

IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

FILED
FEB 26 1980

240

IN THE INTEREST OF

RICKY J. NEGRETE,

A Child-Appellant.

)

)

)

Filed February 26, 1980

319

62240

Appeal from Pottawattamie District Court at Council Bluffs - Daniel R. McTaggart, Judge.

Juvenile-appellant appeals trial court's judgment adjudicating him a delinquent alleging (1) abuse of trial court discretion and judicial prejudice and (2) insufficient evidence to prove commission of the delinquent act. AFFIRMED.

Michael A. Sciortino of Walter & Sciortino, Council Bluffs, for child-appellant.

Thomas J. Miller, Attorney General; John G. Black, Special Assistant Attorney General; and Joseph J. Hrvol, Deputy Pottawattamie County Attorney; for the State of Iowa-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Juvenile-appellant, Ricky J. Negrete, appeals trial court's judgment adjudicating him a delinquent alleging (1) abuse of trial court discretion and judicial prejudice and (2) insufficient evidence to prove commission of the delinquent act. We affirm.

On May 31, 1978, police officers answered a telephone report by Lucille Jasek that juveniles were breaking into the Walter Ruger residence at 726 8th Avenue in Council Bluffs. Upon arrival at the scene, thirteen-year-old Ricky J. Negrete was found standing on the back porch of the Ruger residence. The door was ajar approximately three inches. One of Negrete's hands was on the door knob; a dart was in the other.

A petition was filed on June 16, 1978, alleging Negrete was a delinquent based on commission of criminal trespass in violation of section 716.7(2)a, supplement to the Code 1977. Prior to the July 6, 1978 hearing on the matter, the county attorney amended the petition to allege delinquency based on breaking and entering in violation of section 713.3, supplement to the Code 1977. At the hearing, Lucille Jasek testified she had observed Negrete first "fiddle" with the lock on the back door of the Ruger residence, then enter the house, and remain therein for several minutes. Walter Ruger stated the doors to the house were closed, and possibly locked, when he left the home. He further indicated a radio kept in his bedroom had been moved to a bench by the back door in the kitchen. A playmate of Negrete's, John Anthony Welsh, disclosed he was present earlier in the day when Negrete and another youth talked about breaking and entering the Ruger house.

On July 14, 1978, trial court found Negrete, "beyond all doubt," had committed the act of breaking and entering in violation of section 713.3, supplement to the Code 1977. Negrete subsequently was adjudged a delinquent child on July 17, 1978, and ordered placed at the Iowa Training School for Boys, Eldora, Iowa, for an evaluation and a report to the court. A final dispositional order of August 31, 1978, placed Negrete on probation and continued the matter to June 1, 1979. Negrete appeals from this order.¹

¹ Negrete's original application for permission to appeal was filed on July 18, 1978. On August 7, 1978, the Iowa Supreme Court issued an order providing trial court 30 days to make a final disposition in the matter. Trial court, on August 31, 1978, ordered the matter continued until June 1, 1979. On September 6, 1978, Negrete filed an amended application for permission to appeal. The Iowa Supreme Court then granted his application, without deciding whether the order appealed from was or was not a final judgment. In light of the Supreme Court's action in this matter, we conclude we have authority to decide this appeal whether it be interlocutory in nature or from a final judgment.

I. Scope of Review. Our review of an order adjudicating a juvenile to be delinquent is *de novo*. In the Interest of Potter, 237 N.W.2d 461, 462 (Iowa 1976); in the Interest of Meek, 236 N.W.2d 284, 289 (Iowa 1975). We will not let a finding stand if, on examination of the record, it is clear a fair trial or hearing was not had. State v. Beverlin, 263 N.W.2d 535, 538 (Iowa 1978); State v. Brown, 176 N.W.2d 180, 181 (Iowa 1970); State v. Meyers, 257 Iowa 857, 861, 135 N.W.2d 73, 75 (1965).

II. Sufficiency of Evidence. Negrete contends trial court erred in finding sufficient evidence proving beyond a reasonable doubt he committed the delinquent act. On our *de novo* review of the evidence, we cannot agree.

For purposes of section 713.3, supplement to the Code 1977, burglary is defined as follows:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure or area enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft or criminal mischief, such occupied structure or place not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure or other place where anything of value is kept, commits burglary. Section 713.1, supplement to the Code 1977.

Requisite intent may be inferred from the fact of breaking and entering a building containing things of value. State v. Morelock, 164 N.W.2d 819, 822 (Iowa 1969); State v. Fox, 159 N.W.2d 492, 494 (Iowa 1968).

While we cannot agree with trial court's conclusion the offense was established "beyond all doubt," we believe the offense establishing the delinquency was proven beyond a reasonable doubt in this case. See State v. Marshall, 105 Iowa 38, 45, 74 N.W. 763, 766 (1898); State v. Bodekee, 34 Iowa 520, 522 (1872); State v. Ostrander, 18 Iowa 435, 453 (1865). An eye witness observed Negrete break into the residence. A peer testified Negrete conspired to break into the home. The homeowner stated the door to the house was closed when he left approximately an hour before police found Negrete on the back porch of the residence. We conclude this evidence is sufficient to establish the underlying offense beyond a reasonable doubt.

III. Abuse of Discretion and Prejudicial Judicial Conduct. Despite our conclusion in Division II, above, we must examine the record to determine whether trial

court's alleged abuse of discretion and prejudicial conduct warrants reversal. Negrete, in brief, assigns ten points of abuse and prejudice, some of which occurred during the adjudicatory phase and others which occurred thereafter.

A. Trial Court's Calling of Witnesses. Negrete alleges trial court abused its discretion by calling two police officers as its own witnesses after the close of all the evidence. The court stated:

They are being called by the Court because the Court was dissatisfied with the presentation by the County Attorney's office, right, and that they are very material witnesses and the Court knew of no reason that they weren't here but then was told they were on vacation so they are the Court's witnesses. App. p. 93.

Section 232.27, The Code 1977, permits the court to require presence of witnesses deemed necessary to the disposition of the petition for delinquency. Further, the practice of calling someone as a court's witness is normally recognized as proper procedure in Iowa. Smith v. United States, 331 F.2d 265, 273 (8th Cir. 1964). Trial court has wide discretion and we will not interfere absent prejudicial abuse. United States v. Allsup, 465 F.2d 287, 292 (8th Cir. 1973). We conclude there has been no showing of judicial prejudice by the court's requiring appearance of the additional witnesses.

B. Prior Acts. Negrete argues trial court abused its discretion in admitting evidence he allegedly broke and entered the Ruger residence on previous occasions. Generally, evidence of other criminal acts committed by an accused is inadmissible. State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979). Such evidence may be admissible if it is relevant to some fact or element in issue besides defendant's criminal disposition. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979). However, assuming the evidence has some relevancy in establishing an accused's 1) motive, 2) intent, 3) absence of mistake or accident, 4) common scheme, or 5) identity, trial court must exercise discretion carefully in determining whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Id.; State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978).

Applying these standards, we find trial court abused its discretion in admitting evidence of Negrete's alleged prior criminal acts. Had this been a criminal trial, we would conclude the danger of unfair prejudice substantially outweighed any probative value of the evidence. However, because our review is *de novo*, we conclude, beyond a

reasonable doubt, the error was harmless. State v. Porter, 283 N.W.2d 351, 353 (Iowa 1979); State v. Ware, 205 N.W.2d 700, 704 (Iowa 1973).

C. Trial Court Remarks. At the dispositional hearing, trial court told Negrete the court was disturbed by the fact it seemed he and his friend perjured themselves. The court went on to inform the juvenile if he retracted the statements during the proceedings, the state could not file any perjury charges against him. Negrete submits trial court abused its discretion in making such statements. We conclude trial court's statements could have been threatening and intimidating to the juvenile and viewed as an attempt to coerce repudiation of his assertion of innocence. However, we cannot see how these statements are prejudicial under the facts of the case.

D. Allegations of Vindictive Conduct Towards Counsel. Negrete's counsel also asserts trial court has further abused its discretion by acting vindictively towards him in a subsequent unrelated juvenile proceeding. Counsel bases his contention on trial court's November 27, 1978 order issued In the Interest of Franks, wherein trial court found as a matter of law counsel's "performance not within the range of normal competency." Counsel further alleges trial court refused all attempts by counsel to stay the order for the juvenile's evaluation at Eldora pending other action or appeal, and attempted to coerce counsel into inaction on any appeal by stating the court probably would refuse to pay attorney fees for such an appeal.

Counsel's allegations against trial court are serious. However, an appeal in this juvenile matter is not a proper forum for review of the propriety of trial court's actions.

Although trial court abused its discretion in allowing testimony regarding Negrete's alleged prior criminal acts, we conclude there was no resulting prejudice in this case.

Judgment of trial court is affirmed.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J. (dissenting)

I dissent. The majority holds the trial court erred in admitting evidence of defendant's prior criminal acts. I agree that under State v. Cott, 233 N.W.2d 324, 326 (Iowa 1979), such evidence is inadmissible. I cannot concur, however, that the evidence was not prejudicial. It is well settled a presumption of prejudice arises from an erroneous ruling of evidence. The error is reversible unless this presumption is affirmatively rebutted by the record. State v. Mattingly, 220 N.W.2d 865, 869 (Iowa 1974). Here, the record does rebut the presumption.

Police officer Walter testified he apprehended the defendant outside the house with his hand on the door knob. Officer Schmidt testified entry to the house was gained through the basement window next to which defendant's companion was found hiding. These facts negate a finding entry was gained through the door where defendant was standing. While the neighbor testified she observed defendant in the house, officer Walter stated he took defendant into the house. The neighbor had called the police when she saw a boy by a shed in the backyard. She said she saw the boy go into the house fifteen minutes later and she testified he was inside fifteen minutes before the police arrived. Thus, according to her testimony thirty minutes elapsed between the time police were called and when they arrived. According to the testimony of the police officers, they arrived on the scene four minutes after the telephone call was received. From the chronology of events, reasonable doubt arises whether the neighbor saw the boy inside the house during the burglary or after police officer Walter had taken him inside. Further doubt arises if officer Schmidt is correct that entry was gained through a basement window rather than the rear door.

We must decide whether the evidence shows the thirteen-year-old defendant intended to go with his friends to fish or to burglarize. The evidence is undisputed the boys wanted an adult to drive them to a fishing location. To prove defendant intended to burglarize, it must be shown he entered or intended to enter the house illegally.

I agree his intent was to burglarize. I reach that conclusion only because of the inadmissible testimony he had aided in a previous burglary of the same house. Without the erroneously admitted evidence, the State has not overwhelmingly shown defendant's guilt. The admission of that evidence prejudiced the court's decision and the prejudice of the inadmissible evidence cannot be overcome. The erroneous admission injuriously affected defendant's rights and reversal is warranted. See State v. Trudo, 253 N.W.2d

101, 107 (Iowa 1977), I would reverse and remand for new trial without the evidence of prior criminal acts. See State v. Wright, 191 N.W.2d 638, 642 (Iowa 1971).