



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed June 24, 1977
vs.	)	
CHESTER ALLEN HOLTZMAN,	)	97
Appellant.	)	-----
		No. 59644

Appeal from Linn District Court -- Robert Osmundson, Judge.

Appellant appeals conviction of assault with intent to inflict great bodily injury in violation of §694.6, The Code, alleging violation of criteria for admission of prior crimes or previous transactions in cross-examination by the prosecution. - REVERSED AND REMANDED

Robert R. Rush, of Ford, Terpstra, Wilkinson & Van Horne, of Cedar Rapids, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Lee M. Jackwig, Assistant Attorney General, and Eugene J. Kopecky, Linn County Attorney, counsel for appellee.

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

DONIELSON, J.

Appellant appeals conviction of assault with intent to inflict great bodily injury in violation of §694.6, The Code 1975, asserting a number of errors for appeal.

The alleged assault arose from an altercation in Joe's Lounge, a bar located in Cedar Rapids, Iowa. Incongruities abound in this case where two of the defendant's eyewitnesses testified they had 15 to 20 "shells" of beer prior to witnessing the melee.

The jury could have found that the appellant approached Craig Weekly for money to buy a pitcher of beer. When Weekly refused, a pushing match ensued with the appellant striking Weekly in the mouth with his fist; the appellant then grabbed a pool cue and with a two handed baseball type grip struck Weekly on the side of the head with the "fat end" * breaking the pool cue and giving Weekly a brain concussion and a skull fracture. The appellant claims that Weekly threw a pool cue ball at him or swung at him with a cue ball in his hand depending upon whether the appellant or his witnesses were testifying. The jury convicted the appellant.

I

Previous transactions

The appellant in his first assigned error claims that the trial court erred in allowing the prosecutor to extensively question the defendant in cross-examination as to previous fights and misconduct. We find that the claim is without merit with the exception of one incident which will be discussed later. The testimony as to previous fights and misconduct is admissible under the exception to the general rule that evidence of other transactions tending to show a crime

* According to the appellant's testimony.

are not admissible. See State v. Johnson, 224 N.W.2d 617, 619 (Iowa 1974) * The exception then generally is that it can be admissible where it tends to prove: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or system of criminal activity; and (5) identity. See also State v. Petters, 202 N.W.2d 84, 91, 92 (Iowa 1972).

The evidence of other similar wrongful acts or similar transactions are well within the (2) intent or (3) absence of mistake or accident so as to make them admissible in the matter before this court. The appellant alleged in his testimony that he did not mean to injure but that the pool cue incident was in effect "instinct" "didn't mean to do it", "it was an accident", "I sure wasn't trying to hurt him", "I didn't even know I done (sic) it until after it happened". Therefore, evidence of previous fights and other similar misconduct was admissible if it was within a reasonable time prior to the event for which he is charged. See State v. Dillman, 183 Iowa 1147, 168 N.W. 204 (1918).

Although the special concurring opinion indicates that mistake or accident are not an issue. It is my belief that intent, mistake or accident are indeed the defendant's defense to the charge. I note that twice on direct examination and once on cross-examination the defendant testified as to

* The first trial was reversed and remanded. The defendant was again convicted and appealed in State v. Johnson, 237 N.W.2d 819 (Iowa 1976).

"instinct" causing his assault on the victim. He also testified on cross-examination that it was an accident. * It is somewhat questionable in my mind whether the "instinct defense" is the same as "self-defense" as indicated in the special concurring opinion since instinct involves some type of automatic reflex action and self-defense has as its foundation an excusable force involving the intent to defend from an aggressor. That, however, can be decided on another day. I would not find inquiry about previous fights so prejudicial as to outweigh the probative value of the questions. If this case is to be retried, however, the special concurring opinion should obviously receive appropriate attention.

I further do not adopt the "dirty linen" quote from State v. Wright, 203 N.W.2d 247, 251 (Iowa 1972), relating to the prior altercation as being applicable in this situation.

To equate previous fights, in an assault with intent to commit great bodily injury, with the prejudicial effect of a prosecutorial insinuation that the defendant was guilty of incestuous behavior with his own daughter in a case where the defendant was charged with the statutory rape of his step-daughter seems to me to be somewhat short of a reasonable comparison of prejudicial events.

The event that requires reversal in this instance relates to an inquiry concerning a specific act of

* "A. I don't believe it was a fight.

Q. Kind of one-sided? A. No.

Q. What would you call it? A. What would I call it, an accident maybe.

On my part it was an accident. He was probably trying to hurt me, but I sure wasn't trying to hurt him.

Q. Have you ever been in a fight before? A. Yes."

misconduct by the defendant which was highly prejudicial. That inquiry was the prosecutor's question about the specific acts of misconduct relating to Nancy Ann Clements. *

It has been repeatedly held that the admissibility of specific acts of misconduct on cross-examination to attack the credibility is within the trial court's discretion and will be disturbed only when that discretion has been abused. See State v. Crawford, 202 N.W.2d 99, 104 (Iowa 1972).

The cross-examination about hitting Nancy Clements in the head with a two foot long stick (later in the trial, this is referred to as a two by four) is a matter commanding reversal by this court. Justice Rawlings in State v. Martin, 217 N.W.2d 536, at 543 (Iowa 1974) ventured a trial procedure to avoid this precise problem. He suggests when impeaching under 622.17, (similar to prior crime exceptions) :

* "Q. Are you familiar with a lady named Nancy Ann Clements? A. Yes.

Q. Do you recall being in a fight with her?

MR. WALSHIRE: Objection. I still don't see the relevancy of all this.

THE COURT: Overruled.

A. It wasn't a fight. We was drinking beer that night. She put some of her medication into my beer and after that I don't know what happened. She put her medication into my beer and -- the whole night--I don't know what happened.

Q. You don't remember hitting her in the head with a two-foot long stick?

MR. WALSHIRE: I object. If we're going to try this case, fine, try it. He's getting into other things totally irrelevant and highly prejudicial.

THE COURT: Overruled.

A. No. I do not remember hitting.

Q. You don't recall hitting her then? A. No, I don't recall hitting her.

Q. Is it possible that you could have?

A. Yes, it's possible.

Q. Do you recall having an argument with her? A. No. I told you I don't recall nothing from that night." (emphasis added)

a hearing should be held outside the presence of a jury so the judge can weigh and resolve relevant factors regarding admissibility. In this instance, had that been done when the defendant denied knowledge of the event, the problem relating to Nancy Clements might well have been avoided.

The problem facing this court is that the prosecution did not conform to the standards set out in *State v. Johnson*, 224 N.W.2d 617, at 620 (Iowa 1974) where the court refers to the burden on behalf of the state to present "*clear proof*" relating to the defendant being culpable in these other wrongful acts. It is essential to the admissibility of other wrongful acts or offenses that the proof be "*plain, clear and conclusive*" and evidence of a "*vague and uncertain character*" is not admissible.

There must be no room for speculation in the minds of the jury whether the similar crimes attempted to be shown were actually committed or not. In this matter, the attempt to show an assault on Nancy Clements with a "*two foot long stick*" was entirely denied by the defendant and thereafter at his sentencing proceedings an Affidavit concerning the dismissal of the charge was introduced relating to the incident which entirely disavowed the defendant's culpability. Therefore, the "*clear evidence*" to be "*plain, clear and conclusive*" is not in this line of inquiry and it was highly prejudicial for the prosecutor to ask the question: "*You don't remember hitting her in the head with a two foot long stick?*" The jury might well have related that particular stick with a pool cue. Noting again that later in the trial, references were made to this "*two foot long stick*" as being a "*two by four*".

Normally, the court would not comment on the other citations of error because of the reversal in this instance, however, due to the fact that we are reversing and remanding, brief comment on the other points of error might well be in order.

II

Previous felony conviction

The defendant also claims error in allowing the prosecutor to question defendant in cross-examination as to whether or not he had been previously convicted of a felony. During the course of the trial, the court overruled defendant's motion in limine to restrict testimony with regard to defendant's prior felony convictions. However, the court did not allow the prosecuting attorney to inquire into the nature of the offense, but only as to whether or not the defendant had been convicted of a felony. The defendant had been previously convicted of breaking and entering within the last ten years prior to trial. Such an inquiry into a felony conviction satisfies all criteria under *State v. Martin*, 217 N.W.2d 536, 540-541 (Iowa 1974) which gave further instruction and guidance to *Gaskill v. Gahman*, 255 Iowa 891, 896, 124 N.W.2d 533 (1963).

III

Cross-examination

Further, the defendant claims that the court unfairly restricted defense attorney's cross-examination of a prosecuting witness during direct examination. During direct examination, the prosecuting witness, Weekly, the alleged victim in the assault, testified that he was at the halfway

house prior to the incident. On cross-examination, the defense attorney asked why the witness lived in a halfway house. The court sustained the State's objection to this question on the basis of irrelevancy.

In a recent Iowa Supreme Court case, *State v. Sheffey*, 250 N.W.2d 51 (Iowa 1977), the court held that there had been no abuse of discretion in the trial court's refusal to permit cross-examination of a witness regarding his address at time of trial. The Iowa court further held that *"ordinarily one has the right to cross-examine a witness concerning his address, occupation and other routine matters. However, that right is not absolute and may be restricted to protect a witness from embarrassment, harassment or threat to safety. (cases cited)"*. Cross-examination, while a valuable right, jealously guarded, has its limits. We hold no abuse of discretion by the trial judge. See *State v. Crawford*, 202 N.W.2d 99, 105 (Iowa 1972).

IV

Rebuttal Testimony

Defendant also asserts error where the testimony of a physician was allowed in rebuttal but was not listed in the minutes of testimony. We find that the trial court did not abuse its discretion in allowing a physician to testify in rebuttal. See *State v. McCullough*, 226 N.W.2d 216 (Iowa 1975); *State v. Hansen*, 225 N.W.2d 343, 351 (Iowa 1975). The doctor's rebuttal testimony was for the purpose of contradicting the theory of injury advanced by the defense witness, and, therefore, within the perimeters of the trial court's discretion.

v

Prosecution Misconduct

The defendant asserts that the trial court improperly denied defendant's motion for a new trial based on prosecutor's misconduct in closing argument. However, the party alleging prosecutorial misconduct in closing argument did not call the matter to the attention of the trial court when the issue appeared, and instead waited until an adverse verdict had been returned by the jury. *State v. Phillips*, 226 N.W.2d 16 (Iowa 1975); *State v. White*, 225 N.W.2d 104 (Iowa 1975). The defendant in his brief concedes that he did not object to the State's comment for fear of placing undue influence and emphasis on the controversial comments. The defendant, therefore, appeared willing to take his chances on a favorable verdict and such actions constitute a waiver of the State's misconduct. *State v. Phillips*, *supra* at 19. Of course, Iowa recognizes the exception that where misconduct is flagrant, improper and evidently prejudicial, error need not be preserved. *State v. Phillips*, 226 N.W.2d 16 (Iowa 1975). However, we find that the alleged misconduct in the present case does not fall within this exception.

This should not be interpreted as any approval of either the "two by four" argument or the words used in describing the defendant's witnesses. We note that juries have traditionally taken care of verbal excesses by the parties. However, we wish to add the caveat that if this case should be returned to us with error properly preserved and the same arguments used, we will no doubt review it in a more critical light to say the least.

REVERSED AND REMANDED.

ALLBEE, C.J., SNELL, OXBERGER, JJ., specially concur.

Because I am unable to agree with the broad statement of Division I that evidence of the accused's previous altercations is admissible into evidence, I must specially concur. The majority correctly states the law but falters in its factual application.

During cross examination the prosecutor was allowed to question Holtzman concerning his ten or so previous fights. The years in which these incidents occurred were never established and therefore they may be extremely remote. *See State v. Dillman*, 183 Iowa 1147, 1155-1156, 168 N.W. 204 (1918).

But further, the relevant character of these altercations was never established by the State. In fact, Holtzman denied that they were anything other than the garden variety fisticuff matches. As such, proof of these previous fights can hardly be said to help establish that Holtzman had the intent to commit great bodily injury on the evening in question. *See State v. Wright*, 191 N.W.2d 638, 639-642 (Iowa 1971). Similarly, mistake or accident are not at issue since Holtzman admitted that he instinctively struck Weekly with a pool cue after Weekly swung a cue ball at him. Thus, evidence of the ten previous scraps does not establish lack of mistake or accident here.

Finally, any evidence of defendant's past misconduct must relate to some factual issue in controversy. *State v. Wright*, supra. If the factual issue does not exist, such evidence is unnecessary and highly prejudicial. *State v. Wright*, supra. Here Holtzman conceded he struck Weekly with the cue, and relied upon self defense. Evidence of his past fights, without knowledge of their character, does little to negate the self defense claim.

Moreover, the probative value, if any, of evidence of prior altercations is far outweighed by its prejudicial effect.— In short, I believe that this evidence's "minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *See State v. Wright*, 203 N.W.2d 247, 251 (Iowa 1972). Unless a further showing of relevancy is made on retrial, I would hold this evidence is inadmissible.

SNELL and OXBERGER, JJ., join in this special concurrence.