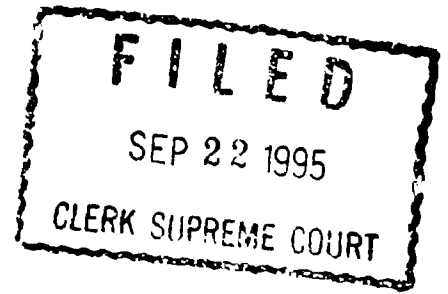


IN THE COURT OF APPEALS OF IOWA

No. 5-368 / 94-0596



STATE OF IOWA,

Appellee,

vs.

CLARENCE RAY THOMAS,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul,
Judge.

Defendant appeals the admission of evidence regarding his prior incarceration,
the exclusion of evidence regarding alleged subsequent conduct, and the trial court's
denial of his request for the appointment of new counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Martha E. Boesen, Assistant Attorney
General; Thomas S. Mullin, County Attorney; and Clinton L. Spurrier, Assistant
County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

DONIELSON, C.J.

The defendant appeals the judgment and sentence entered upon his convictions for attempted murder, burglary in the first degree, willful injury, and assault while participating in a felony. He argues the trial court abused its discretion in: 1) admitting evidence of his prior incarceration; 2) excluding evidence of alleged subsequent conduct; and 3) denying his request for the appointment of new counsel. We affirm on all issues.

I. EVIDENCE OF DEFENDANT'S PRIOR INCARCERATION

During the early morning hours of June 12, 1993, the defendant stabbed Salvador Tule at Tule's apartment. Tule and his roommates had a limited ability to understand the English language. However, they did comprehend some of what the defendant said immediately prior to the stabbing, and Tule's roommate, Fidel Estrada, testified the defendant had twice said to his companion, "Don't you think I could kill someone?" Tule testified he heard the defendant state two or three times he had been to prison. Following his arrest, the defendant voluntarily told a police officer he was on his way back to prison, but it did not bother him to go as he had been there most of his life.

The defendant objected to Tule's and the officer's testimony regarding his statements about having been previously imprisoned. The admissibility of evidence

lies within the discretion of the trial court. *See State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992). We reverse only when we find a clear abuse of discretion. *Id.*

The defendant asserts this evidence was not relevant and was unfairly prejudicial. Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988); Iowa R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403.

The defendant's statements were relevant because the State is entitled to show the circumstances surrounding the crime.

[T]he circumstances surrounding the commission of a crime may ordinarily be shown, even if such evidence would otherwise be inadmissible. . . . The state is always entitled to show what actually happened at the time of the offense. The fact that this may necessarily include recitation of the commission of another crime or other unfavorable circumstances does not render such evidence inadmissible.

State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974).

The admission of such evidence is contingent upon the acts being closely related in time and place so they form a continuous transaction. *See id.* Even when the evidence would have a tendency to inflame the minds of the jury, statements and conduct of the accused at the time of the commission of the offense are part of the transaction itself and may be admissible as *res gestae*. *See State v. Thompson*, 365

N.W.2d 40, 43 (Iowa App. 1985). “The mere fact that the testimony is not directly relevant to the elements of the crime charged does not render it inadmissible, absent more.” *Id.*

The State was entitled to introduce evidence of the defendant’s statements made immediately before the stabbing. They were made at the same time and place as the attack and were “an inseparable part of the whole deed.” *State v. Deases*, 476 N.W.2d 91, 98 (Iowa App. 1991). As part of the *res gestae*, these statements were properly admitted.

The defendant’s statements to the police officer were properly admitted to establish his identity as the perpetrator of the crime. Tule heard his assailant say he had previously been to prison. The defendant’s similar statements to the police officer were relevant to identify him as the perpetrator.

We reject the defendant’s argument that the evidence, even if relevant, was unfairly prejudicial and should have been excluded. “Unfair prejudice” is an “undue tendency to suggest decisions on an improper basis.” *See Plaster*, 424 N.W.2d at 231. The defendant contends the evidence regarding his prior imprisonment would merely have been used to show he was a “bad person,” and would have led to his conviction on that basis alone. While evidence of a person’s prior criminal record is generally subject to strict limitations, Iowa R. Evid. 609, the disputed evidence in this case did not involve specific allegations of prior offenses committed by the defendant. The only evidence was defendant’s own statements regarding his prior

incarceration. The relevance of this evidence to establish the circumstances surrounding the crime, as well as the identity of the perpetrator, outweighs any prejudicial effect.

II. EXCLUSION OF EVIDENCE REGARDING SUBSEQUENT CONDUCT

The trial court would not allow the defendant to introduce evidence regarding conduct which allegedly occurred several days after the stabbing. It was alleged that on separate occurrences two to three days after the stabbing, several Hispanics drove by the defendant's home and directed threatening gestures and stares at the defendant's brother and at the son of the defendant's girlfriend. The defendant claims the introduction of this evidence was essential to demonstrate the hostile nature of the victim and to support his claim that the stabbing occurred when he acted in self-defense.

A review of the record reveals the witnesses who would have testified as to the alleged menacing conduct were not able to specifically identify Tule as the individual who made any threatening gestures or stared at them. The evidence is not probative as to what actually occurred at the time of the stabbing, and the trial court did not abuse its discretion in excluding it.

III. REQUEST FOR APPOINTMENT OF NEW COUNSEL

During a hearing regarding the defendant's rejection of a plea agreement, the defendant requested the appointment of new counsel. The defendant claimed his counsel was not investigating the facts of his case and had not been in touch with prospective witnesses. The defendant also asserted he felt pressure had been placed upon him to plea bargain his case. Defense counsel explained to the court that even if the prospective witnesses were to testify as the defendant claimed they would, their testimony would not have had a dispositive effect on the case. Counsel informed the court that since the defendant had declined to enter the plea agreement, he would be contacting all prospective witnesses designated by the defendant. The trial court concluded there were not sufficient grounds to appoint new counsel.

A defendant must demonstrate sufficient cause to warrant the appointment of substitute counsel. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994). We review the denial of such a request for an abuse of discretion. *See id.* This record does not reflect a conflict of interest, an irreconcilable conflict, or an irreparable breakdown in communications between the attorney and the defendant. The issues surrounding the plea bargain were mooted by the defendant's decision to withdraw from the plea agreement, and defense counsel assured the trial court he would investigate all potential witnesses brought to his attention. Under these circumstances, it was not an abuse of discretion to deny the defendant's request for new counsel.

AFFIRMED.