

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL ALLEN WAILAND,

Defendant-Appellant.

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Filed November 30, 1987

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86-1304

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Dickinson County (No. 5197), James H. Andreasen, Judge.

Defendant appeals his conviction of possession of burglary tools in violation of Iowa Code section 713.7 and of being a habitual offender in violation of Iowa Code section 902.8. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and Richard Meyer, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

The defendant, Michael Wailand, appeals his conviction of possession of burglary tools, in violation of Iowa Code section 713.7, and of being a habitual offender, in violation of Iowa Code section 902.8. He asserts two issues on appeal: (1) that the trial court abused its discretion in permitting the State to cross-examine Wailand about an eighteen-year-old burglary conviction; and (2) that the trial court abused its discretion permitting the State to offer evidence of prior thefts involving Wailand. We affirm.

Our scope of review is for corrections of errors at law. Iowa R. App. P. 4. We will develop the pertinent facts as we discuss the issues raised by the defendant.

Wailand contends the trial court abused its discretion in permitting the State to cross-examine him about an eighteen-year-old burglary conviction. The defendant testified on his own behalf and, on direct examination, was asked, "[W]ere you making a list up at that point of places that you might later go out and burglarize?" The defendant replied, "No, sir. I am not a burglar." The State, during cross-examination, asked the court to reconsider its prior ruling on defendant's Motion in Limine barring the use of defendant's prior burglary conviction.¹

The defendant contends this evidence was inadmissible for several reasons. First, the evidence was barred by Iowa Rule of Evidence 609(b) since the State failed to give notice, and the court failed to make specific findings as to the probative value of the evidence. Second, the evidence was not properly admitted to rebut evidence of a pertinent character trait under Iowa Rule of Evidence 404(a)(1) because rule 404(b) bars the use of prior crimes to prove character in order to show a person acted in conformity therewith. The State, in response,

¹The State originally had no plans to use the prior conviction for impeachment purposes.

argues that the defendant opened the door and the evidence was properly admitted under rule 404(a)(1) in order to rebut the character evidence offered by the defendant.

The trial court did not specify under which theory it was allowing the evidence. We, however, are not limited by the trial court's analysis of the evidentiary issue. State v. Kern, 392 N.W.2d 134, 136 (Iowa 1986) (Appellate court will uphold a ruling of the district court on the admissibility of evidence on any ground appearing in the record, whether urged below or not); State v. Jespersen, 360 N.W.2d 804, 806 (Iowa 1985); State v. McCowen, 297 N.W.2d 226, 227 (Iowa 1980). We conclude the evidence was not barred by rule 609(b) and properly admitted under rule 404(a)(1).²

The defendant on direct examination sought to depict himself as a law-abiding citizen who would not even consider committing a crime, let alone a burglary. He went far beyond, as he argues, merely denying guilt of the specific charge, and stated unequivocally he was not a burglar. By testifying in this manner, the defendant opened the door for rebuttal evidence on a pertinent trait of his character, namely his propensity not to commit criminal acts. Wailand, however, argues that rule 404(b) would bar the use of the prior conviction.³ We disagree.

²Rule 404(a), which is identical to its Federal counterpart, states:

- (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
 - (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

³Rule 404(b) states:

- (b) 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.

When a defendant testifies that he has not committed a particular crime in the past, or that he would not commit such a crime, he places his character's propensity not to commit a particular offense in issue. Often the only evidence to rebut this assertion is a prior conviction of the defendant for that particular crime. The State has the right to cross-examine the defendant on a material matter raised by the defendant on direct examination. Iowa R. Crim. P. 19(1); Gibb v. Hansen, 286 N.W.2d 180, 186 (Iowa 1979) (proper for a defendant to be cross-examined on areas in which he has been questioned about on direct). To deny the State to cross-examine Wailand about his prior conviction would be to deny the State a fair trial. Gibb, 286 N.W.2d at 186. The questions, however, must be narrowly framed and restricted to actual events which affect the traits the accused has placed in issue. United States v. Dahlin, 734 F.2d 393, 395 (8th Cir. 1984); United States v. Lewis, 482 F.2d 632, 639 (D.C. Cir. 1973). The court must closely supervise this questioning and balance the probative value of the information elicited against possible prejudice to the defendant. Id.; see United States v. Murzyn, 631 F.2d 525, 529 (7th Cir. 1980).

We conclude, because the defendant opened the door, the rebuttal evidence offered by the State was squarely within rule 404(a)(1) and not barred by rule 404(b). United States v. Dahlin, 734 F.2d 393 (8th Cir. 1984) (defendant's alibi placed his reliability and familial devotion in issue and Government was entitled to question regarding defendant's role in family fights as well as his drug dependency); United States v. Gaertner, 705 F.2d 210, 214-17 (7th Cir. 1983) (defendant's testimony that he was not involved in drugs and was "clean living" opened the door for questioning regarding his present and prior drug involvement including drug-related convictions); State v. Lawless, 332 N.W.2d 120, 122-23 (Iowa App. 1983) (defendant's testimony that he had never before been arrested for sexual assault allowed State to present rebuttal evidence to establish that he had been arrested). We hold, when a defendant opens the door and places

his character's propensity not to commit a particular crime in issue, evidence of a prior conviction relating to that propensity is not barred by rule 404(b) and is properly admissible under rule 404(a)(1).

Wailand contends rule 609(b) bars the admission of the evidence since the State failed to give advance notice of intent to use the evidence, and because the trial court failed to make specific findings regarding the evidence's probative value. Wailand contends the court admitted the evidence for impeachment purposes. The State contends written notice was unnecessary since Wailand raised the matter through his testimony.

We agree with the defendant that if the evidence was used strictly for impeachment purposes, it would possibly be barred by rule 609(b). However, as noted earlier, the evidence is admissible for rule 404(a)(1) purposes rather than rule 609(b) purposes. Therefore, since the evidence is not being admitted for impeachment purposes, the rule 609(b) requirements are inapplicable and defendant's contention must fail. The trial court, therefore, did not abuse its discretion in permitting the State to cross-examine the defendant about his prior burglary conviction.

The defendant's second argument on appeal is that the trial court abused its discretion in permitting the State to offer evidence of prior thefts. Wailand filed a Motion in Limine to prohibit the State from referring to or offering evidence of other crimes including an alleged crime at the Norge Laundromat in Estherville, Iowa, and a crime at a laundromat in Davenport, Iowa. The trial court admitted the evidence of the Estherville laundromat incident because it was necessary to "complete the story of events which occurred on the evening of the 12th and in the early hours or so of the 13th." The court also allowed the evidence of the Davenport incident but on unspecified grounds. Wailand argues the evidence is inadmissible under any theory. The State argues the evi-

dence is admissible because it is highly relevant to the case's main issues of the defendant's intent and knowledge.

As a general rule, the prosecution may not prove a crime by proof that the defendant committed another criminal act or that the defendant has a criminal disposition. State v. Connor, 314 N.W.2d 427, 429 (Iowa 1982). The purpose of the rule is to exclude from the jury's consideration evidence which has no relevancy except to show the defendant is a bad person and thus likely committed the crime in question. State v. Coen, 382 N.W.2d 703, 705 (Iowa App. 1985). The rule, however, is inapplicable to evidence of a fact or element in issue other than the defendant's criminal disposition such as (1) motive, (2) intent, (3) absence of mistake or accident, (4) common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other, (5) identity of the person charged with the commission of the crime. State v. Mendiola, 360 N.W.2d 780, 781-82 (Iowa 1985), State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982); Iowa R. Evid. 404(b) (knowledge). Furthermore, when acts are so closely related in time and place that they form a continuous transaction, the whole transaction may be shown to complete the story of what happened. State v. Hood, 346 N.W.2d 481, 483-84 (Iowa 1984); State v. Oppelt, 329 N.W.2d 17, 19 (Iowa 1983).

To secure a conviction, the State had to establish: the burglary tools were found in the defendant's van; the defendant knew the tools were there; and, the defendant intended to use them to commit a burglary. The defendant testified that he did not own the tools, that he did know they were in the van, that he did not know how to use them, and that he did not intend to use them to commit a burglary. By testifying in this manner he placed all the above in issue and made the evidence of the prior incidents highly relevant and probative on the contested issues.

The evidence of the Estherville laundromat incident was highly probative to defendant's knowledge that the tools, particularly the tubular lockpick, were in his van. The defendant and an accomplice were seen in a laundromat working on the lockbox of a dryer. They fled the building in a van when the owner returned. The owner got a partial license plate number and gave police an estimate of how much money was stolen. A van with matching plates was stopped by police, and a search revealed the burglar tools and \$30.75 in quarters.⁴ Defendant's involvement in the Estherville incident clearly established the defendant knew the tools were in his van. Furthermore, the facts of the incident were necessary to complete the chain of events that took place on that evening.

The evidence relating to the Davenport laundromat theft was relevant and probative to show that the defendant knew how to use the tubular lockpick. We conclude these incidents were highly relevant to the issues in the case and properly admissible as proof of defendant's knowledge. We hold the trial court did not abuse its discretion in allowing evidence of the prior thefts as proof of defendant's knowledge.

AFFIRMED.

⁴Wailand argues that, since there was a question as to the identity of the man involved the evidence was inadmissible. The State in order to introduce evidence of this nature must show by "clear proof" that the defendant was indeed culpable. State v. Spargo, 364 N.W.2d 203, 209 (Iowa 1985); State v. Williams, 360 N.W.2d 782, 786 (Iowa 1985). The record leaves no doubt the defendant was involved in the Estherville laundromat incident.