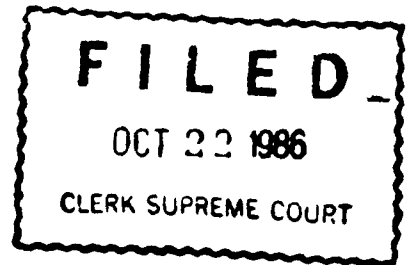


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed October 22, 1986

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vs.

)

THOMAS CLINTON DORSEY,

)

6-288
85-1299

Defendant-Appellant.

)

Appeal from the Iowa District Court for Warren County (9048) - John P. Crouch, District Associate Judge.

Defendant appeals his conviction, following a jury trial, for theft in the fourth degree. **REVERSED AND REMANDED.**

Richard B. Clogg of Elgin, Hoyman, Clogg & Patin, Indianola, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann DiDonato, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Sackett, JJ., but decided by Oxberger, C.J., Donielson, Snell, Schlegel, and Sackett, JJ. Hayden, J., takes no part.

SCHLEGEL, J.

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The defendant appeals his conviction, following a jury trial, for theft in the fourth degree. Defendant-appellant Thomas Dorsey was charged jointly with codefendant Laverne Hackney. We reverse Dorsey's conviction and remand the case for a new trial.

Defendants Dorsey and Hackney were charged with the theft on May 8, 1985, of sixty rings of bologna from the Fareway grocery store in Indianola. Hackney had been convicted in 1970 for larceny of a cow or domestic animal. Dorsey requested severance of the defendants. After a hearing on the motion in July 1985, the request was denied. Dorsey renewed his request for severance before trial began and in August 1985 the motion was again denied.

During the trial Hackney was questioned about his prior felony conviction:

Q. Mr. Hackney, isn't it true that you were once convicted of a felony in Lucas County, Iowa?

A. Yes, sir.

Q. That felony was for larceny?

A. Cattle rustling.

Q. You were convicted of that felony in '70 in Lucas County?

A. Yes, sir.

Hackney and Dorsey were convicted of fourth degree theft. Dorsey's request for a new trial, based on the alleged prejudicial nature of Hackney's prior conviction and on the denial of severance, was denied.

On appeal, Dorsey contends the trial court erred because it did not make an adequate determination on the record that the probative value of the prior conviction of Hackney outweighed its prejudicial effect. Dorsey further contends that the trial court erred by refusing to sever his trial from Hackney's trial.

Iowa Rule of Evidence 609, subsections (a) and (b), provide:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime involving dishonesty or false statement shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime constituted a felony, aggravated misdemeanor, or other crime punishable by imprisonment in excess of one year pursuant to the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Hackney's prior crime was a felony punishable by imprisonment in excess of one year; more than ten years had elapsed since the date of the conviction or release; advance written notice was given to Dorsey and Hackney by the State of its intent to use the prior conviction. Dorsey contends that since the trial court did not explicitly state what the specific facts and circumstances were which supported its ruling on the admissibility of the prior conviction, the court failed to exercise the required discretion in such matters.

The determination of the admissibility of a witness's prior crime for the purpose of impeachment lies within the discretion of the trial court. State v. Zaehring, 325 N.W.2d 754, 755-56 (Iowa 1982). The evidence of a witness's prior conviction is admissible if (1) the felony involved dishonesty or false statement, and (2) the judge determines that any danger of unfair prejudice does not substantially outweigh the probative value of the prior conviction, taking

into account such factors as (a) the nature of the conviction, (b) its bearing on veracity, (c) its age, and (d) its propensity to improperly influence the minds of the jurors. State v. Latham, 366 N.W.2d 181, 184 (Iowa 1985).

If there were no support in the record that the court considered the requirements of Rule 609(b), we would be compelled to agree with Dorsey that the court abused its discretion in admitting the prior conviction. It is preferable, of course, if the court would explicitly state the reasons for its findings on the admissibility of such evidence. However, we believe that when there is sufficient support in the record for the trial court's decision and where a defendant is given the opportunity to respond at a hearing to the proposed use of the prior conviction, the trial court may make a ruling as to admissibility without explicitly stating the specific facts and circumstances on which the ruling is based. See, e.g., United States v. Key, 717 F.2d 1206, 1209 (8th Cir. 1983). The court's failure to explicitly state that it is balancing the competing interests does not amount to an abuse of discretion.

Dorsey argued at his motion to sever at the July 1985 hearing and his renewal of the motion at the hearing before trial that Hackney's prior conviction would be highly prejudicial to Dorsey. The State argued at both of these hearings that Dorsey would not be prejudiced by the introduction of Hackney's overage crime. The State contended that the prior conviction would be used to impeach Hackney's credibility, and that the State would clearly bring out at trial the time of the prior conviction. After hearing arguments on these issues from defendants' respective counsel, the court made its ruling. The court made extensive remarks on the propensity, or lack thereof, of the prior conviction to influence the minds of the jurors. Given the arguments made, the available record, and the court's subsequent ruling, we find that the court did not abuse its discre-

tion in not making explicit its conclusion that the probative effect of the evidence of the prior conviction would outweigh its prejudicial value.

Dorsey also argues that the trial court erred in overruling his motion for a separate trial from Hackney. Iowa Rule of Criminal Procedure 6(4) provides:

a. **Multiple defendants.** Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or the same transaction or occurrence out of which the offense or offenses arose. Such defendants may be charged in one or more counts together or separately, and all the defendants need not be charged in each count.

b. **Prosecution and judgment.** When an indictment or information jointly charges two or more defendants, those defendants may be tried jointly if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties. Otherwise, defendants shall be tried separately. When jointly tried, defendants shall be adjudged separately on each count.

This rule vests the decision to sever in the discretion of the trial court. State v. Belieu, 288 N.W.2d 895, 900 (Iowa 1980). Dorsey claims that the trial court abused its discretion in denying his motion to sever. The State argues that Dorsey was not unfairly prejudiced by the introduction of Hackney's prior conviction.

We are not convinced by the authority cited by the State that where prior convictions committed long ago by one defendant are admissible against that defendant, that factor alone is sufficient to avoid any prejudice arising from a joint trial. State v. Streets, 330 N.W.2d 3 (Iowa 1983), cited by the State, does not stand for that proposition. Rather, Streets found that when codefendant's testimony about the defendant was not about other crimes but was a recitation of conversations with the defendant and other codefendants, no prejudice sufficient to constitute denial of a fair trial was shown. Streets, 330 N.W.2d at 5. The State contends that since the defenses of Hackney and Dorsey

were not irreconcilable and mutually exclusive, the defendants should not be severed. The authority cited for this proposition, State v. Snodgrass, 346 N.W.2d 472, 475 (Iowa 1984), does not concern itself with the circumstance of a long ago prior conviction of a codefendant. Rather, Snodgrass, in its refusal to find that codefendants should have been severed, said that the mere presence of conflict, antagonism or hostility among the defendants or the desire to exculpate oneself by inculcating another are insufficient grounds to require separate trials. Id. at 475. The federal cases cited by the State which construe and apply the federal rule similar to Iowa's rule governing joint trials of codefendants are no more persuasive since they do not directly deal with the issue at hand. United States v. Helmelt, 769 F.2d 1306, 1322 (8th Cir. 1985) (defendant is not entitled to severance simply because evidence of the crime may be admissible as to one defendant but not as to the other); United States v. Reda, 765 F.2d 715, 722 (8th Cir. 1985) (different theories of the case not enough to require severance); United States v. Davis, 597 F.2d 648, 650 (8th Cir. 1979) (repeated evidence of wrongdoing of codefendant was not prejudicial).

It is particularly noteworthy that in the case State v. Sauls, 356 N.W.2d 516, 518 (Iowa 1984), which the State cites for the proposition that evidence is not deemed prejudicial requiring a severance of codefendants merely because it is "potent and damning," the court explicitly states that " 'prejudice' arises from unfairness, for example, impeachment by proof of an offense of long ago by the defendant. See Iowa R. Ev. 609(b)."

We also do not agree with Dorsey's sole reliance on State v. Belieu, 288 N.W.2d 895 (Iowa 1980), for the proposition that Dorsey was prejudiced by the admission of Hackney's prior crime. Belieu involved the admission of testimony of a codefendant about other crimes involving the defendant which were inadmissible against the defendant. The State in Belieu did not offer any evidence

of prior convictions of the defendants. The supreme court based its reversal of the trial court on the prejudicial impact on the defendant of the testimony of a codefendant as to the defendant's prior criminal activity. Id. at 901.

When a trial court denies severance in the exercise of its discretion, the ruling will be reversed on appeal only if the defendant demonstrates an abuse of discretion. Belieu, 288 N.W.2d at 900. To establish an abuse of discretion, the defendant must show sufficient prejudice to constitute denial of a fair trial. Id.

Hackney's prior conviction should have no probative value whatsoever in an assessment of Dorsey's guilt. The trial court weighed the probative value versus the prejudicial impact of the overage conviction only against Hackney. The trial court then determined that the probative value of the evidence did in fact outweigh its prejudicial value as against Hackney. The court acknowledged that a prior conviction "is prejudicial by operation, in effect, by operation of law it is a prejudicial matter."

It must be remembered, however, that Dorsey and Hackney did not dispute each other's stories. The State admits that they "presented consistent stories as to what happened." Therefore, the overage felony conviction must have been probative in determining whether the duo, in concert, committed the bologna theft. It is a close question whether the evidence was more probative than prejudicial as to Hackney. See, e.g., State v. Thornburgh, 220 N.W.2d 579, 584 (Iowa 1974). Yet, even granting the probative value of the overage conviction as to Hackney, no probative overlap should have been permitted as to Dorsey.

The policy behind disfavoring overage convictions is well established. As McCormick observes:

The sharpest and most prejudicial impact of the practice of impeachment by conviction . . . is upon one particular type of witness, namely, the accused in a criminal case

who elects to take the stand. If the accused is forced to admit that he has a "record" of past convictions, particularly if the convictions are for crimes similar to the one on trial, there is an obvious danger that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to the legitimate bearing of the past convictions on credibility.

McCormick on Evidence, § 43 (1972). Even as to the person who committed the overage crime, convictions over ten years old should be admitted very rarely and only in exceptional circumstances. United States v. Acosta, 763 F.2d 671, 693 (5th Cir. 1985). Rule 609(b) establishes what is in effect a rebuttable presumption against the admissibility of prior convictions more than ten years old. See United States v. Reeves, 730 F.2d 1189, 1196 (8th Cir. 1984). Given the strong presumption against admissibility based on the highly prejudicial nature of the prior conviction as to Hackney, we can only assume that codefendant Dorsey suffered at least some prejudice. To allow even some prejudice against Dorsey as a part of the team when there has not been, and in fact could not have been, a prior determination of the overage conviction's probative value as against Dorsey, is to violate the mandate of 609(b). Such overage crime should never be used in a probative capacity against a defendant who has not committed a prior felony.

The trial court abused its discretion by not allowing a severance of the trials of Dorsey and Hackney since Dorsey was sufficiently prejudiced by the admission of Hackney's overage conviction. The jury should not have been expected to undertake the task of compartmentalizing the prior conviction as applying to Hackney but not to Dorsey. This is particularly true when the defendants' stories are consistent and neither defendant is testifying against the other. A jury's determination of the guilt of one of the defendants in these

circumstances is tantamount to the determination of guilt of the other. We do not think that the record presented such overwhelming evidence of guilt in this case to find such error harmless, nor was the evidence in question cumulative. See State v. Freeman, 297 N.W. 363, 367 (Iowa 1980). We reverse the trial court and remand the case for a new trial for Dorsey.

REVERSED AND REMANDED.

Oxberger, C.J., and Snell, J., concur; Donielson, J., and Sackett, J., dissent.

I respectfully dissent. I believe that the trial court was correct in denying defendant's motion to sever.

The general rule in Iowa is that defendants who are indicted together are tried together. State v. Sauls, 356 N.W.2d 516, 517 (Iowa 1984). Concerning conspiracy cases, persons charged in a conspiracy together are generally tried together as well, particularly where the government's proof for all the defendants is based upon the same evidence and acts. United States v. Reda, 765 F.2d 715, 722 (8th Cir. 1985). Whether or not a trial court grants a motion to sever is within the sound discretion of the trial court, United States v. Brown, 605 F.2d 389, 393 (8th Cir. 1979), cert. denied 444 U.S. 972, 100 S. Ct. 466, 62 L. Ed. 2d 387, and in order to establish an abuse of discretion by the trial court in denying a motion to sever, the defendant must show great prejudice to constitute denial of a fair trial. United States v. Nabors, 762 F.2d 642, 651 (8th Cir. 1985); State v. Snodgrass, 346 N.W.2d 472, 475 (Iowa 1984); State v. Belieu, 288 N.W.2d 895, 900 (Iowa 1980).

In United States v. Robinson, 774 F.2d 261 (8th Cir. 1985), the Eighth Circuit discussed the issue of evidence of past bad acts or "other crimes" that have been introduced against a codefendant. The Robinson court stated that evidence which is admitted as to one codefendant but not the other does not alone require severance. 774 F.2d at 267. The court also held that "evidence of prior criminal offenses of one defendant does not prejudice his codefendants to the level requiring severance." Id. Nor is a defendant entitled to a severance merely because the evidence against a codefendant is more damaging or potent. Id.; State v. Sauls, 356 N.W.2d 516, 518 (Iowa 1984). Under such circumstances where evidence of bad acts or prior convictions has been introduced against one codefendant, it has been held that a jury can reasonably be expected to

compartmentalize the evidence of the codefendant against whom the evidence was introduced and could independently determine that codefendant's guilt or innocence. Reda, 765 F.2d at 722-23. Severance only becomes necessary in such a case where proof is such that a jury could not be expected to compartmentalize the evidence as it relates to separate defendants. Nabors, 762 F.2d at 651; United States v. Jackson, 549 F.2d 517, 523 (8th Cir.) cert. denied, 430 U.S. 985, 97 S. Ct. 1682, 52 L. Ed. 2d 379 (1977).

In the present case, the defendant has alleged no significant prejudice other than the fact that the overage conviction offered against Hackney may have influenced the jury in finding him guilty. The trial court found, and apparently the majority agreed, that while the issue of the admissibility of Hackney's overage conviction was close, the probative value of the overage conviction outweighed its prejudicial effect. The defendant makes no argument that the jury could not have compartmentalized the evidence of the overage conviction against Hackney. Nor does the defendant object to the instructions handed down to the jury by the trial court. All that defendant claims is in essence that he would have had a greater chance of acquittal had he not been tried jointly with Hackney. The State's proof in this case was not so complicated or confusing that the jury could not consider the guilt of the two defendants independently. Therefore, severance requires more than merely showing that defendant would have had a better chance of acquittal at a separate trial. United States v. Krevsky, 741 F.2d 1090, 1094 (8th Cir. 1984). For these reasons, I would affirm the defendant's conviction.

Sackett, J., joins this dissent.