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MAR 3 1 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed March 31, 1987

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
DALE LEONARD SCHECHINGER,	)	6-362 85-1356
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Carroll County (No. 28563) - James C. Smith, Judge.

The defendant appeals from his convictions, following a jury trial, for two counts of delivery of a controlled substance. **REVERSED AND REMANDED.**

Charles Harrington, Chief Appellate Defender, and Deborah Goins and Dory Sutker, Assistant Appellate Defenders, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; Barry Bruner, Carroll County Attorney; and Patrick Hall, Assistant Carroll County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell and Schlegel, JJ.

OXBERGER, C.J.

Defendant Dale Schechinger challenges the jury's verdict convicting him of two counts of delivery of a controlled substance (cocaine) in violation of Iowa Code sections 204.401(2) and 204.401(2)(a)(1983). Schechinger raises three issues for appellate consideration: (1) that the trial court abused its discretion in admitting testimony regarding his participation in drug usage and sales on prior occasions; (2) that the evidence adduced by the State was not sufficient to support the jury's verdict; and (3) that the trial court erred in refusing to instruct the jury that an addict-informant's testimony is an insufficient basis upon which to premise a guilty verdict unless the testimony is corroborated. We agree with Schechinger's first assignment of error, and accordingly, we reverse the judgment and remand the case for a new trial.

A brief recitation of the facts will aid in understanding the contentions raised in this appeal. The defendant's conviction arose after his alleged encounters with an undercover police informant named Barry Anderson. Pursuant to an agreement with the police, Anderson became involved in undercover operations by arranging to purchase illicit drugs. Anderson, himself a drug user, made contacts with drug sellers and arranged meetings to consummate the sales. The police provided Anderson with money to make the purchases, and he then related the events surrounding the sales. As a result of the information provided by Anderson, the Carroll police made over twenty-two arrests. Further investigation revealed, however, that on a number of occasions, Anderson fabricated the sales and kept the money for himself; consequently, the charges that had been filed against six of the twenty-two persons arrested were subsequently dismissed because Anderson withdrew his accusations.

At trial, the theory advanced by the defendant was that Anderson had fabricated the alleged sales which provided the basis for the defendant's arrest.

Anderson, however, testified that on the nights of December 7, 1983, and February 22, 1984, he purchased cocaine from the defendant. Anderson's testimony was the only evidence adduced by the State regarding the defendant's participation in the sales. The defendant was convicted on the basis of this testimony.

I. EVIDENCE OF PRIOR DRUG USAGE AND SALES

In addition to his testimony concerning the two alleged sales in question, Anderson testified that he had used drugs with the defendant and purchased drugs from the defendant on numerous prior occasions. The defendant maintains that the trial court committed reversible error in permitting Anderson to testify with respect to these prior acts. He urges that this testimony was irrelevant and unduly prejudicial under rules 403 and 404 of the Iowa Rules of Evidence.

Before addressing the merits of the defendant's contention, we must resolve a preliminary question concerning the preservation of error. Although the defendant filed a pretrial motion in limine in which he alleged that the testimony concerning his prior use and sale of drugs was inadmissible, he did not reassert his objections at trial. Nevertheless, we conclude that, in the circumstances of this case, defense counsel's failure to object does not constitute a waiver of the alleged errors. In State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982), the supreme court recognized that a party need not renew his objections at trial if the court has entered a prior unequivocal ruling on the evidentiary questions at issue. In the instant case, as in Harlow, a hearing had been held on the motion in limine, and the record discloses that the trial court explicitly overruled the motion with respect to both the defendant's prior use and prior sale of drugs. Accordingly, we conclude that the court's ruling constituted an unequivocal holding as to these issues, and that the alleged errors were adequately preserved.[1]

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[1]Because of our conclusion that error was properly preserved, we find it unnecessary to address the appellant's contention that his attorney's failure to object at trial constituted ineffective assistance of counsel.

The principles governing our review of a trial court's evidentiary rulings are well established. The admission or exclusion of evidence rests largely within the trial court's discretion, and we will interfere with its decisions in this respect only if an abuse of discretion has occurred. State v. Williams, 367 N.W.2d 310, 312 (Iowa Ct. App. 1985).

Ordinarily, evidence of a defendant's prior crimes, wrongs, or acts is inadmissible as bearing upon his guilt. State v. Mendiola, 360 N.W.2d 780, 781 (Iowa 1985); State v. Serr, 322 N.W.2d 96, 99 (Iowa Ct. App. 1982). The inadmissibility of such evidence is premised upon the notion that prior crimes or acts may not be used to establish that the defendant acted in conformity therewith on the occasion in question. Iowa R. Evid. 404 (b); see also State v. Cott, 282 N.W.2d 324, 326 (Iowa 1979). Consequently, this exclusionary rule was devised to prevent the jury from considering evidence "which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question." State v. Cott, 282 N.W.2d at 326.

Where evidence of a prior crime or act is relevant to prove some fact or element in issue other than the defendant's criminal propensity, however, an exception to the above rule's general prohibition has been recognized. Id; see also State v. Kern, 392 N.W.2d 134, 136 (Iowa 1986). Accordingly, rule 404(b) of the Iowa Rules of Evidence delineates certain categories of permissible objectives for which evidence of prior crimes and acts may be admitted. These categories include evidence tending to establish: (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other, or (5) the identity of the person charged with the commission of the crime. State v. Serr, 322 N.W.2d at 99-100; Iowa R. Evid. 404(b). If the prior crime or act is relevant under one of these exceptions, it is admissible

as long as its probative value outweighs its prejudicial impact. State v. Mendiola, 360 N.W.2d at 782.

The State urges that the testimony challenged in the present case was properly admitted because it tended to establish the defendant's identity and to negate any mistake or accident on Anderson's part in identifying the defendant as the person who sold him the drugs. We think that this contention indicates a misunderstanding of the identity and absence of a mistake or accident exceptions set forth in rule 404(b).

The "absence of mistake or accident" exception is designed to admit evidence which tends to establish that "the act on trial was not inadvertent, accidental, unintentional, or without guilty knowledge." McCormick, Handbook of the Law of Evidence § 190 (2d ed. 1972); C. Torcia, Wharton's Criminal Evidence § 187 (14th ed. 1985). Our prior case law illustrates that such evidence is admissible when the defendant's knowledge is crucial to the State's case. State v. Mendiola, 360 N.W.2d at 782. "When this is true, and when the defendant's prior crime tends to prove knowledge with respect to the current crime, the prior act becomes relevant and admissible in the face of the general rule against introducing prior crimes." Id. Accordingly, evidence of prior crimes or acts has been admitted under this exception when the defendant claimed that he did not know that scales found in his possession could be used to weigh marijuana, State v. Mendolia, 360 N.W.2d at 781-82, to rebut the defendant's assertion that he did not sell marijuana to an informant, but that the informant grabbed a bag of the defendant's marijuana and threw two twenty-dollar bills at him, State v. Serr, 322 N.W.2d at 100, and to counter the defendant's alleged lack of knowledge concerning overdrawn checks. State v. Storrs, 351 N.W.2d 520, 521 (Iowa 1984).

In the instant case, there is no comparable issue concerning a mistake or accident on the defendant's part. The State's attempt to use the evidence of

the defendant's prior acts to negate the possibility of a mistake on the part of the informant illustrates a mischaracterization of the proper use of this exception. As such, we conclude that the evidence bore no relevancy to the exception and was inadmissible in this capacity.

In a concomitant argument, the State maintains that the evidence of the defendant's prior acts was properly received under the identity exception of rule 404(b). We disagree. In each of those cases where evidence of a defendant's prior acts has been admitted, it has also been buttressed by one of the other exceptions enumerated in rule 404(b). See, e.g., State v. Newman, 326 N.W.2d 796, 798 (Iowa 1982) (commission of sexual crimes sufficiently similar to permit evidence of prior offenses under identity exception); State v. Walsh, 318 N.W.2d 184, 185 (Iowa 1982) ("strikingly similar" nature of crimes allowed admissibility under identity exception); State v. Colt, 283 N.W.2d 324, 328 (Iowa 1979) (testimony regarding prior incident tended to prove identity of defendant because of the similarity of the acts and method by which they were accomplished). Furthermore, in State v. Walsh, 318 N.W.2d at 185-86, the supreme court clarified the showing that must be made before evidence of prior acts may be admitted under the identification exception. There, the court noted that much more is required than the repeated commission of the same class of crimes -- there must be a showing that the prior act or crime and that charged were "strikingly similar" or of a "unique nature". Id. See also McCormick, Handbook of the Law of Evidence § 190 (2d ed. 1972).

In the present case, there has been no allegation that the defendant's prior acts were in any way unique or similar to the crime charged, thereby tending to establish his identity as the perpetrator of the sale in question. The State's only argument is that, because the defendant previously sold drugs to the informant, he was likely to have sold them on the nights of December 7, 1983, and February 22, 1984. Notably, the creation of such an inference is precisely

what the prohibitions of rule 404(b) attempt to obviate. Accordingly, we conclude that the evidence was not admissible under either the identification or absence of mistake or accident exceptions. See State v. Finchum, 364 N.W.2d 222, 225 (Iowa 1985) (testimony regarding prior acts erroneously admitted because it did not fit into the exceptions set forth in rule 404(b)); State v. Wright, 191 N.W.2d 638, 640-41 (Iowa 1971) (evidence of prior acts improperly admitted because it lacked relevance under any of the 404(b) exceptions).

II. SUFFICIENCY OF THE EVIDENCE

We next consider the defendant's contention that the evidence adduced by the State was insufficient to support his conviction. The principles governing our review of an attack levied against the sufficiency of evidence are well established. We view the evidence in the light most favorable to the State. State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981). We consider all of the evidence, and we may indulge all legitimate inferences arising reasonably and fairly therefrom in support of the jury's verdict. Id. The verdict is binding if it is supported by substantial evidence. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). "Substantial evidence" is that which could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Mulder, 313 N.W.2d at 888.

The record discloses that on December 7, 1983, Anderson informed the police that he had made an arrangement to purchase drugs from the defendant. Shortly before Anderson was scheduled to meet with the defendant, he was strip searched by the police and given the money to make the purchase. Officer Caylor then observed Anderson walk into the Dancin' Lounge. Officer Caylor and Chief of Police Harms surveilled the lounge and observed the defendant's pick-up truck park outside, and watched the defendant go into the lounge. Approximately

forty-five minutes later, Anderson came out of the lounge and gave the officers a bag full of cocaine. Anderson was searched again, and no other substances were recovered.

The identical procedure was employed before Anderson entered the lounge on February 22, 1984. On that occasion, however, the officers observed the defendant, Anderson, and a third person come out of the lounge and get into the defendant's vehicle. After the three rode in the vehicle for several minutes, Anderson was dropped off at his apartment. At that juncture, Anderson gave the police a second bag of cocaine.

While we think that this evidence may have been sufficient to have supported the jury's verdict, see State v. Johnson, 219 N.W.2d 690, 694 (Iowa 1974) (conviction upheld upon substantially identical facts), we are unwilling to assume that the erroneously admitted evidence of the defendant's prior acts played no role in the jury's decision. The courts of this state have repeatedly held that when an evidentiary error has been found, "prejudice is presumed unless the contrary is affirmatively established." State v. Ganz, 376 N.W. 887, 891 (Iowa 1985); see also Collins v. Auger, 577 F.2d 1107, 1110 (8th Cir. 1978). Given the paucity of the evidence against the defendant in the present case, we are particularly disinclined from concluding that the evidentiary error was merely harmless. Accordingly, we conclude that the case must be reversed and remanded for a new trial.

III. CORROBORATION OF ADDICT-INFORMANT'S TESTIMONY

We also address the final issue raised in this appeal, as it may recur on retrial. The question is whether the trial court erred in refusing the defendant's requested jury instruction that Anderson's testimony could not provide the basis for a conviction unless it was corroborated. We find no error in the court's refusal to submit the instruction.

The defendant's request is premised upon Iowa Rule of Criminal Procedure 20(3). This rules provides that, "[a] conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which [tends] to connect the defendant with the commission of the offense". Iowa R. Crim. P. 20(3), see also State v. Cuevas, 281 N.W.2d 627, 629 (Iowa 1979). The rationale undergirding rule 20(3) is the recognition that corroboration enhances the dubious credibility of an accomplice or solicited person whose motivation to testify is inherently suspect because of his or her interest in placing the blame upon the defendant. State v. Berney, 378 N.W.2d 915, 918 (Iowa 1985).

In State v. Johnson, 219 N.W.2d 690 (Iowa 1974), the supreme court explicitly considered whether the dictates of rule 20(3) are applicable to the testimony of an informant as opposed to an accomplice or solicited person. The court answered this question in negative, concluding that the concerns inhering in an accomplice's testimony are not implicated when an informant testifies. Id. at 694. We think that the present case falls directly within Johnson's ambit; Anderson was not an accomplice, nor was his testimony solicited.

The defendant urges, however, that because Anderson was a former drug addict, and because he was given immunity for his thefts from the police department in exchange for his testimony, the dictates of rule 20(3) govern. While we think that these facts were relevant to the jury's assessment of Anderson's credibility, we adhere to the supreme court's decision in Johnson in concluding that they do not require a corroboration instruction. The record discloses that the trial court's instruction number 7 advised the jury that, in passing upon the credibility of the witnesses and in according weight to the testimony, the jurors should consider the witness's appearance, conduct, age, intelligence, knowledge about the matters testified to, motives as witnesses, fairness or bias, and prejudice.

In addition, the court advised the jury to consider the reasonableness of each witness's testimony and whether it was corroborated or contradicted by the other evidence. In conglomeration with the evidence adduced at trial, this instruction provided adequate safeguards to protect the defendant and inform the jury of the concerns inhering in Anderson's credibility. Accordingly, we find no error in this respect. See State v. Bishop, 387 N.W.2d 554, 560-61 (Iowa 1986) (it is proper practice for a trial court to submit a general credibility instruction informing the jury to consider the potential biases of all of the witnesses even without calling particular attention to a paid informant's testimony). The judgment is reversed, and the case is remanded for a new trial.

REVERSED AND REMANDED.