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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

405

STATE OF IOWA,)

Plaintiff-Appellee,) Filed September 24, 1985

vs.)

KENNETH L. JENSEN,) 5-362
84-1056

Defendant-Appellant.)

Appeal from the Iowa District Court for Scott County - James E. Kelley, Judge.

Defendant appeals from his conviction, following a jury trial, for burglary in the second degree. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, P.J.

The defendant appeals from his conviction, following a jury trial, for burglary in the second degree.

At trial there was testimony that the burglary victim had identified the defendant's picture from a photographic array. However, the State could not produce the photographs shown to the victim; the photographs had apparently been misplaced. The State at trial also produced evidence that a search of the defendant's residence had yielded items stolen in three other burglaries during the two months preceding the burglary charged in this case. The trial court admitted this evidence as relevant to intent and identity in the present case. Intent was an issue in the present case because the intruder had been scared off before any items were taken. On appeal, the defendant contends the admission of this evidence was erroneous.

Defendant contends the trial court should have suppressed evidence about a photographic identification where the photographs used were unavailable at trial. He also contends the trial court erred by admitting evidence linking the defendant to unrelated burglaries; he challenges the trial court's conclusion that this evidence was relevant to intent and identity in the present case.

I. Intent Exception

Defendant claims the trial court abused its discretion in admitting evidence of three previous burglaries under the intent and identity exceptions to Iowa Rule of Evidence 404(b). The analytical framework we adopt in resolving such an issue was recently articulated in State v. Spargo, 364 N.W.2d 203 (Iowa 1985).[1]

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[1]Defendant's brief relies primarily on State v. Belieu, 288 N.W.2d 895, 900-01 (Iowa 1980), for the proposition that evidence cannot be admitted under the intent exception because "the intent exception does not apply when intent may be inferred from the nature of the acts charged; it applies only when by its nature the act might have been entirely innocent." Defendant broke into and entered a house which, by itself, is not an entirely innocent act. Under

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

If evidence of prior acts is found by the trial court to be relevant to any of these other purposes, then the court must also determine whether the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. Spargo, 364 N.W.2d at 209 (citing State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982)). See also State v. Mendiola, 360 N.W.2d 780, 782 (Iowa 1985). The court's ruling on admissibility will not be disturbed unless it constitutes an abuse of discretion. Id.

The evidence of other crimes in this case was used to show that, although defendant did not steal any property after the break-in, he did have an intent to steal because he had committed burglary on three previous occasions. We are satisfied that the trial court properly found this evidence was relevant.

Belieu, therefore, the intent exception would not necessarily apply because intent could be inferred from the act of breaking and entering.

We, however, find a degree of tension between the Belieu holding and State v. Fetters, 202 N.W.2d 84, 92 (Iowa 1972), which provided that "in other words . . . the other offenses must be wrongful acts, crimes, offenses or attempted offenses of a like nature to the charge against accused. Right conduct, lawful acts and honest transactions ordinarily are not indicative of a plan or scheme to commit the offense charged nor of any wrongdoing of criminal intent with respect to its commission on the part of the accused." While we cannot find defendant's argument is misplaced, we believe Fetters yields a better result on the admissibility of other crimes to show intent. Because the more recent case of Spargo cites Fetters with approval and does not mention Belieu, we follow Fetters.

Defendant's reply brief directed us to State v. Finchum, 364 N.W.2d 222 (Iowa 1985), where evidence involving acts under similar circumstances was not admitted. We find Finchum inapplicable because the court based its holding upon the prosecution's failure to use any 404(b) exceptions. Id. at 225. In this case, the prosecution relies heavily upon Rule 404(b) exceptions.

Defendant further argues that the intent exception does not apply because the other crimes were wholly independent of the present offense. We disagree. The four break-ins occurred within a six-week time span from June 10-July 27, 1982. These crimes took place in the same county at approximately the same time in the morning, and in rural settings. By pointing out the similarities in the offenses, the State sought to establish defendant's intent to steal. See Spargo, 364 N.W.2d at 209. We find this sufficient to conclude that these crimes were part of a related six-week burglary spree and not wholly independent acts. We also conclude that the trial court's limiting instruction directed at the potential for resulting prejudice from the admission of such evidence adequately insured that the jury would use such information appropriately.

Because the evidence was properly admissible under the "intent" exception of Rule 404(b), it is unnecessary for us to address the "identity" exception issue.

II. Unavailable Photographs

Defendant also maintains that the trial court erred because it failed to suppress a photographic identification of the defendant in which the State subsequently could not produce the photographs it used. We disagree.

The prosecution relies on State v. Bass, 349 N.W.2d 498 (Iowa 1984), for the proposition that failure to preserve a photographic array does not merit suppression of a witness' testimony. While the facts in Bass are similar to this case, the witness in the former case originally misidentified the suspect and the jury was aware of the misidentification; whereas in this case the witness made a correct identification so that it was difficult for the defense to impeach the victim's testimony on cross-examination.

Despite the distinction with Iowa authority, other states have held that "a mere claim that the procedure might have been unfair is not enough to require that the [state] must produce the photographs where evidence establishes their

nonavailability is due to inadvertence and not intended destruction." People v. Kaiser, 113 Cal. App. 3d 754, 765, 170 Cal. Rptr. 62, 67 (1980).

The relevant factors considered in determining admissibility of such evidence are: "[1] the degree of negligence or bad faith involved, [2] the importance of the evidence lost, and [3] the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice." Cotton v. United States, 388 A.2d 865, 869 (D.C. 1978) (quoting Montgomery v. United States, 384 A.2d 655, 662 (D.C. 1978)).

Applying these factors leads us to the conclusion that the trial court did not err in its decision. First, there is no suggestion that the State did not produce the photographs due to bad faith. The State should not have "misplaced" the photographs, yet it appears that this was done inadvertently.

Second, the testimony indicated five photographs of men with similar features were used. We find little reason to believe the photographic array was suggestive in any manner. The police did not talk to the witness as the photographs were placed before her and she made a correct identification shortly thereafter. Moreover, the defense had an opportunity to cross-examine the witness about the identification procedures and could have sought an instruction regarding lost evidence.

Finally, the witness made an in-court identification and she viewed defendant carefully at the scene of the crime. She had eye contact with defendant when she saw him in the daylight. She identified the defendant's photograph less than three hours after the incident. She did not display any doubt that she could have misidentified the defendant. Based on the record, there was little chance of misidentification so as to merit a new trial. Accordingly, we deny defendant's appeal.

AFFIRMED.

Hayden, J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent. The majority's dismissal of the reasoning in State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980), unduly expands the intent exception spelled out in Iowa Rule of Evidence 404(b). The intent of the intruder, identified to be defendant, was clearly inferred by the nature of the act charged—the forcible entry of the victim's house. The evidence of other crimes simply inferred that the defendant, who may have committed burglaries on prior occasions would have committed a burglary on the time in question. That inference, in this case, was prejudicial and improper. It was reversible error for the court to refuse to exclude the "other crimes" evidence.