes is generally inadmissible lest a jury be led to convict a defendant because he is a bad person rather than because he is guilty of the particular crime for which he is being tried. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979). Because evidence which is relevant to prove some fact or element in issue other than the defendant's disposition may be a permissible objective for proof, certain exceptions have evolved if the proof of other crimes is necessary to show: (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other, and (5) identity of the person charged with the commission of the crime. Id.; State v. Folkens, 281 N.W.2d 1, 5 (Iowa 1979) (cites ommitted). In order, then, for evidence from the burglaries from the four other locations to be admissible, the evidence must prove other crimes, must fit into one of these five exceptions, and be more probative than prejudicial. See State v. Cott, 283 N.W.2d at 329.

Section 714.1(4), The Code 1979, provides:

> 714.1 Theft defined. A person commits theft when the person does any of the following:
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> * * *
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> 4. Exercises control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen, unless the person's purpose is to promptly restore it to the owner or to deliver it to an appropriate public officer. The fact that the person is found in possession of property which has been stolen from two or more persons on separate occasions, or that the person is a dealer or other person familiar with the value of such property and

> has acquired it for a consideration which is far below its reasonable value, shall be evidence from which the court or jury may infer that the person knew or believed that the property had been stolen.

Evidence was received that showed all of the items seized were stolen. The items, when seized, still had sales tags on them, were displayed on racks, and were identified in court as stolen from their establishments by those people from whom they were taken. There seems to be no question, then, that the items from the other four locations were proof of other crimes.

The next question to be resolved is whether that proof of other crimes was admissible because it fell into one of the five exceptions. Defendant argues that there was no nexus between him and the other crimes, no direct evidence to show that, if they were crimes in fact, he had any proven connection or relationship to them. The case against defendant rested primarily on circumstantial evidence. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Even so, the State was entitled to prove defendant exercised control over property he knew, or had reasonable cause to know, was stolen. To do this, the State needed to prove that the likelihood of mistake or lack of knowledge as to the condition of this property was small. According to the theft statute, showing that defendant exercised control over two sets of items taken on two separate occasions from two separate people at least raised the inference to the court that defendant had guilty knowledge. An inference, of course, must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. County Court of Ulster County, New York v. Allen, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777, 791 (1979); State v. Rinehart, 283 N.W.2d 319, 321 (Iowa 1979). Therefore, the State cannot rely on the inference alone to prove defendant's guilty knowledge beyond a reasonable doubt.

The additional evidence showed that the apartment within which defendant and Moore were living had four rooms. The items from all six locations were

stored throughout the apartment, and were in plain, open, and visible sight. Defendant emphasized twice to a police officer that the apartment was his own place. Given the factual setting here, we believe the evidence of other crimes fit the exception showing absence of mistake and therefore knowledge that the property was stolen. State v. Leto, 305 N.W.2d 482, 490 (Iowa 1981). The reason that this necessarily follows is that "the recurrence of a like act lessens by each instance the possibility that a given instance could be the result of inadvertence, accident, or other innocent intent." State v. Leto, 305 N.W.2d at 490 (cites ommitted).

The primary basis for all of the situations in which evidence of other crimes is deemed to be admissible is relevancy. The State must show that such evidence is relevant, State v. Jeffs, 246 N.W.2d 913, 915 (Iowa 1976), and that its probative value outweighs the danger of prejudice. State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978); State v. Johnson, 224 N.W.2d 617, 621 (Iowa 1974). The previous discussion concerning lack of mistake disposes of any relevancy problem.

Defendant separately asserts that the evidence of his connection with the stolen property other than that upon which the present charge is based is both quantitatively and qualitatively insufficient to satisfy the requirement for certainty of proof stated in State v. Johnson, 224 N.W.2d at 620. We believe the requirement of clear proof alluded to in Johnson is only a corollary of the requirement of independent relevancy. As such, the required degree of quantitative and qualitative certainty will vary with the facts of the particular case. Here, the evidence of defendant's connection with the stolen property other than that included in the charge against him is, by its nature, very similar to the proof linking defendant with the stolen property which was included in the charges against him. Because we uphold the relevancy of the other stolen property, it need not be excluded based upon insufficient certainty of proof.

II. Defendant also contends the trial court committed error by admitting hearsay evidence. The testimony about which defendant objects is the giving of the contents of a conversation that occurred out of court between Waterloo police detective Snider and Moore, which Snider was permitted to repeat at trial. In substance, Moore had related to Snider that garbage bags used to hold the clothing while it was being stolen, and instruments employed in committing the burglaries at DeLorbe's and Les Doll's, were in the apartment rented by Moore and lived in by both Moore and defendant. Defendant believes the statements were admitted for the truth of the matter asserted and do not fall into any exception to the hearsay rule; the State argues that Moore's statement was not hearsay but, if it was, its admission was harmless error.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). However, there is a recognized distinction between statements offered to prove the truth of a matter asserted and those offered to prove only (1) the fact that such statements were made or (2) their effect on subsequent actions of the hearer. State v. Rush, 242 N.W.2d 313, 319 (Iowa 1976). It has also been stated that if the hearsay rule can be found inapplicable under any theory, then the ruling admitting the evidence will be upheld. State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976). Generally, an investigating officer may explain his actions by testifying as to what information he had and its source regarding the crime and the criminal. State v. Reynolds, 250 N.W.2d 434, 440 (Iowa 1977). We think this applicable law demonstrates that Snider properly was permitted to testify as to the contents of the conversation he had with Moore because the contents of the conversation were necessary to explain what information the officer had and why he took subsequent actions leading to defendant's arrest.

However, in examining the record, we find that up until the time of defendant's cross-examination of Snider, no mention was made by him of any out-of-court conversation. During cross-examination of Snider, defendant attempted to find out why defendant had been arrested. Defendant's whole line of questioning of Snider seemed to be an attempt to show that Snider acted on unreliable information, or out of personal vindictiveness against defendant. Thereafter, on redirect, the State elicited the contents of the conversation between Snider and Moore which led to defendant's arrest. Defendant cannot now complain about testimony given by Snider after defendant opened the door to this evidence by attempting to find out why Snider had acted as he did and implying that he had no knowledge on which to proceed. State v. Flesher, 286 N.W.2d 218, 221 (Iowa 1979).

We have considered defendant's arguments and find no basis for reversal. The trial court's decision is therefore affirmed.

AFFIRMED.