

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 15 1989

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JOHN ERWIN CIHA,)

Defendant-Appellant.)

214

9-161
88-716

Appeal from the Iowa District Court for Linn County
(CRF 10534), August P. Honsell, Judge.

The defendant appeals from his conviction for delivery
of a controlled substance. **AFFIRMED.**

William L. Wegman, State Public Defender, and Shari
Barron, Assistant State Public Defender, for the
defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats,
Assistant Attorney General; and Jerry Vander Sanden,
Assistant County Attorney, for plaintiff-appellee.

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

SACKETT, J.

215

We are asked to determine whether the trial court abused its discretion in admitting evidence of defendant's prior drug sales in a trial for delivery of a controlled substance. Under the facts of this case we determine the trial court did not abuse its discretion. We affirm.

Defendant was charged with delivery of a controlled substance after David Weaver, while in defendant's apartment, obtained heroin, injected it in his body and died. The issue at trial was whether Weaver picked up some heroin in defendant's apartment or whether defendant had delivered it to him. The State introduced evidence defendant sold drugs to Weaver on other occasions. Defendant contends this evidence is inadmissible under Iowa Rules of Evidence 403 and 404. Iowa R. Evid. 404(b) provides in relevant part:

Other crimes, wrongs, or acts. 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.

Evidence of prior crimes is the type of character evidence which is inadmissible under Iowa R. Evid. 404. See State v. Finchum, 364 N.W.2d 222, 225 (Iowa 1985); State v. Spargo, 364 N.W.2d 203, 208-09 (Iowa 1985); State v. Armstrong, 183 N.W.2d 205, 207-08 (Iowa 1971). The rule excluding evidence of other crimes of a defendant is based

on the fundamental principle "[a] defendant must be convicted only if it is proved he committed the offense charged and not because he is a bad man." State v. Wright, 203 N.W.2d 247, 250 (Iowa 1972). One crime cannot be proved by proof of another. Unless evidence of other crimes has probative value under a recognized exception, a trial court has no discretion to admit it. State v. Beliew, 288 N.W.2d 895, 901 (Iowa 1980).

If the evidence is relevant and material to some issue other than defendant's propensity to commit wrongful acts, it is prima facie admissible. See State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987); State v. Emerson, 375 N.W.2d 256, 260 (Iowa 1985). The areas listed in the rule are illustrative and not limiting. Barrett, 401 N.W.2d at 187. The range of relevancy outside the ban is almost infinite and a particular area of proof may fall within several of them. McCormick on Evidence § 190 p. 448. The only real question is whether it is relevant to some issue other than defendant's propensity to commit a crime. Barrett, 401 N.W.2d at 187.

The question is whether the evidence is admissible for a purpose other than showing defendant was a bad actor and had a propensity to commit the crime. We determine the evidence shows Weaver was a drug customer of defendant and thus was admissible to show Weaver did not obtain the drugs because defendant accidentally or inadvertently left them

in his apartment as defendant claims. See State v. Addison, 249 Iowa 905, 910, 87 N.W.2d 916 (1958) (where in a prosecution for receipt of stolen goods evidence defendant had received stolen property at subsequent times admissible to show goods defendant received or concealed had been stolen). United States v. Ross, 321 F.2d 61, cert. denied, 375 U.S. 894 (2nd Cir. 1963) (in a securities fraud case where defendant claimed he was an unwitting tool of his employer, it was proper to show defendant had sold worthless securities by a similar method on prior a occasion).

Defendant next contends even if the evidence is admissible under Iowa R. Evid. 404, the trial court should have excluded it under Iowa R. Evid. 403 which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The question is does the prejudicial effect outweigh the probative value. See State v. Wright, 203 N.W.2d 247, 250 (Iowa 1972). The balancing of the probative value against the ground for exclusion and the question of whether the relevancy is outweighed by prejudice to defendant is for the trial court's discretion. State v. Munz, 355 N.W.2d 576, 580 (Iowa 1984); State v. Harmon, 238 N.W.2d 139, 144-45 (Iowa 1976). We find no abuse of discretion.

AFFIRMED.