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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

412

STATE OF IOWA,
Plaintiff-Appellee,
vs.
CURTIS L. DEMICHELIS,
Defendant-Appellant.

9-01
87-1554

Appeal from the Iowa District Court for Wayne County (CR 1683), Van Wifvat, Judge.

Defendant appeals from his conviction by a jury of second-degree burglary. **REVERSED AND REMANDED.**

William L. Wegman, State Public Defender, and Raymond L. Rogers, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM 413

Defendant was found guilty of second-degree burglary by a jury. The testimony showed defendant and two others stole a videocassette recorder (VCR) from the home of relatives of one of the other participants. Demichelis relied upon an alibi defense. He admitted to two prior felony convictions and was sentenced as an habitual offender.

On appeal defendant contends the only evidence tending to connect him with the burglary was provided by the alleged accomplishes. Next, he claims the trial court erred in allowing him to be impeached with evidence of a prior conviction for second-degree arson. Finally, defendant contends the trial court erred by allowing identification of a prosecution witness as his parole officer. We reverse and remand for a new trial.

Before defendant took the witness stand in his own behalf, he moved in limine to preclude the prosecution from attempting to impeach him with any prior convictions as he had never been convicted of any crimes involving dishonesty or false statement. The State resisted defendant's motion in limine primarily on the claim, the prior conviction was an "arson for profit" and it would "pertain to the theft-type offense criteria allowing it to be an impeachable offense." The trial court overruled defendant's motion and permitted defendant to be impeached with his prior conviction of arson in the second degree.

The general rule for impeachment by evidence of conviction of a crime is embodied in Iowa Rule of Evidence 609(a) and provides as follows:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime involving dishonesty or false statement shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime constituted a felony, aggravated misdemeanor, or other crime punishable by imprisonment in excess of one year pursuant to the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect. (Emphasis ours.)

As stated in State v. Gavin, 328 N.W.2d 501, 502 (Iowa 1983):

> To be admissible, evidence of a prior conviction must meet a two-pronged test: (1) the prior crime must involve dishonesty or false statement, and (2) the trial court must determine that the danger of unfair prejudice does not substantially outweigh the probative value of the conviction.

Id. at 502 (citations omitted).

To determine whether specific categories of crimes meet the criteria of dishonesty, Iowa uses the "elemental test." Id. State v. Zaehringer, 325 N.W.2d 754, 756 (Iowa 1982). "Dishonesty or false statement" involve crimes that encompass deceit, fraud, cheating, or stealing in an elemental sense. See Iowa Code §§ 720.2 (perjury requires knowing false statement of material fact or false denial of knowledge), 714.1(1) (intent to deprive another as element of theft), 714.1(2) (misappropriation), 714.1(3) (deception), 714.1(5) (intent to defraud). Id.

Iowa Code section 712.1 (1987) defines the elements of arson as follows:

> Causing a fire or explosion, or placing any burning or combustible material, or any incendiary or explosive device or material, in or near any property with the intent to destroy or damage such property, or with the knowledge that such property will probably be destroyed or damaged, is arson, whether or not any such property is actually destroyed or damaged.

Arson in the second degree occurs "when the property which the defendant intends to destroy or damage, or which the defendant knowingly endangers, is a building or a structure, or real property of any kind, or standing crops, or is personal property the value of which exceeds five hundred dollars." Iowa Code § 712.3 (1987).

While dishonesty and/or false statement might actually be present in some arson cases, they are not elements expressly or impliedly required or found in Iowa Code sections 712.1 or 712.3.

Our supreme court has rejected and refused to adopt the "underlying facts approach." This approach would require the trial court to scrutinize the underlying facts of the prior conviction to determine if dishonesty was involved. "The 'underlying facts' approach . . . requiring trial court to interrupt proceedings and hear argument on the specific circumstances of a prior conviction, runs counter to the principle that evidentiary rules should be convenient, predictable, and mechanically applicable." Zaehringer, at 758. In that case the supreme court went on to say: "We find no compelling reason to discard our

present rule for one that would spin off satellite minitrials delving into contested details surrounding a prior crime." Id.

We hold the trial court committed reversible error in allowing impeachment based on a conviction of arson in the second degree. At this trial, defendant's credibility was critical to the success of his alibi defense. We cannot find the error was harmless. See Gavin, 328 N.W.2d at 503, and Zaehringer, 325 N.W.2d at 758. The cases cited and relied upon by the State do not follow Iowa's "elemental test" regarding false statements and dishonesty in impeachment issues. We decline the State's implied invitation to go against established precedent or to overturn the Iowa Supreme Court.

In view of our holding above, we do not reach defendant's other two assignments of error on appeal.

We reverse and remand for new trial.

REVERSED AND REMANDED.

Donielson, P.J., and Hayden, J., concur; Habhab, J., dissents.

HABHAB, J. (dissenting) 117

I respectfully dissent. I believe that the defendant's conviction of the crime of arson as it is described in the record of these proceedings is admissible for impeachment purposes.

It is not disputed that the defendant was convicted of arson in the second degree. The burden then shifted to the defendant to show that this conviction did not involve dishonesty or false statement. I agree the burden has never been extended to encompass specific facts of the prior crime. The burden extends only to argument regarding the effect of the offense in its abstract, generic sense. State v. Zaehringer, 325 N.W.2d 754 (Iowa 1982).

As the majority points out, dishonesty and/or false statements may be present in arson cases. "Dishonesty or false statement" involve crimes that encompass deceit, fraud, cheating, or stealing in an elemental sense. Id. at 756.

If the defendant, in his arson conviction, raised the affirmative defense that he had the consent of the owner of the property, the State would then have to prove beyond a reasonable doubt as an element of arson in the second degree that the defendant did not have the consent of the owner or that an insurer was exposed fraudulently to risk of loss. These involve deceit or fraud.

The defendant did not carry his burden of showing that the arson conviction did not involve dishonesty or false statement. I believe it was incumbent upon the defendant to meet this burden under the circumstances of this case, particularly when discussion did take place that money was involved in the arson conviction.