IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed January 25, 1979
vs.	)	
JAMES HESTER,	)	720 / 61230
Appellant.	)	

Appeal from the Black Hawk District Court - Carroll E. Engelkes, Judge.

Defendant appeals from conviction of false drawing and uttering in violation of § 713.3, The Code, 1977, alleging errors in the admission of evidence and giving of instructions. Affirmed.

Douglas V. Coonrad, of Hudson, Iowa, and Stanford J. Patterson, of Waterloo, Iowa, for appellant.

Thomas J. Miller, Attorney General, Kermit L. Dunahoo, Assistant Attorney General, and David H. Correll, Black Hawk County Attorney, for appellee.

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

PER CURIAM

Defendant James Douglas Hester appeals his conviction by jury of false drawing and uttering in violation of § 713.3, The Code, 1977. Defendant asserts that trial court erred as follows: 1) in overruling defendant's motion in limine to prevent defendant's impeachment through use of a five year old felony conviction; 2) in overruling defendant's relevancy objection to introduction into evidence of other bad checks for which defendant had not been charged; 3) in denying defendant's motion for directed verdict based on failure of the State to prove the essential element of defendant's intent to defraud; 4) in denying defendant's requested amendment to trial court's instruction which referred to defendant's subsequent restitution; 5) in overruling defendant's objection to the proposed instruction which referred to evidence of other bad checks as they related to defendant's intent to defraud.

I. The admissibility of evidence of prior felony convictions for impeachment purposes under § 622.17, The Code, 1977, is within the trial court's discretion subject to the standards and restrictions set forth in State v. Martin, 217 N.W.2d 536 (Iowa 1974). Martin requires that the prior felony involve dishonesty or false statements and that trial court evaluate whether the probative value of any such prior felony conviction outweighs the danger of undue prejudice to the defendant, taking into account the nature of the conviction, its bearing on veracity, its age, and its propensity to improperly influence the jury. State v. Martin, supra at 542. Defendant asserts that trial court failed to make these determinations in ruling on his motion in limine.

In the instant case defendant had a prior felony conviction for breaking and entering but, in good faith, erroneously misrepresented to the trial court in his motion that the previous conviction was for burglary. While felonies involving theft and breaking and entering have been held to reflect on veracity (State v. Conner, 241 N.W.2d 447, 455 (Iowa 1976)(larceny and burglary), Hampton v. United States, 340 A.2d 813 (D.C. App. 1975)(breaking and entering)), defendant asserts that neither burglary nor breaking and entering involve theft per se. As a result, he argues, this requires trial court to evaluate the facts surrounding the prior conviction to determine whether theft was involved. We disagree and find that the burden is on the defendant to preserve the record by showing the nature of the prior felony convictions. State v. Lyles, 225 N.W.2d 124, 126-27 (Iowa 1975). See also, State v. Davis, 229 N.W.2d 249, 252 (Iowa 1975). In the absence of facts to the contrary, it is not an abuse of discretion for trial court to conclude that burglary or breaking and entering involves dishonesty and that such a prior conviction is admissible to allow impeachment as it reflects on defendant's veracity.

Defendant further contends that State v. Martin, supra, requires trial court to make an explicit determination on the record of the factor balancing process used in deciding whether the probative value of the evidence of the prior conviction outweighs its prejudicial effect to defendant. While an explicit record may be desirable, we find nothing in Martin to indicate that an explicit record is required. The record in this case demonstrates that trial court was cognizant of State v. Martin, supra, as the trial judge discussed the remoteness of the conviction and the type of offense involved. (App. p. 2.).

We have already found that trial court did not abuse its discretion in finding burglary involves dishonesty. Also, the Supreme Court has held a six year old felony conviction is not too remote. State v. Conner, supra. Finally, we can assume that trial court gave appropriate consideration of the relevant factors without requiring the record to show a specific evaluation of each and that trial court's ruling which permitted the admission of the evidence implicitly indicates that the court weighed its propensity to improperly influence the minds of the jurors. See State v. Martin, supra at 543.

II. Defendant's assertions that trial court erred in allowing evidence of other bad checks for which he had not been charged to be admitted over his relevancy objections and in overruling his objection to the proposed instruction which referred to such evidence of other bad checks as they related to his intent to defraud can be consolidated for discussion.

Trial court allowed a bank employee to testify as to the number of checks defendant had drawn on his account for which there were insufficient funds and their total amount. Defendant admitted that other checks were drawn on his account for which he knew there were insufficient funds to cover. The State attempted to prove through testimony of two bank employees that defendant had made no arrangement with the bank for covering overdrafts on his checking account, for automatic transfer from savings to checking account to cover overdrafts, or for covering of checks written between August 2, 1977, the day he opened the account, and August 15, 1977, the date of his first anticipated paycheck.

Defendant testified unequivocally that he had made arrangements for transfer of money from his savings to his checking account and for covering checks written between August 2, 1977 and August 15, 1977. As a result, the issue of defendant's intent to defraud in writing the check for which he was charged was placed in issue. See State v. Coburn, 244 N.W.2d 560, 562 (Iowa 1976).

While proof of other crimes generally is not admissible, exceptions permit such evidence to be admitted when, inter alia, it tends to prove intent or absence of mistake or accident. State v. Johnson, 237 N.W.2d 819, 820 (Iowa 1976). The question goes to the relevancy of the evidence and "[t]he basic test is whether the evidence offered would render the desired inference [intent to defraud] more probable than it would be without the evidence." State v. Johnson, supra at 821.

> "In order to be relevant to the issues, the other offense of which testimony can be offered must . . . be reasonably similar to the act on which the prosecution is based. There must be such connection between the offense charged and the other offenses that the latter can reasonably be said to tend to establish the first on some essential fact in issue. In other words, the other offenses must be wrongful acts, crimes, offenses or attempted offenses of a like nature to the charge against the accused. . . ."

State v. Coburn, supra at 563, quoting State v. Cotton, 240 Iowa 609, 620, 33 N.W.2d 880, 887 (1949).

"The proof of similar transactions involving crime must be clearly shown. Mere suspicion is not enough. The evidence must be such that there can be no room for speculations in the minds of the jury [sic] whether the similar crimes attempted to be shown were actually committed or not. However, commission of such other offenses need not be established beyond a reasonable doubt to be admissible." State v. Hopkins, 192 N.W.2d 747, 749 (Iowa 1972), quoted in State v. Coburn, supra at 564. There also must be clear proof that defendant was culpable in the other acts in question. State v. Johnson, supra at 821.

Here the evidence of other bad checks was offered to prove defendant's intent to defraud. Defendant admitted the other checks were drawn on his account when it lacked sufficient funds to cover the checks. We believe the record demonstrates that these acts were shown sufficiently to have been similar offenses committed by defendant to establish their probative value and that their probative value outweighs any prejudicial effect they may have had on the jury. State v. Coburn, supra at 562. We conclude that trial court did not abuse its discretion in determining the evidence was admissible or in overruling defendant's objection to Instruction No. 10.

III. In determining the propriety of trial court's ruling on defendant's motion for directed verdict, the evidence is viewed in the light most favorable to the state irrespective of whether it is contradicted and "every legitimate influence that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence." State v. Dahlstrom, 224 N.W.2d 443, 448 (Iowa 1975). A court should not direct a verdict for acquittal if there is any substantial evidence which reasonably tends to support the charge. Stated another way, a directed verdict should not be granted if the evidence is sufficient to raise a fair inference of guilt. Dahlstrom, supra.

Defendant argues trial court should have granted his motion for directed verdict because the State failed to introduce sufficient evidence on the required elements that he intended to defraud and that he lacked an arrangement with the bank for funds with which to pay checks. Defendant passed the check for which he was charged to an innocent third party; he had no previous dealings with the bank whereby an overdraft might be looked upon as an extension of credit. While defendant testified to what he called an "arrangement" with the bank, there was no written proof of such an arrangement or any showing of a previous similar arrangement. This generates a jury question as to whether defendant had such an arrangement and, when considered with evidence as to other bad checks, whether he intended to defraud.

IV. Defendant's final contention is that trial court erred in refusing to amend Instruction No. 9 at his request.[1] He argues that references in the instruction to defendant's guilt, even if he later made restitution, constituted an implicit instruction to the jury that trial court was assuming his guilt for purposes of the instruction. He further

[1]The relevant text of the instruction is as follows: (App. p. 39, ll. 8-13) (Tr. p. 97, ll. 14-20)

> "If you find that the State has established each and all of the five provisions set forth in Instruction No. 7 by the evidence beyond a reasonable doubt, then the defendant would be guilty of the offense of false drawing and uttering; and this would be true even if the Ramada Inn later received payment in full or in part for the amount of the check."

asserts that he offered no evidence of restitution and that the court's instruction, therefore, prejudicially raised that issue for the jury's consideration.

We find the record discloses evidence of restitution through testimony of defendant and witness Ruth Brenner and such is admissible for the limited purpose relating to defendant's intent to defraud. Hence, an instruction referring to that evidence is permitted.

The court explicitly informed the jury that if it found the State had established each and all of the five propositions set forth in Instruction No. 7 (these propositions set forth the elements of the offense) defendant would be guilty of false drawing and uttering, even if (emphasis added) he later paid the amount of the check. An examination of Instruction No. 9 in its entirety convinces us that it in no way required an implicit assumption of guilt.

Finding no reversible error, the judgment of trial court is affirmed.

AFFIRMED.