

FILED

DEC 18 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed December 18, 1985

vs.

)

485

DWIGHT T. WHARTON,

)

5-505
84-1661

Defendant-Appellant.

)

Appeal from the Iowa District Court for Dubuque County - Joseph C. Keefe and R. J. Curnan, Judges.

The defendant was tried in a single trial for two counts of robbery in the first degree. A jury found him guilty of both counts and the trial court later imposed consecutive sentences. Defendant has appealed from his convictions and sentences. **AFFIRMED.**

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

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Ralph R. Potter, Assistant Dubuque County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

The defendant was tried in a single trial for two counts of robbery in the first degree. A jury found him guilty of both counts, and the trial court later imposed consecutive sentences.

The defendant was accused of committing two robberies in two franchised restaurants located on the same road which occurred on the same night, during a three-hour span. He was charged with two counts of robbery in the first degree, and was tried on both counts at a single trial. A jury found him guilty of both counts; the court later imposed two consecutive prison terms, each for up to 25 years. The defendant has appealed from his convictions and sentences.

The defendant contends the trial court erred by overruling his motion to sever the two robbery counts for separate trials. He asserts that joint trial was not authorized under Iowa Rule of Criminal Procedure 6(1) because the two charges did not arise "from the same transaction or occurrence or from . . . transactions or occurrences constituting parts of a common scheme or plan." He also asserts that even if joint trial would have been justified under rule 6(1), there was nonetheless good cause for separate trials in this case because the State had much stronger evidence against him for one robbery than for the other.

The defendant also claims the trial court abused its sentencing discretion by basing its consecutive sentences in part on the ground the State had not tried to invoke the mandatory minimum sentence for use of a firearm. He asserts this was an important factor to consider in choosing a sentence. He acknowledges that the sentencing court considered other, arguably proper factors in choosing consecutive sentences, but he asserts that the presence of an improper factor nonetheless requires resentencing.

I.

Defendant submits the trial court erred by not severing the two robbery counts pursuant to rule 6(1) and relies heavily upon State v. Bair, 362 N.W.2d 509 (Iowa 1985), as authority for his position.

Bair involved the application of only the same transaction prong of rule 6(1). The court stated that this "test focuses on three ways on how crimes are linked together: time, place, and the circumstances." Id. at 512. Applying the facts in Bair to this test, the court noted:

The two robberies charged here were somewhat closely linked in time. They occurred within about an hour and one-half of one another. . . .

The two robberies are relatively less closely linked in terms of their place. One occurred next to a stalled automobile; the other occurred within easy walking distance from there. The linkage of place militates somewhat against jointly trying the two counts.

The next question is whether the events of the evening, common to both crimes, were a mere background to separate robberies or are so closely related to both offenses that it could be said the two offenses were conditioned upon or determined by each other. These events, the movement from bar to bar, the procurement of the automobile, and the trip to Fort Madison, are interrelated and might qualify as a "common scheme or plan" under rule 6(1) as later amended. But it is another thing to say these events rendered the two crimes a "same transaction or occurrence" under the applicable rule.

The McCallister robbery involved the two defendants roughing up a lone man near a car and getting his money. There was no allegation any type of weapon was used. The tavern incident involved one man, supposedly Bair, holding up a bartender. The bartender testified the robber appeared to have a gun. There is some evidence that Kruse was nearby at the time of the robbery but he was not inside the tavern at the time. Except for the fact the two robberies occurred in the same evening, by the same men, there is no suggestion of any additional relationship between the two crimes. There is nothing to indicate that they were conditioned upon or determined by one another.

Id.

We believe this situation is distinguishable from Bair when reviewing the circumstances element of the test. Bair involved a robbery of a lone man on a street without a weapon and a bartender held up by a gun. In this case, both robberies involved restaurants on the same road. Both robberies occurred after the restaurants had closed. Both robberies involved a confrontation with the restaurant's employees who were instructed to lie on the floor and then to enter a cooler where they were restrained.

A weapon was used in each robbery. While these salient differences between Bair and this factual scenario could have resulted in finding that the same transaction prong was satisfied in this case, we, nevertheless, eschew deciding this case on the same transaction grounds. Rather, we feel our decision is based on more solid grounds if we apply the common scheme prong. Even with the facts in Bair, the majority intimated the common scheme or plan test might be satisfied and the three dissenting justices explicitly felt this test was met. Id. at 513 (Carter, J., dissenting). We are convinced the present facts amply satisfy the common scheme or plan prong.

It is likely that the defendant, before he embarked on the initial robbery, had decided to go on a restaurant robbing spree by waiting until the targeted establishment closed for the evening. The three-hour time lapse between robberies merely goes to the fact that after the first robbery was perpetrated, the defendant had to wait until the second restaurant closed before he would attempt the robbery. We find substantial evidence in the record to lead us to conclude that these two robberies of closed, franchised restaurants on the same evening with the same operandi were part of a common scheme or plan¹.

¹Federal Rule of Criminal Procedure 8(a) provides for joinder where offenses are part of: (1) the same transaction or occurrence; (2) a common scheme or plan; or (3) the same or similar character. The defendant concedes that the same or similar character test of the federal rule would be satisfied in this instance. Defendant correctly notes that Iowa Rule 6(1) did not incorporate the third prong, but only adopted the first two prongs.

See State v. Cunha, 193 N.W.2d 106 (Iowa 1971) (common scheme or plan interpreted under Iowa Rule of Evidence 404(b)). See also United States v. Eads, 615 F.2d 617 (4th Cir. 1980); cert. denied, 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981); United States v. Jordan, 602 F. 2d 171 (8th Cir. 1979); cert. denied, 444 U.S. 878, 100 S. Ct. 165, 62 L. Ed. 2d 107 (1979).

Because we find a common scheme or plan connected the two robberies, we must address defendant's contention that the district court abused its discretion by denying severance. The district court "is to order severance where the defendant shows his or her 'interest in receiving a fair trial uninfluenced by the prejudicial effects which could result from a joint trial [are] outweighed [by] the State's interest in judicial economy.'" Id. at 511 (citing State v. Trudo, 253 N.W.2d 101, 104 (Iowa 1977), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977)).

Defendant claims undue prejudice because the evidence to support a conviction for the second robbery was allegedly stronger than the first robbery. Besides the judicial economy of time and impaneling another jury, we are unpersuaded by defendant's claims for several other reasons.

In ruling on the motion to sever, the trial court found it would be difficult to present the facts as they occurred if separate trials were ordered. The trial court also felt it would be difficult to separate the witnesses. The trial court gave a cautionary instruction to mitigate any undue prejudice to defendant which provided:

... If you find the Defendant innocent or guilty on any one of the two counts, you shall not infer or conclude that he is guilty or innocent of the remainder. Rather, the Defendant's innocence or guilt must be determined separately as to each count of the trial information in accordance with the evidence received and the instructions given to you.

Instruction No. 6.

In addition, evidence of other crimes can be admissible pursuant to Iowa Rule 404(b). Federal authority on the same rule logically provides:

In those instances where evidence of one crime is admissible at a separate trial for another, it follows that a Defendant will not suffer any additional prejudice if the two offenses are tied together.

When offenses are joined under rule 8 on the ground that they "are based on the same act or transactions connected together or constituting parts of a common scheme or plan," it is manifest that evidence of one offense would ordinarily be admissible at a separate trial for the other. When offenses are joined because they "are of the same or similar character," however, admissibility at separate trials is not so clear.

United States v. Foutz, 540 F.2d 733, 736-37 (4th Cir. 1976) (footnote and citations omitted).

If the facts of these robberies would satisfy the requirement of rule 404(b), then no prejudice would result to defendant by having the charges tried together. Rule 404(b) provides exceptions to admitting evidence of other crimes which includes an exception when a common plan existed. See State v. Wright, 191 N.W.2d 638 (Iowa 1979) (evidence of other crimes to be admissible by a common plan or scheme must be more than defendant committing other crimes of same nature, but must be in some way each have a bearing on the other).

In Cunha, the Iowa court held:

Stated another way, the State is not permitted to give in evidence other crimes alleged to have been committed by the defendant unless they are so connected by circumstances with the particular crime charged as that proof of one fact with its circumstances has some bearing on the issue on trial other than to show in the defendant a tendency or disposition to commit the crime with which he is charged.... On June 14, 1969 three robberies occurred at which one or more of the four men were identified. The last of the robberies, the instant case, resulted in a killing. It was necessary that the available evidence as to the activities of the four men be shown. Such actions were relevant from the time of the jail escape until the admissions and identification made at Waterloo four days later.

We conclude . . . that the evidence was admissible to show a common scheme embracing the commission of two or more crimes so related to each other that proof of one tends to prove the other.

193 N.W.2d at 112 (citations omitted).

The facts of this case amply support admissibility under the common plan exception to rule 404(b).

Based on the above-mentioned reasons, we conclude the trial court did not abuse its discretion in denying the motion to sever.

II.

Defendant maintains the trial court's imposition of consecutive twenty-five year sentences under sections 902.8 and 902.9(1) was based on its purported misreliance upon the fact that a five-year minimum mandatory sentence under section 902.7 could not have been given. According to the defendant, the sentence as rendered constitutes an abuse of discretion. We disagree.

The trial court had the discretion to impose a consecutive sentence pursuant to Iowa Code § 901.8 (1983). Therefore, reasons for imposing the particular sentence must be stated on the record. Iowa R. Crim. P. 22(3)(d); State v. Luedtke, 279 N.W.2d 7, 8-9 (Iowa 1979). On appeal, this court will not disturb a sentence authorized by statute "unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as trial court consideration of impermissible factors." State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983). This court will find an abuse of discretion in sentencing if the defendant shows "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

The trial court reviewed defendant's background, the nature of the offense-armed robbery, chances for rehabilitation, and determined two consecutive

twenty-five year sentences were appropriate. After thoroughly reviewing the record, we find the trial court did not sentence defendant to consecutive twenty-five year sentences because a five-year mandatory minimum was not available. Rather, the court sentenced defendant to the consecutive sentences because the trial court felt defendant deserved this amount of punishment. We cannot find that the trial court abused its sentencing discretion by considering an impermissible factor in this case.

AFFIRMED.