FILED
SEP 25 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed September 25, 1984 141
vs.)
CHARLES RAYMOND BAIR,) 4-244 / 83-875
Defendant-Appellant.)

Appeal from the Iowa District Court for Muscatine County - Linda K. Neuman and J. L. Burns, Judges.

The defendant appeals from his convictions, following a jury trial, for two counts of second-degree robbery. He contends the trial court erred by refusing to sever the two counts for separate trial. He also contends the evidence did not support the trial court's "flight instruction." Finally, he contends the evidence was insufficient to establish that one of the two alleged robberies ever even took place. AFFIRMED.

Charles Harrington, Appellate Defender, and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

The defendant, Charles Bair, and his co-defendent, Leslie Kruse, were accused of two robberies which occurred on February 2, 1983, in Muscatine. They were charged by joint information with two counts of second-degree robbery. Count 1 alleged the robbery of an individual, Erwin McCallister; count 2 alleged a robbery at a bar of its bartender.

The State accused both men as principals in the robbery of McCallister (count 1). With respect to the robbery of the bar (count 2), the State alleged that Bair had committed the robbery as a principal and that Kruse had aided and abetted him by entering the bar 30 to 45 minutes earlier to observe it.

The facts of the case are as follows: On February 2, 1983, Bair and Kruse went to a bar called Edward's where Kruse's girlfriend, Cindy Davis, worked. Bair and Kruse played pool with Erwin McCallister until Davis finished work at 8:00 p.m. At that time, the four left Edward's and drove to another bar in Muscatine. McCallister wanted to return to Edward's, so Kruse and Bair drove him back in Davis' car. Partway there, the car stalled. McCallister claimed that Kruse and Bair then robbed him of $33.00 and threatened to get him if he did not "let it slide." He testified that after that he returned to his apartment, got some money and returned to Edward's. He did not report the incident to the police.

Bair testified that after the car stalled, he and Kruse walked to the Southside Tavern to see if Kruse's father was there. Kruse went into the bar alone while Bair remained outside. Tammy Trusedale, the bartender at the Southside Tavern, confirmed that Kruse came into the bar and got a packet of matches at about 9:10 p.m. Since his father was not at the bar, Kruse went home to see if his father was there. Bair waited for Kruse in another bar, Pete's Tap, until he returned at approximately 9:30 p.m. Trusedale also testified that approximately 35 to 40 minutes after Kruse had left the bar, another man, who she identified as Bair, entered with what she believed to be a gun and demanded all the money.

Bair testified that after Kruse returned from his home, the two went back to the bar where Davis was waiting. The three then went to where the stalled car was and got it started. They returned to Edward's. Davis testified that at Edward's she saw McAllister and he told her to "take her friends and get out of the bar" and that her friends had "beaten him and taken his money from him."

Bair, Kruse, and Davis left Edward's at approximately 11:30 p.m. They drove to Fort Madison and stayed with a friend of Kruse's, Tom Gray. Kruse testified that he had previously called Gray about borrowing money to pay some traffic tickets. Davis testified that Bair and Kruse had mentioned earlier that they wanted to see some friends in Fort Madison. Gray testified that Kruse had called him that day and had said "he would probably be down that evening sometime." The three left Muscatine at about 11:30 p.m. and drove to Fort Madison. Bair testified that Davis slept during the drive. According to Davis' testimony, however, she was awake during the drive and saw Bair pull out some money and give some of it to Kruse. She also testified that she asked Bair where he got the money, and he said he had robbed a bar.

The following morning Kruse and Bair refused to return to Muscatine with Davis. Davis, angry with their refusal, drove back alone. According to both Bair and Kruse, Davis threatened to get even with them for refusing to ride back with her.

Prior to trial Bair and Kruse filed motions to sever, asking that count 1 and count 2 not be tried at the same time for either defendant, and also asking that Bair and Kruse be tried separately on count 2. The trial court overruled these motions to sever, and both men were tried on both counts at a single joint trial. Both men were found guilty of two counts of second-degree robbery.

Bair has appealed from the resulting convictions. He argues that: (1) the trial court erred by refusing to sever count 1 from count 2 (he does not complain about the fact that he was tried jointly with Kruse); (2) the trial court erred by

giving the jury a "flight instruction" stating that if the jury found he had fled to avoid apprehension, the jury could consider that circumstance as evidence pointing to guilt; and (3) the evidence was insufficient to prove that a robbery of McCallister ever even took place.

I. Severance. Bair contends that the trial court acted improperly in refusing to sever the two counts and that a new trial should be granted. In summary, he argues that the circumstances surrounding the two robberies are so different that the prejudicial effects that resulted from prosecuting the two counts together outweigh the State's interest in judicial economy. We cannot agree.

The decision of whether to sever the counts is within the discretion of the trial court. Cf. State v. Belieu, 288 N.W.2d 895, 900 (Iowa 1980). When the trial court refuses to sever a case, the ruling will be reversed on appeal only if the defendant demonstrates an abuse of discretion. Id. To establish an abuse of discretion, the defendant must show sufficient prejudice to constitute denial of a fair trial. Id.

The rule in effect at the time the case was decided provided:

> When the conduct of a defendant may establish the commission of more than one public offense arising out of the same transaction or occurrence, the defendant may be prosecuted for each of such offenses. Each of such offenses may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

Iowa R. Crim. P. 6(1) (1981) (emphasis added).

Bair argues that these two incidents are so distinct that they cannot be considered to have arisen from the same transaction or occurrence. The phrase "the same transaction or occurrence" has never been interpreted within the context of rule 6(1). However, in 1983 this rule was clarified by an amendment. It now reads:

> Two or more public offenses which arose from the same

> transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

Iowa R. Crim. P. 6(1) (amended 1983) (emphasis added).

In interpreting the new provision, we recognize that our ultimate goal is to ascertain and give effect to the intention of the legislature. Kohrt v. Yetter, 344 N.W.2d 245, 246 (Iowa 1984). The legislative intent can be derived from the language used in the statute and the objects sought to be accomplished. Lau v. City of Oelwein, 336 N.W.2d 202, 203 (Iowa 1983).

Applying these principles, we conclude that the amendment to rule 6(1) was intended to clarify existing law rather than to alter it. The supreme court has recognized:

> Changes made by revision of a statute will not be construed as altering the law unless the legislature's intent to accomplish a change in its meaning is clear and unmistakable. An intent to make a change does not exist when the revised statute is merely susceptible to two constructions.

State v. Peterson, 327 N.W.2d 735, 738 (Iowa 1982) (quoting Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978)) (emphasis added). We do not find that the language of rule 6(1) "clearly and unmistakably" manifested a legislative intent to alter the standard for severance of counts. Therefore, we hold that the amended rule 6(1) and the prior rule should be interpreted in the same manner.

In view of this conclusion, we believe the two charges would appropriately be tried together. The evidence in the record is sufficient to show a common scheme or plan as required by Iowa Rule of Criminal Procedure 6(1). The term "common scheme or plan" has not been defined within the context of this rule. However, federal decisions interpreting similar language found in Federal Rule of Criminal Procedure 8(a) are instructive on this point. The Court of Appeals for the Eighth Circuit has stated that "[w]here the evidence overlaps and the offenses

are similar and occurred over a relatively short period of time, joinder is usually proper." United States v. Riley, 530 F.2d 767, 770 (8th Cir. 1976); see also United States v. Jordan, 602 F.2d 171, 172 (8th Cir. 1979). Additionally, the Supreme Court of Iowa has interpreted the phrase "single plan or scheme" found in Iowa Code section 714.3 (aggregation of theft charges). In construing this phrase, the court stated:

> If each taking is the result of a separate, independent impulse, each is a separate crime; but where the successive takings are all pursuant to a single, sustained, criminal impulse and in the execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may lapse between each act.

State v. Amsden, 300 N.W.2d 882, 884 (Iowa 1981).

In light of these definitions, we conclude that the evidence in the record more than adequately demonstrates the existence of a common scheme or plan. The robberies in question were closely connected in time as well as location. The record indicates that the two defendants were drinking together on the evening of February 2, 1983. At one bar they joined Erwin McCallister and Cindy Davis and went to another bar. Between 8:30 p.m. and 9:00 p.m., they then left with McCallister to take him back to the first bar and robbed him along the way. Shortly thereafter, defendant Kruse entered a third bar (the scene of the second robbery) apparently to inspect the premises because he merely picked up a book of matches and then left. At approximately 10:00 p.m., the bar was robbed by defendant Bair.

Essentially, the defendants were on a crime spree with the common purpose of stealing money. This is precisely the type of situation rule 6(1) was intended to cover. The offenses are sufficiently related to render joinder appropriate under this rule. Finding no error, we affirm the district court in this respect.

II. Flight Instruction. Bair contends that there was insufficient evidence to justify submission of the flight instruction to the jury. It is proper for the court to

submit an instruction on flight when the evidence creates a question concerning the defendant's reason for leaving town. State v. Webb, 309 N.W.2d 404, 409 (Iowa 1981). Bair and Kruse left Muscatine at 11:30 p.m. on the night of the robberies and drove to Fort Madison. Both Bair and Kruse as well as Davis and Tom Gray, Kruse's friend in Fort Madison, all testified that Kruse had contacted Gray about borrowing some money to pay some traffic tickets. However, the testimony of the four is conflicting as to when the decision was made to leave that night following the robberies. The evidence also indicates that Bair and Kruse had intended to return the following day but later changed their minds and remained a couple of additional days.

We find the evidence here does constitute a sufficient foundation for submission of the flight instruction and the question of whether he departed because of guilty conscience is one for the jury.

III. Insufficient Evidence to Establish That the McCallister Robbery Occurred. Bair argues that the trial court acted improperly in overruling his motion for judgment of acquittal on count I, the McCallister robbery. He contends that there is insufficient evidence to establish that the robbery of McCallister in fact occurred.

It is well settled that a trial court should not direct a verdict if there is substantial evidence reasonably tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). If there is evidence sufficient to raise a fair inference of guilt, then the court should not direct a verdict but should allow the case to go to the jury. Id. In determining whether the trial court acted properly, we view the evidence in a light most consistent with the verdict and in doing so, we conclude that there was ample evidence to justify presenting the issue to the jury.

McCallister testified that Bair and Kruse hit him with small rabbit punches while demanding his money. The fact that McCallister did not report the robbery

does not lead to the conclusion that it did not occur. There was testimony that Bair and Kruse threatened to come after McCallister if he reported the robbery. Davis testified that McCallister told her that Bair and Kruse had robbed him and also that she overheard Bair say that Kruse had hit McCallister over the head and that Bair then took McCallister's money.

We find that this evidence raises a fair inference of guilt and is more than suspicion, speculation, or conjecture. See State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976). The trial court acted properly in overruling the motion for a judgement of acquittal.

AFFIRMED.

All judges concur except Snell and Schlegel, JJ., who dissent.

I respectfully dissent from Division II of the majority opinion.

The trial court erred in refusing to sever the two counts under the old Iowa R. Crim. P. 6(1). The rule in effect at the time the case was decided provided that separate charges may be joined for trial if they arose out of the same transaction or occurrence. Although the phrase "same transaction or occurrence" has never been interpreted within the context of rule 6(1), cases which have considered the term stress such things as: "all offenses charged are of the same general nature, growing out of a series of transactions or connected transactions, are committed by the same offender . . ., and require the same or similar proof and punishment." City of Greenville v. Chapman, 210 S.C. 147, 160, 41 S.E.2d 865, 867 (1947); "transactions involving the same persons and the same law," State v. Gibb, 303 N.W.2d 673, 677 (Iowa 1981).

The McCallister robbery involved the two defendants roughing up a lone man and getting approximately $30. There was no apparent injury and there was no allegation that any type of weapon was used. The tavern incident involved one man, supposedly Bair, holding up a bartender. The bartender testified that the robber appeared to have a gun. There is no evidence that Kruse was there or nearby at the time. The only similarity between the two robberies is that they both occurred on the same evening. The facts indicate that these constituted two separate actions, rather than the "same transaction or occurrence."

Because of the difference between the two incidents, the refusal to sever under the old rule was prejudicial to Bair and he is entitled to a new trial. The purpose of the severance rule is to protect the defendant from the prejudicial inferences that arise when trying two separate offenses together.

The majority holds that it matters not whether these robberies arise from the same transaction or occurrence because they constitute parts of a common scheme or plan. To reach this conclusion, a new criminal rule that became law

after defendant was convicted is superimposed on the standard by which he was tried. I cannot accept the notion that the new rule is a mere clarification when it changes the standard from one transaction or occurrence to two transactions or occurrences with the added dimension that these are parts of a common scheme or plan. These are substantive statutory changes that directly affect a defendant's right to a fair trial.

In this case there is no evidence of a common scheme or plan.

> It is not enough that the defendant committed other crimes of the same nature unless in some way each has a bearing on the other. * * *
>
> Nowhere is there any suggestion that one crime was dependant upon or connected with any of the others. * * *
>
> Common scheme or plan means more than the commission of two similar crimes by the same person.

State v. Wright, 191 N.W.2d 638, 641 (Iowa 1971).

Moreover, there is no evidence of a legislative intent that the new rule be applied retrospectively.

> The general rule is that a statute will be given prospective application only, unless it appears the legislature clearly intended it to be applied retrospectively. An exception exists, however: when a statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively. But if the statute relates to a substantive right, it is usually only applied prospectively.

State ex rel. Leas in Interest of O'Neal, 303 N.W.2d 414, 419 (Iowa 1981). The purpose of the severance rule is to protect the defendant's right to a fair trial. See State v. Turnbow, 67 N.M. 241, 244, 354 P.2d 533, 535-36 (1960). This right is a substantive right. The new rule should be given only a prospective effect and would not be applicable in this case.

The result of the majority's analysis is to retroactively apply a new criminal rule to defendant's case which changed the standards by which defendant was tried and convicted without any indication from the legislature that such was desired or even contemplated. Defendants Kruse and Bair, who were tried together, were

denied their right to a fair trial regarding this issue and should be granted a new trial.

Schlegel, J., joins this dissent.