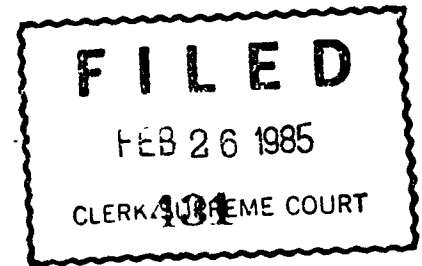


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed February 26, 1985

vs.

)

CORNELIUS DION JOHNSON,

)

4-488
84-664

Defendant-Appellant.

)

Appeal from the Iowa District Court for Black Hawk County - Roger F. Peterson, Judge.

Defendant appeals his conviction of first degree robbery. REVERSED AND REMANDED.

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Snell, and Schlegel, JJ.

Defendant, Cornelius Johnson, appeals his conviction of first degree robbery. He asserts that the trial court erred in admitting evidence of a prior robbery allegedly committed by him, and in denying his motions for a mistrial. We reverse and remand for a new trial.

Johnson was tried for a robbery of a convenience store in Waterloo that occurred on November 23, 1983. At approximately 8:40 a.m. a black man approached Lois Oswegan, the store manager, and requested a box of Smith Brothers Cherry cough drops. The cough drops were behind the counter, and Aswegan turned her back on the customer to get a box. When she turned back to face the customer, he had an all-silver steak knife pointing at her. The man demanded money, and Aswegan gave him approximately thirty-five dollars from the cash register. At that point a female customer entered the store and the robber fled. However, he left a set of keys on the counter.

Upon receiving a report of the robbery, two police officers went to an apartment complex located near the store. An informant told one of the officers that a Johnson who lived in one of the apartment buildings had previously robbed the same store. The officers went to that apartment and knocked on the door. No one answered, even though the policemen had heard a muffled male voice. Other officers called the apartment, but the phone was not answered.

The police ultimately obtained a search warrant. They entered Johnson's apartment using one of the keys left at the store. Inside the apartment they found a box of Smith Brothers Cherry cough drops and an all-silver knife that was hidden under a mattress. The police also found a hooded sweatshirt and a gray tweed coat with raglan sleeves. These items matched Aswegan's description of the clothing worn by the robber.

Johnson was in the apartment when the police entered. He denied robbing the store. Instead, he stated that two other men--a Ware and a Heygood--had

robbed the store and returned to his apartment where they changed clothes before leaving for Texas.

Johnson was tried before a jury and was convicted of first-degree robbery. He appeals that conviction. Our review of this appeal is for correction of errors only, and not de novo. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982); Iowa R. App. P. 4.

I. Evidence of a Prior Robbery. Johnson first contends that the trial court erred in admitting into evidence testimony that Johnson had previously robbed the same convenience store on September 28, 1983. The trial court had overruled Johnson's motion in limine requesting exclusion of evidence relating to the prior robbery. The trial court held that the evidence was admissible for the limited purpose of showing identity, and that the possibility of prejudice did not outweigh the probative value of the evidence. Although the question presented is a very close one, we cannot say the court erred in admitting the evidence.

As a general rule, one crime cannot be used to prove another. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979); Iowa R. Evid. 404(b) ("Evidence of other crimes . . . is not admissible to prove the character of a person to show that he acted in conformity therewith."). The purpose of the rule is to exclude from the jury's consideration evidence which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question. Cott, 283 N.W.2d at 326. Rule of Evidence 404(b), however, does allow evidence of other crimes to be used for certain limited purposes, such as proving identity. Iowa R. Evid. 404(b). See also State v. Newman, 326 N.W.2d 796, 797 (Iowa 1982).

The identity of the robber on November 23, 1983, was a central issue in the trial, so admission of evidence of the prior crime to prove identity was permissible if other prerequisites to admissibility were met. There are two such prerequisites. First, the two crimes must have common circumstances that are "strikingly similar," "peculiar and distinctive," or of a "like or unique nature." State v. Walsh,

318 N.W.2d 184, 186 (Iowa 1982).¹ This prerequisite guarantees that the evidence of the prior crime will be relevant. See id. at 185. Second, the trial court must determine whether the probative value of the evidence is outweighed by its potential prejudice. See id.; Newman, 326 N.W.2d at 798; Cott, 283 N.W.2d at 329. We conclude that under the facts of this case, these two prerequisites were minimally satisfied.

The following similarities between the two robberies appear:

1. The same convenience store was robbed both times.
2. Both robberies occurred in the morning.
3. On both occasions the robber asked for goods stored behind the counter so that the clerk would have to turn her back.
4. The weapon used in both robberies was an all-silver steak knife.
5. Defendant was identified as the perpetrator of both robberies.

This list of similarities is not overly persuasive. Some of the factors mentioned could be present in the robbery of any convenience store, an occurrence which is not uncommon. Still, we conclude that use of an all-silver steak knife and the same ploy to distract the clerk in the same store are minimally sufficient to support a conclusion that both crimes were peculiar and distinctive. Were any of those three elements different, we would be inclined to rule that the prior crime was not sufficiently similar to the crime charged to be admissible.

In balancing the probative value of the challenged evidence against its potential prejudice, the trial court was charged with determining whether the "probative value is substantially outweighed" by the danger of prejudice. Iowa R. Evid. 403. This balancing by the trial court is a matter of discretion.

As may be expected, this balancing "calls for a large measure of individual judgment about the relative gravity

¹ The State must also show that the defendant committed both crimes. Newman, 326 N.W.2d at 798.

of imponderables." State v. Johnson, 224 N.W.2d 617, 621 (Iowa 1974) (quoting McCormick's Handbook of the Law of Evidence § 190, at 453). For this court to hold that the trial court abused its discretion, the complaining party must show that the trial court's action was "unreasonable in the light of attendant circumstances." See State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978) (authority omitted).

Cott, 283 N.W.2d at 329. Again, although the question on this issue is a very close one, we cannot say the trial court abused its discretion.

In reviewing the balancing process, we must remember that "evidence is not prejudicial simply because it is damaging." Walsh, 318 N.W.2d at 187. The type of prejudice to be considered in this situation was discussed in the Walsh and Cott cases. The court stated:

Dean Wigmore has summarized the types of prejudice the general exclusionary rule seeks to avoid as follows:

(1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) The tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses; . . . (3) The injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated

Cott, 283 N.W.2d at 329-30, quoted in Walsh, 318 N.W.2d at 187.

In discussing such prejudice, the Iowa Supreme Court has noted that the second and third factors mentioned can be eliminated when the defendant has already been convicted of the prior crime. Walsh, 318 N.W.2d at 187; Cott, 283 N.W.2d at 330. However, in this case Johnson had not been convicted of the previous robbery, nor had he been charged for that robbery. We therefore must examine all three factors of potential prejudice.

The third factor is offset to an extent by the fact that Johnson received advance notice—through amendment of the minutes of testimony—of the prosecution's intent to present evidence of the prior crime.² The first and second

² Although Johnson had advance notice of the prosecution's intent to present evidence of the crime, the fact remains that Johnson had not been convicted of

factors were offset to an extent by the limiting instruction giving to the jury. Because the circumstances of the crimes in question were not especially heinous, we cannot say that the trial court abused its discretion in concluding that a properly instructed jury would not be prejudiced by evidence of the prior robbery.

We find that all the prerequisites to use of evidence of prior crimes have been minimally met and affirm the trial court's ruling on Johnson's motion in limine.

II. Identification by Unnamed Individuals. Johnson's second contention of error relates to a statement made by a prosecution witness on redirect examination. The prosecution witness was officer Caughron. During redirect examination the prosecutor asked Caughron how many people—other than the witnesses to the two robberies—had viewed Johnson when he was a member of a physical lineup. Caughron answered that he would estimate five. In response to a further question, Caughron indicated that some of those five others had identified Johnson. At that point Johnson's attorney approached the bench to make an objection. The trial court then decided to have a hearing outside of the presence of the jury.

In the judge's chambers, Johnson's attorney stated his objection to Caughron's testimony of other identifications. He also stated that he had been surprised by the question and unable to interpose an objection before the question was answered.

Johnson's objection was that mentioning identification of Johnson at a lineup by unnamed persons other than the witnesses to the two robberies impermissibly

the crime. As such, the events in question could have become hotly contested during trial, potentially resulting in the jury being misled or the issues becoming confused. Those two results are grounds for excluding otherwise relevant evidence, and should have been considered by the trial court. See Iowa R. Evid. 403.

indicated to the jury that Johnson had been involved in other crimes. Johnson's counsel stated that admitting evidence of those other crimes was error.

The prosecutor argued that the identification by the unnamed individuals went to the issue of the thoroughness of the police investigation, an issue the prosecutor claimed had been opened up by Johnson's cross-exam. The trial court ruled that Johnson had opened the door to the testimony. Upon returning before the jury, the prosecutor had Caughron testify that because of the identification of Johnson made by the unnamed individuals, the police discontinued the investigation of the two men Johnson claimed committed the robbery.

The trial was then recessed and Johnson's attorney asked the court to declare a mistrial because evidence of other crimes had been admitted without any showing of the foundational prerequisites. The trial court overruled the motion, reasoning that Johnson had opened the door to the evidence.

Although the heading in Johnson's brief claims the trial court erred in failing to grant a mistrial on this matter, we note that the brief's substance is directed to the correctness of the trial court's evidentiary ruling. Because error was preserved on that ruling, we consider Johnson's argument to be that the trial court erred in admitting Caughron's challenged testimony. We believe Johnson's argument is correct. The trial court's ruling was erroneous and must be reversed.

It is true that Johnson, on cross-examination, challenged the thoroughness of the police investigation of the charge in this case. That challenge may have been sufficient to open the door to rebuttal on the issue of the reasonableness of the police investigation. See State v. Munro, 295 N.W.2d 437, 445 (Iowa 1980) (rebuttal permissible when previous examination "creates an inference as to the existence of a fact not directly testified to . . ."). Opening the door to rebuttal, however, does not suspend all rules of evidence. Evidence that is otherwise inadmissible can be admitted on rebuttal only when the other party first introduced inadmissible evidence. See State v. Pepples, 250 N.W.2d 390, 394 (Iowa

1977) (quoting Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 864 (Iowa 1974)).

The evidence of identification of Johnson by individuals who were not witness to the two robberies is clearly evidence of other crimes or bad acts. The foundational prerequisites for admission of that evidence, see Walsh, 318 N.W.2d at 185, were not met. Hence, that evidence is inadmissible. Because Johnson did not introduce inadmissible evidence on cross-examination, the trial court erred in admitting inadmissible evidence on rebuttal. See State v. Pepples, 250 N.W.2d at 394. See also State v. Tolson, 248 Iowa 733, 736-39, 82 N.W.2d 105, 107-08 (1957) (prejudicial error to admit rebuttal testimony about prior bad acts unconnected to charge at trial).

We cannot say that the trial court's error was harmless. The evidence in question was inadmissible under operation of rule of evidence 404(b) because it is presumed to be prejudicial. We must therefore reverse and remand for new trial. Tolson, 248 Iowa at 738-39, 82 N.W.2d at 108.

III. Motion for Mistrial. Johnson finally argues that the trial court erred denying another motion for a mistrial. He claims he was unfairly prejudiced by testimony that the robber in the first robbery barricaded the store clerk in the bathroom. He reasons that such testimony was extremely prejudicial because it suggested to the jury that he committed the additional crime of kidnapping or false imprisonment. The State argues that Johnson failed to preserve error on this issue.

Because of our disposition in division II of this opinion, we need not decide the merit of this issue or whether error was preserved. Nonetheless, because this issue is likely to arise on retrial, we do address it here. We do not believe this evidence is so prejudicial that it is inadmissible. On the other hand, we believe the evidence is irrelevant and should be excluded upon a proper objection. The

evidence is irrelevant because it does not in any way show that the prior robbery was one involving such "strikingly similar" circumstances that it becomes relevant to the issue of identity. See Walsh, 318 N.W.2d at 186.

REVERSED AND REMANDED.