

FILED

MAY 28 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed May 28, 1985

472

vs.

)

DONALD LEE McVEY,

)

5-85

84-479

Defendant-Appellant.

)

**Appeal from the Iowa District Court for Polk County - Gene L. Needles,
Judge.**

**Defendant appeals from judgment and sentence for exercising control over
stolen property and attempting to elude police, in violation of Iowa Code sections
714.1(4) and 321.279 (1983). AFFIRMED.**

**Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant
Appellate Defender, for defendant-appellant.**

**Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant
Attorney General, for plaintiff-appellee.**

Heard by Donielson, P.J., and Snell and Sackett, JJ.

DONIELSON, P.J.

This is an appeal from judgment and sentence on the criminal charges of exercising control over stolen property and attempting to elude a law enforcement vehicle. The defendant asserts that 1) the trial court erred in admitting evidence that the defendant was a prison escapee, and 2) the trial court erred in barring the defendant from introducing evidence of diminished capacity. We affirm.

On September 15, 1983, Donald McVey was involved in a high-speed chase with the police. McVey's car turned out to be a stolen vehicle. He was subsequently charged with exercising control over stolen property and attempting to elude the police.

Prior to trial, defense counsel moved to exclude evidence that the defendant was an escapee from Fort Madison at the time of the offenses on the ground that the probative value was outweighed by prejudice. The State argued that the evidence showed motive, opportunity, and intent. The trial court denied the motion and allowed testimony at trial which referred to the fact that the defendant was an escapee.

The defendant gave notice of his intent to rely on the defense of diminished capacity. Prior to trial, the State moved to exclude such evidence on the grounds that diminished capacity was not a defense to general intent crimes. The State's motion was granted and the defendant was precluded from presenting evidence of diminished capacity.

The defendant was found guilty as charged.

We first consider defendant's claim that the trial court should not have allowed evidence that the defendant was a prison escapee. It is submitted by the defendant that such evidence should have been excluded because its "highly inflammatory and prejudicial effect" far outweighed its "negligible probative value." We disagree.

The test of relevancy is whether evidence offered would render the desired inference more probable than it would be without such evidence. Iowa R. Evid. 401. Generally, the determination of whether this test is met is within the discretion of the trial court. State v. Webb, 309 N.W.2d 404, 412 (Iowa 1981). It is also within the court's discretion to decide whether the danger of unfair prejudice outweighs any probative value. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979). In the case before this court, we cannot say that this discretion has been abused.

Contrary to the defendant's assertion, we believe that the fact that he was a prison escapee is highly relevant. The record reflects that McVey escaped from the Fort Madison Penitentiary on September 14, 1983. This factor would show that the defendant was in Fort Madison at the time the vehicle was stolen and thus had the opportunity to steal it. Furthermore, we agree with the State that this evidence was relevant to show motive. Since the defendant had recently escaped from prison, he may have wanted a car in order to flee from law enforcement officials. Finally, we note that circumstances surrounding the commission of a crime may ordinarily be shown even if evidence would otherwise be inadmissible. In State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974), the supreme court stated:

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.

We therefore conclude that evidence that the defendant was a prison escapee was relevant.

We also conclude that the admission of this evidence was not unfairly prejudicial. Prior to the commencement of the trial, the court requested that the prosecutor inform her witnesses not to discuss the reason that McVey was incarcerated. Instead, testimony was to be limited to the fact that the defendant was an inmate. The supervisor of records at the Iowa State Penitentiary testified that her records indicated that the defendant escaped on September 14, 1983; the

correctional officer's testimony confirmed that defendant was absent from the institution after that date. The only other testimony alluding to McVey's imprisonment was the arresting officer's statement that defendant told him he was an escapee from Fort Madison.

It is apparent to this court that the manner in which this evidence was introduced was sufficient to guard against unfair prejudice. Accordingly, we hold that the trial court did not abuse its discretion in admitting evidence that the defendant was an escapee.

The defendant also argues that he should have been able to introduce evidence of diminished capacity. We disagree.

In Iowa, proof of diminished capacity is admissible on the issue of the defendant's ability to form a specific intent, when this intent is an element of the crime charged. Veverka v. Cash, 318 N.W.2d 447, 449 (Iowa 1982). It is not recognized as a defense to a crime which requires only a general intent. Id.

Theft by exercising control over stolen property in violation of section 714.1(4) has no specific intent element. In fact, in interpreting the theft statute, the supreme court has recognized that a "common pattern of 'general criminal intent' is to be found throughout the various definitions of theft contained in section 714.1." State v. Hutt, 330 N.W.2d 788, 790 (Iowa 1983). Defendant apparently concedes this point. However, it is claimed that we should not adhere to the labels "general" and "specific," at least in the technical sense of the words. Defendant relies on the fact that a violation of section 714.1(4) requires guilty knowledge. He argues that this guilty knowledge should be included within the realm of specific mental states subject to the diminished capacity defense. We are unpersuaded by this argument.

There is little reason to carve out an exception to the well-established rule that diminished capacity is only a defense to a specific intent crime. The guilty knowledge requirement to which the defendant refers should not be equated with

the specific intent necessary to trigger the applicability of this defense. In interpreting other portions of the theft statute, the supreme court found guilty knowledge to be the mens rea of the offense, not a specific intent. Eggman v. Scurr, 311 N.W.2d 77, 80 (Iowa 1981); State v. Smith, 300 N.W.2d 90, 93 (Iowa 1981). By analogy, we consider these cases controlling. We believe that defendant was properly precluded from introducing evidence of diminished capacity.

Accordingly, the judgment and sentence imposed by the trial court is affirmed.

AFFIRMED.