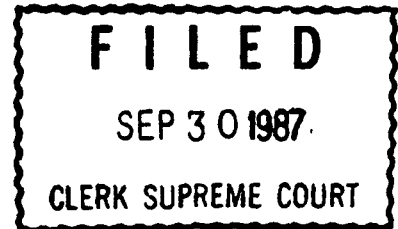


IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
vs.)
)
RICKI L. BRADLEY,)
)
Defendant-Appellant.)



Filed September 30, 1987

7-238
86-1425

226

Appeal from the Iowa District Court for Dubuque County (No. 16105) -
R. J. Curnan, Judge. Alan L. Pearson, Judge (sentencing).

Defendant appeals from his conviction of second-degree burglary.
AFFIRMED.

Charles L. Harrington, Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney
General; Fred H. McCaw, Dubuque County Attorney, and Timothy J. Gallagher,
Assistant Dubuque County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.**227**

After a jury trial, the defendant, Ricki L. Bradley, was convicted of second-degree burglary. See Iowa Code §§713.1, .5 (1985). Defendant argues on appeal that the trial court erred in overruling his objection to allegedly irrelevant evidence of defendant's bad character and in denying his motions for mistrial. Finding no error, we affirm.

On or about Saturday, March 8, 1986, Karen Fetgatter's apartment was burglarized. On Monday, March 10, Sue Schumacher reported to the police that her boyfriend, the defendant, had broken into Fetgatter's apartment. Based on this information, the police obtained a warrant to search the house shared by Schumacher and defendant. Upon execution of the warrant, the officers recovered several of the items taken from Fetgatter's apartment. Defendant was accused of the crime.

At trial, the State's key witnesses were Fetgatter, Schumacher, and Tressa Hoag. Fetgatter testified that she was a friend of defendant and that she knew and disliked his girlfriend, Sue Schumacher. Schumacher testified that defendant admitted to her he burglarized Fetgatter's apartment. She also testified that her sister had had an argument with Fetgatter the Friday before the burglary. Schumacher stated she did not get along with Fetgatter. Schumacher's friend, Tressa Hoag, lived in the apartment directly across the hall from Fetgatter. Hoag also testified that defendant admitted to her he burglarized Fetgatter's apartment.

Defendant's posture at trial, as reflected by the jury instructions, was (a) the defendant did not commit the crime, but (b) if the jury believes defendant did commit the crime, he will argue that there is no credible evidence other than the testimony of Schumacher and Hoag, whom the jury should find are

accomplices. A defendant cannot be convicted upon the testimony of accomplices alone. 2 Iowa Uniform Jury Instructions 201 (1984). The case was submitted to the jury on these theories, and the jury found defendant guilty.

L

Defendant's first assignment of error concerns a reference made to defendant's "silencers" by Schumacher on direct examination. Schumacher had identified a State exhibit as a blow dryer defendant brought from Fetgatter's apartment.

Q. What did he use this for? A. I think he was drying the silencers with [it].

At this point, defendant made a motion for mistrial outside the presence of the jury on grounds of substantial prejudice. The trial court denied defendant's motion for mistrial and offered to admonish the jury not to consider the question and answer. Defendant declined the court's offer to admonish the jury, fearing this would draw more attention to the remark. The court granted defendant's subsequent motion in limine and ordered the State "not to talk of any weapons, silencers or fruits of any other crime" not found in connection with the burglary of Fetgatter's apartment.

The trial court has considerable discretion in deciding whether or not a mistrial is warranted. State v. Burrell, 255 N.W.2d 119, 122 (Iowa 1977). Defendant, in order to predicate a reversal of his conviction on the improper testimony, must demonstrate that the evidence was of a type more likely than not to implant prejudice of an indelible nature upon the minds of the jurors. State v. Mayberry, No. 85-1879, slip op. at 20 (Iowa July 22, 1987).

Ordinarily, the striking of improper testimony cures any error. State v. Peterson, 189 N.W.2d 891, 896 (Iowa 1971). See State v. Collins, 236 N.W.2d 376, 378 (Iowa 1975) (State witness volunteered comment regarding defendant's

unrelated escape charge); State v. Johnson, 183 N.W.2d 194, 198 (Iowa 1971) (State witness referred to previous unrelated thefts).

Schumacher's brief and casual reference to "silencers" was not made in the context of a discussion of weapons or illegal contraband. Schumacher's testimony regarding defendant's silencers was not so highly prejudicial that no admonition could eradicate it from the minds of the jurors. See Mayberry, No. 85-1879, slip op. at 19. In light of the fact the trial court offered to admonish the jury, we find the trial court did not abuse its discretion in overruling defendant's motion for mistrial.

II.

Defendant's other assignment of error arises from the trial court's ruling on the admissibility of evidence of his violent character. On cross-examination of Sue Schumacher, defendant posed questions that suggested Schumacher and Hoag were accomplices in or had committed the burglary.

Schumacher was in Hoag's apartment on Sunday, March 9, when the police were investigating the burglary across the hall.

Q. Why didn't you just walk across the hall and say, "Hey, Rick Bradley did this?" A. I— no, I was too afraid of him.

On redirect, the State attempted to rehabilitate Schumacher.

Q. You said you are afraid of the defendant? A. Yes.

Q. Why are you afraid of him?

MR. FITZSIMMONS: I am going to object to that, Your Honor, as being irrelevant.

THE COURT: Overruled. You may answer.

A. He gets very violent and he has a very short temper. He has held guns to my head, has beaten me up, has choked me, put holes in my apartment, threatened to burn my parents' house down. . . . I am very afraid of him.

Defendant later moved for mistrial on the basis of this statement admitted by the court.

Ordinarily, evidence of a defendant's bad character is not admissible. See Iowa R. Evid. 404. A defendant may open the door to such testimony, however, by attempting to impeach or discredit a State witness on cross-examination. See, e.g., United States v. Draiman, 784 F.2d 248, 255 (7th Cir. 1986); Hawkins v. United States, 417 F.2d 1271, 1272 (5th Cir. 1969); Beck v. United States, 317 F.2d 865, 869-70 (5th Cir. 1963). This creates a delicate situation for the trial court's exercise of discretion so as not to permit undue prejudice to the defendant merely to correct some possible jury impression that may be of no lasting consequence. Draiman, 784 F.2d at 255.

Defendant attempted to impeach Schumacher's testimony on cross-examination with questions on her delay in reporting the crime. He thus raised the issue of her credibility and seemingly improper conduct. Whether Schumacher was an accomplice to defendant or committed the crime herself is an issue that goes to the heart of the State's case. Under these circumstances, we find the trial court did not abuse its discretion in admitting Schumacher's explanation why she did not report the crime to the police sooner.

We note that both Schumacher and Hoag stated they were afraid of defendant during other parts of their testimony. Defendant did not object to these remarks, nor did he request a cautionary instruction to limit the disputed testimony to the credibility of the witness and not the character of the defendant.

We hold the trial court did not err in overruling defendant's objection and subsequent motion for mistrial.

AFFIRMED.