IN THE COURT OF APPEALS OF IOWA

No. 1-511 / 00-0128
Filed November 16, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID HAROLD STONE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

Defendant appeals from the judgment and sentence entered upon jury verdicts finding him guilty of first-degree burglary, second-degree burglary, third-degree burglary, and stalking. **REVERSED AND REMANDED FOR NEW TRIAL.**

Ronald L. Wheeler, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, John P. Sarcone, County Attorney, and Jim Ward and Michelle Chenoweth, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ. Eisenhauer, J., takes no part.

HUITINK, P.J.

I. Background Facts and Proceedings.

David Stone was initially charged with one count of burglary in the third degree and two counts of stalking in Polk County criminal case number 137704. The burglary count was based on allegations Stone broke into Debra Dawson's residence and took an answering machine and a coat on April 14, 1999. The stalking counts were based on allegations that Stone telephoned Dawson twice on April 15 and drove by her place of employment four times on April 22, 1999, in violation of a no-contact order entered in Polk County criminal case number 137471. In that case, Stone was charged with criminal mischief based on allegations that he broke a window in Dawson's car. The State subsequently dismissed the criminal mischief charge in 137471 and charged Stone with burglary in the second degree. As the result of these amendments and consolidation of case numbers 137704 and 137471, Stone was charged with one count of burglary in the third degree, one count of burglary in the second degree, and one count of stalking. Stone did not resist the amendments and agreed to consolidation of these counts for trial on November 29, 1999.

On November 18, 1999, the State moved to amend the trial information by adding an additional count charging Stone with burglary in the first degree. This charge was based on allegations that Stone entered Dawson's home on April 12, 1999, and assaulted her causing bodily injury. In his resistance to this motion, Stone argued the State added this count in retaliation for his rejection of a plea

agreement and decision to go to trial. After a hearing on the State's motion, the court found:

> [T]he facts are that the allegations arise out of the same set of circumstances that was the basis for the original Trial Information. The Court accepts the explanation that's been made by the prosecution, that these decisions were made on the basis of collaboration in the office, that the decisions were made on the basis of application of the facts and these allegations to the law as it exists, and I don't see that there was any prosecutorial misconduct.

The State's motion was granted, and the trial information was amended accordingly.

In his first motion in limine Stone sought exclusion of evidence that he had similarly victimized other women. The trial court denied Stone's motion, stating:

> The evidence sought to be introduced by the state would go to prove an essential element of the crime of Stalking. That is the defendant knew or should have known that Debra Dawson would be placed in reasonable fear of bodily harm or death by his conduct. His prior similar actions would tend to prove that his actions were done with this knowledge. It also is relevant to the issue of intent in the burglary charges.
>
> The other testimony is not unduly prejudicial in light of the nature of the current case. The prior crimes or bad acts did not involve conduct more sensational or disturbing than the crimes charged.

At trial three witnesses testified concerning their relationships and experiences with Stone. Each described Stone as possessive and controlling and that he threatened or harassed them when they tried to end their relationships. Prior to receipt of this testimony, the court gave the jury the following limiting instruction:

> Evidence is about to be received concerning other wrongful acts alleged to have been committed by the defendant. The defendant is not on trial for those acts. This evidence must be shown by clear proof and can only be used as bearing on the knowledge element of the stalking offense as charged in Count 3 of

> the Trial Information. If you find other wrongful acts, first, occurred, secondly, were so closely connected in time. And three, were committed in the same or similar manner as the crime charged so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing that the defendant knew or should have known that a particular course of conduct placed Debra Dawson in reasonable fear of bodily injury or death.

In a second motion in limine Stone challenged the admissibility of expert testimony concerning "the dynamics and behaviors associated with domestic violence." The trial court overruled this motion, stating:

> The state intends to present expert evidence by a Laura Schipper. Ms. Schipper has been recognized as an expert by the Iowa Supreme Court. Her evidence will be to explain why a victim might not report an incident of domestic abuse and why a victim might have continued contact with an abuser. These opinions will assist the jury in screening the properly admitted evidence to ascertain the truth. Therefore the Motion to exclude Ms. Schipper's testimony on the two topics stated above should be denied.

(Citations omitted.) Schipper's testimony at trial was confined to the matters anticipated in the court's ruling on Stone's motion in limine. Her testimony was offered to explain why Dawson did not immediately report the April 12, 1999 incident resulting in the first-degree burglary charges against Stone.

The jury returned guilty verdicts on all four counts. The trial court denied Stone's post-trial motion and entered judgment and sentence in accordance with the jury's verdicts.

On appeal Stone challenges the trial court ruling allowing the State to charge him with burglary in the first degree. He argues the additional charge was the product of prosecutorial vindictiveness and that the resulting due process violation necessitates reversal of his conviction on that count. Stone also claims

the trial court's ruling admitting testimony from three women claiming they were similarly victimized was reversible error. Lastly, Stone argues that Laura Schipper improperly expressed an expert opinion on Dawson's credibility and that it was reversible error for the trial court to conclude otherwise.

II. First-Degree Burglary.

Although Stone's resistance to the amended trial information included a claim that the "amendment materially changes the issues to be decided by the jury in violation of Iowa Rule of Criminal Procedure 4(8)," his argument on appeal is limited to prosecutorial vindictiveness. Because a claim of prosecutorial vindictiveness implicates Stone's constitutional rights, our review is de novo. *See North Carolina v. Pearce*, 395 U.S. 711, 723-25, 89 S. Ct. 2072, 2079-80, 23 L. Ed. 2d 656, 668-69 (1969), *overruled on other grounds by Alabama v. Smith*, 49 U.S. 794, 795, 1095 S. Ct. 2201, 2202, 104 L. Ed. 2d 867, 870 (1989); *State v. Hamrick*, 595 N.W.2d 492, 493 (Iowa 1999); *see also State v. Cullison*, 227 N.W.2d 121, 126 (Iowa 1975).

A prosecution is vindictive and violates due process if initiated "to punish a person because he has done what the law plainly allows him to do." *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 2488, 73 L. Ed. 2d 74, 80 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 610 (1978)). It is the defendant's burden to affirmatively prove actual vindictiveness. *Wasman v. United* States, 468 U.S. 559, 569, 104 S. Ct. 3217, 3223, 82 L. Ed. 2d 424, 433 (1984). In the absence of objective proof of actual vindictiveness, the regularity of the prosecutor's decision to file

additional or increased charges following failed plea negotiations is presumptive. *Goodwin*, 457 U.S. at 384 n.19, 102 S. Ct. at 2494 n.19, 73 L. Ed. 2d at 87 n.19; *Hamrick*, 595 N.W.2d at 495; *State v. Sefcheck*, 261 Iowa 1159, 1167, 157 N.W.2d 128, 133 (1968). "[O]nly in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor's action through such a demonstration." *Goodwin*, 457 U.S. at 384 n.19, 102 S. Ct. at 2494 n.19, 73 L. Ed 2d at 87 n.19.

Stone's prosecutorial vindictiveness claim is premised on the retaliatory motives and personal animus of the assistant county attorney assigned to his case. He cites the State's long-standing familiarity with the factual basis for the additional burglary charge and decision to file it only after he rejected a proffered plea agreement. Stone also cites his strained relationship with the county attorney's office resulting from earlier, successful defense of similar charges.

We find the evidence upon which Stone relies insufficient to sustain a claim of prosecutorial vindictiveness. Stone's claims of personal animus and retaliatory motives are belied by the testimony of a senior prosecutor who actually initiated the charging decision at issue. He testified:

> MR WARD: That charge was not originally filed with the Trial Information, as I understand it, because our office made the decision that we didn't want to prosecute that charge because the defendant—or excuse me, because the victim did not immediately report it to the police.
>
> Ms. Chenoweth asked me to assist her on this case about three weeks ago. As I read the case and as I understood the facts and as I understood what had happened on April 12, 1999, I thought that charge should have been filed from the beginning, and I suggested to Michelle that they go ahead and file it now as part of this Trial Information, and as soon as we made that decision, we gave notice to Mr. Brown and completed the paper work.

This testimony combined with the presumptive validity of the prosecutor's charging decision are sufficient to overcome any negative inferences attending the timing of the additional charge or conduct of the county attorney's office. We also note that the motion to amend the trial information was timely filed. *See* Iowa R. Crim. P. 4(8).

We affirm on this issue.

III. Other Victim Testimony.

As noted earlier, Stone contends that the admission of testimony from three persons with whom he had relationships in the past, and who each claimed to have been similarly victimized, was inadmissible. Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This rule is a codification of our common-law rule that one crime cannot be proven by proof of another. *State v. Castaneda*, 621 N.W.2d 435, 439 (Iowa 2001). Its purpose is to exclude from the jury's consideration evidence that has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question. *State v. Nebinger*, 412 N.W.2d 180, 186 (Iowa Ct. App. 1987).

In determining whether evidence of "other crimes, wrongs, or acts" is admissible, the trial court must employ a two-step analysis. The court must first decide whether the evidence is relevant and there is clear proof the individual

against whom the evidence is offered committed the prior acts. *State v. Zeliadt*, 541 N.W.2d 558, 560-61 (Iowa Ct. App. 1995). Iowa Rule of Evidence 401 provides that 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." The test is "whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence." *State v. Plaster,* 424 N.W.2d 226, 229 (Iowa 1988) (quoting 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 401[07], at 401-48 (1986)). Commission of prior acts need not be established beyond a reasonable doubt. *State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985). The purpose of the clear proof rule is to prevent jury speculation or inference drawn on mere suspicion. Corroboration of other crimes, wrongs, or acts is not required. *State v. Jones*, 464 N.W.2d 241, 243 (Iowa 1990). If there is clear proof of defendant's other crimes, the fact of a prior acquittal does not preclude admission of such evidence. *State v. Goodson*, 516 N W 2d 30, 33 (Iowa Ct. App. 1994).

If the court finds the evidence is relevant and established by clear proof, the court must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403; *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992). A positive finding as to the second step overcomes the evidence's prima facie admissibility. *State v. Query*, 594 N.W.2d 438, 443 (Iowa Ct. App. 1999).

Undue prejudice has been defined as follows:

> "Unfair prejudice" is an undue tendency to suggest decisions by the fact finder based on an improper basis, often an emotional one. Unfairly prejudicial evidence is evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

State v. Brown, 569 N.W.2d 113, 117 (Iowa 1997) (citations omitted). In making this determination, we consider the following factors:

> (1) the actual need for the evidence in view of the issues and the other available evidence, (2) the strength of the evidence showing that the prior bad acts were committed by the accused, (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven and (4) the degree to which the jury will probably be roused by the evidence improperly.

State v. Alderman, 578 N.W.2d 255, 259 (Iowa Ct. App. 1998). Our supreme court has stated that these decisions invoke the district court's sound discretion, but they have recognized that discretion is circumscribed as follows:

> It should be recognized, however, that this is not a discretion to depart from the principle that evidence of other crimes, having no substantial relevancy except to ground the inference that the accused is a bad man and hence probably committed this crime, must be excluded. The leeway of discretion lies rather in the opposite direction, empowering the judge to exclude the other-crimes evidence, even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. Discretion implies not only leeway but responsibility. A decision clearly wrong on this question of balancing probative value against danger of prejudice will be corrected on appeal as an abuse of discretion.

State v. Johnson, 224 N.W.2d 617, 621 (Iowa 1974) (quoting McCormick on Evidence, § 190, at 453-54 (2d ed. 1972)).

Keeping these principles in mind we turn to the three witnesses' testimony at issue.

Stephanie Jordan testified that she briefly dated Stone beginning in May 1998. She described him as possessive and jealous and claimed he threatened to shoot her ex-husband for interfering with their relationship. Jordan also testified that when she tried to end the relationship Stone called her home at least twenty times in thirty-six hours and left threatening messages on her answering machine, business cards in her mailbox, and a gift in her car. As a result, Jordan feared for her life and obtained a no-contact order. Jordan's testimony also related that Stone was subsequently charged with harassment based on the messages left on her answering machine but was acquitted. The answering machine tapes were played for the jury during Stone's testimony.

Jan Agan testified that she had a one-month relationship with Stone beginning in 1989. She described him as controlling and claimed he threatened and harassed her when she sought to end their relationship. Agan's testimony detailed Stone's unannounced visits to her apartment and violent behavior including tearing a telephone from the wall when she tried to call police, and breaking her car window and removal of the car keys as she tried to flee. Agan further testified that she obtained a no-contact order based on Stone's threats to harm her and her children.

Celia Tokheim testified that her relationship with Stone commenced in August 1994 and lasted for several weeks. She claimed Stone began to harass her when she attempted to end their relationship. Her testimony detailed Stone's behavior including threats to shoot her, setting her house on fire, bringing a gun to the daycare center where she worked, and disclosing the relationship to her husband if she failed to pay him $500. Tokheim testified she also obtained a no-contact order because she was afraid of Stone.

The State's theory of relevance at trial and on appeal is that the foregoing evidence proves the consequential fact that Stone knew or should have known that his conduct between April 12 and April 22 placed Dawson in reasonable fear of bodily injury or death. Stone argues that Jordan's testimony was not relevant because he was acquitted of the resulting criminal charges. He claims the conduct Agan described in her testimony was not relevant because it occurred at least ten years prior to trial. Stone similarly claims Tokheim's testimony is irrelevant because it related to conduct that occurred at least four years prior to his relationship with Dawson. Stone also contends there was insufficient factual similarity between the conduct described by these witnesses and that charged in this case.

Stone's acquittal of any criminal charges involving Jordan does not render her testimony irrelevant. *Goodson*, 516 N.W.2d at 33. Because the record fails to disclose any reference in either Stone's motion in limine or trial objections to the remoteness of the conduct referred to by Agan or Tokheim, we decline to consider those arguments on appeal. *State v. Webb*, 516 N.W.2d 824, 828

(Iowa 1994) (issues not raised in district court need not be addressed on appeal). We additionally find evidence of Stone's retaliatory and threatening behavior involving these witnesses following efforts to end their relationships to be sufficiently similar to the conduct complained of in this case to meet any threshold requirement of relevancy. In the absence of any other argument or authority disputing the relevance of this testimony, we assume for purposes of our review that the testimony of all three witnesses was relevant for the reason claimed.

The remaining question is whether the probative value of the foregoing testimony was outweighed by the danger of unfair prejudice. For the following reasons we determine that it was and find that the district court erred by concluding otherwise.

There is abundant evidence aside from the testimony of Stone's other victims from which the jury could make the requisite findings concerning Stone's knowledge. This testimony includes Dawson's detailed recitation of Stone's conduct and the resulting fear she experienced. Dawson's testimony was bolstered by other testimony concerning the observations and investigative conclusions made by law enforcement and other persons with whom Dawson shared her experiences. Although we have determined the disputed testimony was relevant, we do not find it very convincing because it is lacking in temporal proximity to the events of this case. Moreover, this evidence would be insufficient to independently establish Stone's knowledge. *See State v. Williams*, 427 N.W.2d 469, 472 (Iowa 1988) (evidence of prior physical abuse of former

spouse not independently probative of malice element of crime charged). Given the State's limited need for this testimony and its weakness in supporting the desired inference, the probative value of the other victims' testimony in this case was minimal.

In *State v. Castaneda*, the Iowa Supreme Court noted the following concerning the unfair prejudice attending other crimes or wrongful acts evidence:

> When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. That, of course, is why the prosecution uses such evidence whenever it can. When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered[:] to suggest that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again." *United States v. Johnson,* 27 F.3d 1186, 1193 (6th Cir. 1994).

Castaneda, 621 N.W.2d at 441-42. We find these observations especially instructive here. The other victims' testimony in this case indicated Stone previously committed essentially the same crime. Their testimony also implicated Stone's violent propensities towards others. As a result, the inference the jury was most likely to draw was that Stone was a bad person and thus likely to commit the crime in question.

We also reject the State's claim that the court's limiting instruction was sufficient to protect Stone from any prejudice attending admission of the disputed testimony. The content of the other victims' testimony in this case was so inherently prejudicial that no limiting instruction would have been sufficient to prevent the resulting unfair prejudice. *Id.* at 442-43. Lastly, we are unable to say

any error resulting from admission of this evidence was harmless. *See State v. Belieu*, 288 N.W.2d 895, 901-02 (Iowa 1980) (court declined to find mitigation of prejudice resulting from the crime evidence despite strength of State's case).

In summary, we find the district court abused its discretion by admitting the foregoing evidence. Stone's convictions on all counts are accordingly reversed, and this case is remanded for a new trial. Because we have reversed and remanded Stone's case for a new trial, we need not reach the issue concerning Laura Schipper's expert testimony. Should that issue arise on remand, we leave its resolution to the discretion of the trial court.

REVERSED AND REMANDED FOR NEW TRIAL.