IN THE COURT OF APPEALS OF IOWA

No. 9-785 / 98-0311
Filed March 15, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACK BALL,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Arlen J. Van Zee, District Associate Judge.

On appeal from his conviction for driving while barred (habitual offender) in violation of Iowa Code section 321.560 (1997), defendant contends the trial court erred in allowing a booking sheet and a mugshot of him into evidence. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Jeffrey McGraw, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, J.J.

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MILLER, J.

Defendant Jack Ball appeals his conviction following jury trial of driving while barred. He contends the court abused its discretion in allowing certain evidence to be admitted during the State's rebuttal case. We affirm.

I. Background facts

On July 26, 1997, Clinton Police Officer Ottens, while stopped at an intersection assisting another motorist, observed a blue-colored Nova make a left turn. Officer Ottens testified that he observed Ball driving the vehicle, having recognized him from an incident within the past month, and having had contact with him some four or five times within the two months preceding the incident. He also recognized Ball's fiancée, the owner of the Nova, as the passenger, as he had had contact with her within the month before the incident. Because Officer Ottens was assisting another motorist at the time, he was unable to pursue and pull the vehicle over. Officer Ottens did call the police station to record the time and location of the observation because he believed Ball was barred from driving. Approximately an hour later Officer Ottens had been able to confirm that Ball's license was barred, and went to Ball's house and arrested him.

At trial the only issue was the identity of the driver of the blue Chevy Nova. Officer Ottens testified that he recognized Ball as the driver of the vehicle. The defendant and his fiancée testified that Ball had shaved his beard and mustache approximately one month prior to the incident, but that on the date of arrest, he had a full beard. Both Ball and his fiancée testified that the vehicle was for sale on the date Officer Ottens made his observation, and that the driver was an unknown male prospective buyer with Ball's fiancée as a passenger. Other

defense witness testified that Ball had always worn a beard for as long as they had known him, several years for some of them.

The State offered two exhibits into evidence on rebuttal. They are the subject of this appeal. The first exhibit was a booking photograph of Ball taken about two and one-half months prior to his arrest in the present case, State's exhibit 3. It was taken April 16, 1997. The photograph depicts Ball with a mustache, but no beard. Ball objected to it as irrelevant and because its prejudicial effect substantially outweighed its probative value. The second exhibit offered by the State was the booking sheet made upon his arrest in this case, State's exhibit 4. The booking sheet indicated that either Ball was clean-shaven on the date of arrest in this case, or there was no change from the photograph taken about two and one-half months earlier. Ball's objection to it is discussed at III below. Both exhibits were admitted. The jury returned a verdict of guilty, and Ball was sentenced to a county jail term of 120 days. Ball appeals the trial court's rulings admitting the booking photograph and the booking sheet.

II. The Booking Photograph

Ordinarily, we grant the district court wide latitude rearding admissibility of evidence and will disturb the court's ruling only upon finding an abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). To show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998) (citation omitted).

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

or less probable than it would be without the evidence." Iowa R. Evid. 401. The test is "whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence." *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 406[07], at 401-48 (1986)).

The central issue in the trial was the identity of the driver of the Chevy Nova when Officer Ottens observed it on July 26, 1997. A fighting issue was whether Ball had a beard on July 26, 1997. In its case in chief, the State presented the testimony of Officer Ottens, who testified he observed Ball driving the Nova on the date in question. Officer Ottens further testified when he saw Ball, Ball was not wearing a full beard. Ball and other defense witnesses testified that Ball had a beard on that date. The earlier booking photograph showed Ball with only a mustache, and the booking sheet indicated either Ball was clean shaven on the date of arrest or there was no change from the booking photograph taken about two and one-half months earlier.

The booking photograph showed the testimony of defense witnesses, that Ball had always worn a beard, was mistaken or false. It also showed the testimony of Ball and his fiancée, that Ball had always had a beard except for a brief period about one month before July 26, 1997, was mistaken or false. It thus tended to rebut such testimony and by doing so tended to corroborate Officer Ottens' testimony that Ball had no beard on July 26, 1997 and was the driver of the Chevy Nova on that date. It also tended to corroborate the July 26, 1997 booking sheet's indication that Ball had no beard on that date. It was thus relevant because it tended to make it more probable that Ball had no beard on

July 26, 1997, a fact of consequence to the identification of the driver and the determination of this case.

Ball next contends that the probative value of the booking photograph was substantially outweighed by its prejudicial effect. Even relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice *See* Iowa R. Evid. 403. In considering the presence of prejudice, our focus is on unfair prejudice. *State v. Delaney*, 526 N.W.2d 170, 175 (Iowa App. 1994). Relevant evidence is inherently prejudicial in the sense of being detrimental to the opposing party's case. *Id.* We look beyond this type of inherent prejudice to whether the evidence has an undue tendency to suggest a decision on an improper basis, appeals to the sympathies of the jury, or otherwise might cause the jury to base their decision on something other than the relevant legal propositions. *Id.* The complaining party has the burden of establishing that the trial court abused its discretion in the balancing process under rule 403. *State v. Cott*, 283 N.W.2d 324, 329 (Iowa 1979).

In *State v. Brown*, our Supreme Court stated "unfair prejudice" as used in rule 403 is "an undue tendency to sugest decisions by the fact finder based on an improper basis, often an emotional one," and defined "unfairly prejudicial evidence" as evidence that:

> appeals to the jury's sympathies, arouse its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

State v. Brown, 569 N.W.2d 113, 117 (Iowa 1997) (citation omitted).

Ball objected at trial, and asserts on appeal, that the booking photograph carried the danger of unfair prejudice because it conveyed to the jury that he had previously been arrested for another offense. For the following reasons we disagree and conclude the trial court committed no reversible error in admitting the booking sheet.

The purpose for the booking sheet was clear. It directly rebutted certain testimony of Ball and his fiancée and other defense witnesses, some who stated and others of who implied that the only time Ball had been without a beard in the preceding years was a brief period beginning about one month before July 26, 1997. It thus indirectly increased the likelihood that Officer Otten's testimony that Ball had no beard on July 26, 1997 was correct. It did not have an undue tendency to suggest a decision on an improper basis because it was directly relevant to a fighting issue, whether Ball had a beard on July 26, 1997, and was thus also relevant to the central issue in the trial, the identity of the person driving Ball's fiancée's auto on July 26, 1997.

Further, substantially the same evidence contained in the booking sheet is elsewhere in the record without objection. Officer Ottens testified without objection that he had had four to five contacts with Ball in the two months preceding the July 26, 1997 arrest. Defense counsel asked Ottens if he had been called to Ball's address regarding a domestic dispute. A previous arrest would be consistent with this testimony and not go substantially beyond it. Prejudice must be shown before error will require reversal. *State v. Cole,* 295 N.W.2d 29, 40 (Iowa 1980). Assuming, without so deciding, that admission of

the booking sheet was in some manner erroneous, its admission was not prejudicial because substantially the same evidence is elsewhere in the record without objection. *See State v. Wells*, 437 N.W.2d 575, 578 (Iowa 1989).

III. The Booking Sheet.

At trial there was a luncheon recess following presentation of the defendant's evidence. The State apparently informed defense counsel that it intended to present rebuttal testimony and provided copies of State's Exhibits 3 and 4, the April 16, 1997 booking photograph, and the July 26, 1997 booking sheet respectively. Following lunch recess counsel and the court discussed the proposed rebuttal testimony and exhibits, and defense counsel stated an intention to object to the two exhibits. At one point during the discussion the trial court expressed the following opinion: "It appears to me that . . . State's Exhibit 4 . . . could be introduced by the State." Following further discussion the court stated, "I conclude the State *can go ahead with the offer of* State's Exhibits 3 and 4." (Emphasis added). The court made no final ruling at that time on the proposed rebuttal testimony or either of the two exhibits.

When the booking sheet, State's Exhibit 4, was offered during the State's rebuttal evidence, Ball objected that:

> Your Honor, I'm going to interpose an objection. At this point there is no foundation that this witness is familiar with the process that's used by the sheriff's deputies for actually booking in a particular jail inmate or that she's familiar with the categories or classifications that those deputies use or the notations or abbreviations that the deputies would use or particular inmates. Therefore, I don't think she's qualified to comment on any information that might be contained in that jail sheet.

The trial court overruled the objection and admitted the exhibit.

Ball argues on appeal that the booking sheet lacked relevance, and that its "probative value [did not] outweigh the prejudice." He also claims that at trial he objected to the booking sheet on the basis of hearsay. He may thus arguably be seen as urging on appeal that the exhibit was hearsay.

A review of the record shows that at trial Ball never asserted lack of relevance or danger of unfair prejudice as grounds for objecting to the booking sheet. (He did assert those grounds as to the booking photograph, State's Exhibit 3.) Further, although Ball's attorney, the prosecuting attorney and the court discussed hearsay as a ground for objecting to the booking sheet, at the time of such discussion the court apparently was not asked to make a final ruling, and did not do so. When the booking sheet was offered in evidence Ball made the objection quoted above. That objection cannot reasonably be seen as raising any one or more of the grounds now urged on appeal, lack of relevance, the danger of unfair prejudice exceeding probative value, or hearsay.

A defendant may not rest an objection on one ground at trial, and rely on another for reversal on appeal. *State v. Sanborn*, 564 N.W.2d 813, 815 (Iowa 1997). Fairness and considerations of judicial economy dictate that we not consider a contention for the first time on appeal. *Id.*

AFFIRMED.