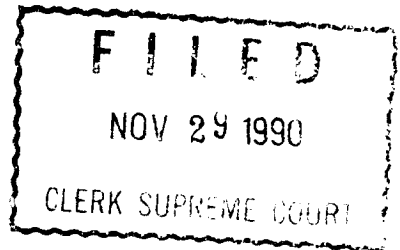


IN THE COURT OF APPEALS OF IOWA

No. 0-491 / 89-1478



STATE OF IOWA,

Appellee,

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vs.

FLOYD E. CROSS,

Appellant.

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Appeal from the Iowa District Court for Polk County,  
Matthew M. McEniry, Judge.

The defendant appeals his convictions and sentences,  
following a jury trial, for three counts of assault with  
intent to inflict serious injury. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Julie A. Halligan,  
Assistant Attorney General, James Smith, County Attorney,  
and Kathleen Deal, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

**PER CURIAM**

During a domestic incident Floyd Cross allegedly assaulted his estranged wife and two police officers she had called to the scene. A jury found Cross guilty of three counts of assault with intent to inflict serious injury. He has appealed the resulting convictions and sentences.

Cross contends the district court abused its discretion by refusing to grant his motion for a mistrial. Cross made this motion after the prosecutor had impeached a defense witness by referring to her twenty-four-year-old felony conviction. The district court agreed with Cross that this impeachment was improper, and the court admonished the jury to disregard any evidence concerning the witness' twenty-four-year-old felony conviction. However, the court denied Cross's motion for a mistrial. Cross contends the improper impeachment was so prejudicial that only a mistrial could cure the error.

Cross also contends the district court abused its discretion by admitting evidence Cross had hidden from police during an unrelated incident which occurred eight months after the offenses charged.

Cross contends the district court abused its discretion by admitting evidence that he had beaten his wife on two occasions in 1980 and 1987. He argues this evidence of "prior bad acts" was inadmissible under Iowa Rule of Evidence 404(b).

Cross contends the district court abused its discretion by admitting into evidence two police reports which contained statements made by witnesses to an officer other than the officer who testified about the reports. Cross argues the witness statements were inadmissible hearsay.

In addition, Cross contends the district court erred by allowing the State to amend the trial information on the date of trial. The amendment increased one of the three assault counts to assault with intent to inflict serious injury; the other two counts already charged that crime. Cross contends this amendment was impermissible because it prejudiced him and because it charged a wholly new and different offense. The State responds, among other things, Cross failed to preserve error on this issue.

In a supplemental pro se brief, Cross raises two additional issues not addressed by his attorney. Cross contends the district court erred by letting his wife testify against him; he argues this testimony violated the spousal communication privilege of Iowa Code section 622.9. (The State responds this privilege does not apply to a prosecution for a crime committed against the spouse.) Cross also contends the district court abused its sentencing discretion by imposing consecutive sentences for the three convictions.

Our scope of review is on errors of law. Iowa R. App. P. 4. We first address the issues raised in Cross's pro se brief. We address these issues solely to clarify the law on them for the sake of the appellant.

First, Cross complains having his wife testify against him violated the spousal communication privilege. Cross is mistaken as to the applicability of the privilege. There is no spousal communication privilege in a prosecution of one spouse for a crime committed against the other. State v. Klindt, 389 N.W.2d 670, 674-76 (Iowa 1986).

Second, Cross contends the judge abused his discretion in sentencing him to three consecutive terms. However, Iowa Code section 901.8 specifically allows the sentencing judge discretion to impose consecutive sentences. See State v. Criswell, 242 N.W.2d 259, 260-61 (Iowa 1976); accord State v. Smith, 309 N.W.2d 454, 457 (Iowa 1981). The judge did not abuse his statutory discretion by imposing consecutive sentences in this case.

We now turn to the arguments presented in the State Appellate Defender's brief. We will address these arguments in the order presented.

#### I.

Cross objects to the State's calling of a defense witness on rebuttal solely to introduce evidence of a twenty-four-year-old conviction. The Iowa Rules of Evidence prohibit evidence of a conviction more than ten years old unless the court determines the probative value outweighs its prejudicial effect. Iowa R. Evid. 609(b). Further, the State is required to give the defendant sufficient advance written notice to enable him to contest the evidence. Id.

In this case, the trial court was not given the opportunity to rule on the admission of this conviction. No written advance notice was tendered to Cross. Finally, we fail to see how the probative value of such an ancient conviction could outweigh its prejudicial effect under these circumstances. See State v. Hackney, 397 N.W.2d 723 (Iowa 1986) (reversing a conviction because of the introduction of a fifteen-year-old larceny conviction admitted after notice to the defendant and a hearing by the trial court). The admission of this evidence was prejudicial error and grounds for a mistrial.

## II.

The State cross-examined a defense witness about an unrelated incident which occurred approximately eight months after the incident at bar. During the later incident, Cross allegedly hid from police. The witness testified the police had not found Cross. The State then called a police officer solely to rebut this witness's testimony.

We fail to see any relevancy between the crimes charged and this alleged act of hiding eight months later, other than perhaps to show Cross was continually getting in trouble with the police. "Evidence which is not relevant is not admissible." Iowa R. Evid. 402.

Additionally, in this case this evidence operated as character evidence and was highly prejudicial. See Iowa R.

Evid. 404. This evidence should not have been admitted.  
Id.

III.

Cross objects to the admission of evidence he had beat his wife in 1980 and 1987. His objection is based on the rule prohibiting prior bad acts or character evidence outside limited exceptions. The State argues the prior bad acts show intent and is admissible under Iowa R. of Evid. 404(b).

Evidence offered under rule 404(b) must be probative of a matter involved in the case. They key is relevancy. . . .

Once trial court concludes the evidence is relevant, it must determine whether the probative value of the evidence outweighs the danger of prejudice to defendant. Trial court determines whether such evidence is admissible by exercising its sound discretion. We will not reverse such a determination unless we find a clear abuse of discretion.

State v. Kern, 322 N.W.2d 134, 136 (Iowa 1986) (citations omitted).

The necessary finding on prejudice was not made in this case. This, coupled with the fact the State waited until the day of trial to elevate the offense charged to the level necessary to introduce this prejudicial evidence, raises questions about the fairness of the trial. However, the issue of prejudice was not raised before the trial court, and we will not address it for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974).

## IV.

Cross objects to the admission of police reports containing statements of other witnesses as inadmissible hearsay. The State in its brief concedes the reports were hearsay, but contends they are not prejudicial. Other witnesses, the State argues, testified to essentially the same facts.

The reports involved were introduced into evidence by an officer other than the one who had made them. In addition, they contained statements of witnesses other than those testifying on trial. The plain purpose of introducing the reports was to get those witnesses' statements before the jury. The introduction of these reports is expressly prohibited by Iowa R. Evid. 803(8)(B). State v. Reitenbaugh, 392 N.W.2d 486, 489-90 (Iowa 1986).

We determine the hearsay statements were prejudicial. "The erroneous admission of hearsay is presumed to be prejudicial, and the person claiming harmless error must affirmatively establish absence of prejudice." Id. at 490. The State has failed to make that showing here.

The fact other witnesses testified to the same facts does not remove the prejudice. Id. at 490-91. These written statements, embodied in official police reports, could be given great weight in the minds of the jurors. In

the very least, the reports corroborated other testimony, thus strengthening its credibility. The reports, being hearsay, should not have been introduced.

V.

Cross complains the court erred in allowing an amendment to the trial information on the day of the trial. The State amended it from assault without intent to inflict serious injury to assault with intent to inflict serious injury.

Because we are reversing on other grounds, we need not consider this issue. We do note, however, under the two-prong test in State v. Berney, neither substantial rights of the defendant were prejudiced, nor was a wholly different offense charged. See State v. Berney, 378 N.W.2d 915, 919 (Iowa 1985). Cross was already charged with two counts of assault with intent stemming from the same incident. The third charge for assault was merely elevated. The burden on Cross at trial remained essentially the same.

We disapprove the prosecution's dilatory filing of its request to amend the trial information....Our rules of criminal procedure provide both the defendant and the prosecution clear procedural guidelines to follow....Here; however,...we are entirely satisfied that defendant was not harmed by the amendment which preceded trial..."

Berney, 378 N.W.2d at 919.

We do not find the trial court erred in allowing the amendment.

In summary, with the single exception of amending the trial information on the day of the trial--and even that is borderline--this whole case appears to have been an almost tragic comedy of errors.

We can think of nothing more appropriate and germane to the duties of a prosecutor and the rights of a defendant than the words of Mr. Justice Thompson speaking for the court in *State v. Tolson*, 248 Iowa 733, 82 N.W.2d 105:

"It is sometimes said that error 'crept' into the trial of a lawsuit. Not so in the case at bar. It marched in like an army with banners, and trumpets. It was escorted, and emphasized, and aggravated by the attorney for the State."

"A prosecuting attorney should use [her] best efforts to represent the State, vigorously and forcefully, in presenting its case within the bounds of proper procedure. [She] owes a second duty, of no less importance, to see that the accused has a fair trial."

State v. Gill, 259 Iowa 142, 146-47, 143 N.W.2d 331, 334 (1966).

Due to the overwhelming number of errors on the part of the State in this case, we determine the appellant did not receive a fair trial. We reverse and remand this case back to the district court.

**REVERSED AND REMANDED.**