FILED
AUG - 9 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 9, 1979
vs.	)	
JAMES PRESTON GRAHAM,	)	143/61056
Defendant-Appellant.	)	

Appeal from Scott District Court - Lowell Phelps, Judge.

Defendant appeals from conviction for breaking and entering in violation of section 708.8, The Code 1975. Affirmed.

Doren Shifley and John G. Mullen, of Shifley & Mullen, of Davenport, for appellant.

Thomas J. Miller, Attorney General of Iowa, Kermit L. Dunahoo, Assistant Attorney General, and William Davis, Scott County Attorney, for appellee.

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

DONIELSON, J.

Defendant James Preston Graham appeals from conviction for breaking and entering in violation of section 708.8, The Code 1975. He contends the trial court erred in overruling his motion to dismiss, in overruling his motion in limine, and in sustaining the prosecution's objection that defendant's evidence was irrelevant and immaterial. We affirm.

Defendant was charged by county attorney's information on April 15, 1977 with breaking and entering after he had been arrested inside a tavern. After jury verdict that found the defendant guilty of the charge, the trial court entered judgment and sentenced him to not more than 10 years imprisonment.

I. Defendant first contends the trial court erred in overruling his motion to dismiss made at the close of the State's case and at the close of all the evidence. The basis for this contention is that there was no proof that the defendant broke into the tavern with intent to commit larceny or any other public offense therein. Defendant asserts his intent in breaking into the tavern, whether established by the circumstances or the direct testimony by the State and defense witnesses, was to facilitate breaking into the building next door, a sporting goods store, to obtain firearms. Since he did not break into the sporting goods store from which he intended to steal, defendant argues, the crime of breaking and entering with the intent of committing a public offense therein was not made out and the motion to dismiss should have been granted.

We are bound to view the evidence in the light most favorable to the State and to accept all reasonable inferences tending to support the verdict. If there is any substantial evidence reasonably supporting the charge, the trial court properly submitted the charge to the jury. State v. Jones, No. 62137 (Iowa, filed June 27, 1979). See State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976).

The issue raised by defendant's contention is whether the State was required to show that the defendant intended to commit a public offense in the building he broke into. We hold the State was not required to prove such an intent and the motion to dismiss was properly overruled.

The language of section 708.8, which sets forth the statutory elements of the crime of breaking and entering, does not require that the person who breaks and enters have the intent to commit a public offense in the place broken into.

> If any person, with intent to commit any public offense, in the daytime break and enter, or in the nighttime enter without breaking, any dwelling house; or at any time break and enter any office, shop, store, warehouse, railroad car, boat, or vessel, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year.

Section 708.8, The Code 1975.

Intent is an essential and necessary element of the crime of breaking and entering. State v. Reaves, 254 N.W.2d 488, 490-91 (Iowa 1977); State v. Clay, 213 N.W.2d 473, 480 (Iowa 1973). We find no support, however, in either the statute or case law for defendant's construction of this section and reject it as an unreasonable reading of the statute. The Iowa Supreme Court has not directly addressed this issue, but we believe they would find as we do. Moreover, cases decided in other jurisdictions support our conclusion. People v. Wright, 206 Cal. App.2d 184, 191, 23 Cal. Rptr. 734, 737 (1962); State v. Charette, 98 N.H. 477, 479-80, 103 A.2d 192, 193-94 (1954); State v. Syddall, 20 Utah 2d 73, 75-76, 433 P.2d 10, 11 (1967). Cf. Jameison v. State, ___ Ind. ___, ___, 377 N.E.2d 404, 407 (1978) (statute specifically provides that intent be to commit a crime in building broken into); State v. Sallee, 436 S.W.2d 246, 251 (Mo. 1976) (statute specifically provides that intent be to commit a crime in building broken into).

Substantial evidence was presented at trial from which the finder of fact could find that the intent of the defendant in breaking and entering the tavern was to commit larceny. State v. Dahlstrom, 224 N.W.2d 443, 447-48 (Iowa 1974). Accordingly, we affirm the trial court's overruling of defendant's motion to dismiss at the close of all the evidence.

II. Defendant also asserts the trial court committed reversible error when it failed to sustain his motion in limine to exclude reference to defendant's prior felony conviction. Specifically, he contends the trial court failed to properly exercise its discretion because the conviction was remote in time and unrelated to truth or veracity; and that the court failed to evaluate any of the facts surrounding the conviction to determine whether the probability of undue prejudice would outweigh the probative value of the evidence of conviction. The State, in response, argues defendant failed to preserve this issue for appeal. It is also the State's contention that the trial court did

not abuse its discretion when it overruled defendant's motion in limine. We hold that the issue was not waived, but that the trial court did not abuse its discretion in its overruling of defendant's motion in limine.

Reversible error cannot ordinarily be predicated on an order overruling a motion in limine. It must be predicated on a record made during trial when the evidence is offered. State v. Langley, 265 N.W.2d 718, 721 (Iowa 1978); State v. Johnson, 244 N.W.2d 809, 812 (Iowa 1976); State v. Johnson, 222 N.W.2d 483, 485 (Iowa 1974); Twyford v. Weber, 220 N.W.2d 919, 924 (Iowa 1974); State v. Hinsey, 200 N.W.2d 810, 817 (Iowa 1972). The record shows that defendant did not object to the State's question concerning his prior felony conviction. However, this omission was not necessarily a waiver of the issue. Concerning waiver, the Iowa Supreme Court has stated:

> What is critical is what the trial court does or purports to do. A ruling that only grants or denies protection from prejudical references to challenged evidence cannot preserve the inadmissibility issue for appellate review. But if the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during trial. [State v. Jones, 271 N.W.2d 761, 765-66 (Iowa 1978); State v. Miller, 229 N.W.2d 762, 767-78 (Iowa 1975)].

State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979). See State v. Langley, 265 N.W.2d at 721.

The record indicates that the trial court was presented with defendant's argument against the admissibility of the prior conviction record, the law and facts were discussed, and the trial court made a final ruling that the conviction was admissible. Under these circumstances, it was unnecessary to raise again during trial the objections set out in the motion. State v. Cuevas, No. 61947 (Iowa, filed July 25, 1979); O'Connell, 275 N.W.2d at 202; State v. Jones, 271 N.W.2d 761, 765-66 (Iowa 1978); State v. Miller, 229 N.W.2d 762, 767-68 (Iowa 1975). See State v. Burt, 249 N.W.2d 651, 653 (Iowa 1977). The issue was preserved for appeal.

Defendant's argument raises the issue of whether the trial court's ruling violated the standards set forth in State v. Martin, 217 N.W.2d 536 (Iowa 1974). Evidence of a prior felony conviction is admissible only if the felony involved dishonesty or false statement, and the trial court determines any danger of unfair prejudice does not substantially outweigh the probative value of such prior felony conviction taking into

account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to improperly influence the minds of jurors. Id. at 542.

We believe the crime of receiving stolen property involves dishonesty. See State v. Burt, 249 N.W.2d 651, 653 (Iowa 1977) (robbery); State v. Miller, 229 N.W.2d 762, 769 (Iowa 1975) (larceny in the nighttime; larceny of property valued in excess of $20; and shoplifting larceny of property valued at over $20). "In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity." Martin, 217 N.W.2d at 540, quoting Gordon v. United States, 127 U.S. App. D.C. 343, 347, 383 F.2d 936, 940 (1967).

The trial court's determination of admissibility for the prior felony conviction was not an abuse of its discretion. Although the conviction was five years old at the time of trial, mere age does not warrant a finding of abuse of discretion if conviction is admitted. State v. Cuevas, No. 61947 (Iowa, filed July 25, 1979) (eighteen-year-old conviction held admissible); State v. Jones, 271 N.W.2d 761, 766 (Iowa 1978) (eight-year-old conviction held admissible); State v. Miller, 229 N.W.2d 762, 769-70 (Iowa 1975) (ten-year-old conviction held admissible); State v. Thornburgh, 220 N.W.2d 579, 583-84 (Iowa 1974) (fourteen-year-old conviction held too remote). Moreover, defendant has failed on appeal to show that the danger of unfair prejudice substantially outweighed the probative value of this evidence in the light of all the circumstances. See State v. Burt, 249 N.W.2d 651, 653 (Iowa 1977). We affirm the trial court's overruling of defendant's motion in limine.

III. Lastly, defendant contends the trial court improperly sustained the prosecution's objections that some of defendant's evidence was irrelevant and immaterial. These rulings, defendant argues, denied him a right to present his defense, thereby denying him a fair trial and due process of law. Defendant sought to establish entrapment as a defense by showing that the conduct of the law enforcement officials and their informant was so reprehensible that the defendant should not be held responsible for the acts that he committed; that he was entrapped by police conduct that was so provocative as to induce a normally law-abiding person to commit a crime; and that the government informant through the creation of the heroin dependency of the defendant induced the commission of the offense charged by improper and unlawful means.

The defense of entrapment exists "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." State v. Mullen, 216 N.W.2d 372, 382 (Iowa 1974). See State v. Pooler, 255 N.W.2d 328, 330 (Iowa 1977); State v. Cooper, 248 N.W.2d 908, 910 (Iowa 1976). Evidence concerning conduct by law enforcement agents involved here that would induce a normally law-abiding person to commit this offense would be relevant and material, thus admissible. The evidence, however, defendant sought to introduce concerned matters unrelated to any such conduct.

The defendant on offer of proof, after State's objections as to immateriality and irrelevance were sustained, asked various witnesses regarding the government informant's use of drugs, the witnesses' prior course of dealing with the informant, and the relationship between one of the parties to the break-in and a government agent. Neither the informant's use of drugs, the witnesses' prior course of dealings with the informant, nor the relationship between defendant's accomplice and a government agent were clearly relevant or material to the issue of whether defendant's increased drug dependence allegedly caused by the informant eroded defendant's will to the point where, as a normally law-abiding person, he was induced to commit the crime with which he was charged.

The entrapment defense focuses on the conduct of the police and its effect on a normally law-abiding individual. The testimony that defendant wished to introduce was not material as it did not prove this proposition that was in issue. See State v. Clay, 213 N.W.2d 473, 477 (Iowa 1974). Nor did it tend to make it more or less likely that the defendant was entrapped by the police or their agents.

A determination of the relevancy and materiality of evidence rests largely in the discretion of the trial court. Cowman v. LaVine, 234 N.W.2d 114, 121 (Iowa 1975); Hagenson v. United Telephone Co., 209 N.W.2d 76, 80 (Iowa 1973). If the materiality of a question is not readily apparent, the party seeking to introduce the evidence must state what he expects to prove and thus make its materiality known. State v. Hummel, 228 N.W.2d 77, 82-83 (Iowa 1973). Defendant failed to make apparent the materiality, if

any, of the evidence he sought to introduce. We find the trial court did not abuse its discretion when its sustained the State's objections to defendant's question regarding the informant's drug use, the nature of particular witnesses' relationship with the informant, and the relationship between defendant's accomplice and a government agent.

We affirm the trial court's judgment and conviction of the defendant.

AFFIRMED.