IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,	)	Filed November 30, 1987
Plaintiff-Appellee,	)	
vs.	)	7-226 86-1263 350
THOMAS LEE NEELEY,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Tama County (No. CR 2137), Harold J. Swailes and Thomas L. Koehler, Judges.

The defendant appeals his conviction of second degree burglary. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Richard R. Vander Mey III, Assistant Tama County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J. 351

The defendant Thomas Lee Neeley appeals his conviction of second degree burglary in violation of Iowa Code sections 713.1 and 713.5. The defendant was also prosecuted and sentenced as a habitual offender. He asserts on appeal: (1) that the trial court erred in admitting evidence of the nature of his prior felony convictions for impeachment purposes; and (2) that he was denied due process of law by the use of his trial testimony against him at his subsequent trial on the habitual offender charge. We affirm.

Neeley was convicted of burglary in the second degree following a jury trial. He was charged with taking meat, cigarettes, and liquor from a Sun Mart grocery store in Toledo, Iowa. At trial, Russ Zilek and Brad Fenton testified they, along with the defendant, were responsible for the burglary. Fenton's wife corroborated this story. Neeley testified at trial and denied any involvement in the burglary.

On cross-examination the defendant admitted he had prior felony convictions. The State then proceeded, over defendant's objection, to inquire about the nature of the prior convictions. The following exchange took place:

> Q. Mr. Thompson asked you if you've been convicted of felonies. Let me ask you this question, Mr. Neeley: You've been convicted of a felony crime in the state of Iowa involving dishonesty or false statement? A. Dishonesty?
>
> Q. Or false statement. A. Would anything that I do that's breaking the law be dishonest or something like that?
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> Q. Have you been convicted of a — Suppose a burglary involved dishonesty. A. That's what I am asking you.
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> Q. Let's assume that it does. If burglary involved dishonesty or false statement, have you been convicted of a felony crime in the state of Iowa? A. Yes, I have.
>
> Q. Would that have been in Burglington [sic] in Des Moines County? A. Yes, I have.
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> Q. If we assumed that robbery involves dishonesty or false statement, have you been convicted of a felony crime involving dishonesty or false statement? A. In the state of Iowa?
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> Q. In the state of Indiana at South Bend, Indiana. A. Yes, I have.

Q. You have been convicted of that felony crime involving dishonesty or false statement in 1973; is that right? A. Yes.

Q. Have you been — Assuming that forgery or burglary is a crime involving dishonesty or false statement, have you been convicted of such a crime in the state of Tennessee in 1982? A. Yes, I have.

The defendant argues that the prejudicial effect of revealing the specific nature of the prior felonies outweighs its probative value and, therefore, the evidence should not have been admitted under Iowa Rule of Evidence 609(a).[1] He argues the State did not bear its burden to prove the probative value outweighed the prejudicial effect. The State, in reply, argues the burden is on the defendant to show the prejudicial effect outweighs the probative value, and that the evidence was highly probative of the defendant's credibility and veracity.

It is permissible, for impeachment purposes, to inquire into the specific nature of a witness' prior felony conviction provided the probative value of such inquiry is not outweighed by the prejudicial impact to the defendant. Iowa R. Evid. 609(a); State v. Willard, 351 N.W.2d 516, 519 (Iowa 1984) (interpreting Iowa Code § 622-17, forerunner of rule 609(a)). The proponent of the evidence bears the burden to show the probative value of the evidence outweighs its prejudicial effect. Cf. State v. Roth, 403 N.W.2d 762, 767 (Iowa 1987); State v. Hackney, 397 N.W.2d 723, 727 (Iowa 1986).

Because of the inherent danger of unduly prejudicing the defendant by admitting this type of evidence, the trial court must exercise sound judicial discre-

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[1]Rule 609(a) states:

(a) General rule. 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.

tion. State v. Martin, 217 N.W.2d 536, 544 (Iowa 1974). Rulings regarding the admissibility of prior convictions are within the trial court's discretion and will be disturbed only when such discretion has been abused. State v. Hackney, 397 N.W.2d 723, 726 (Iowa 1986); see also State v. Latham, 366 N.W.2d 181, 184 (Iowa 1985); State v. Zaehringer, 325 N.W.2d 754, 755-56 (Iowa 1982).

We find the trial court did not abuse its discretion in allowing questioning as to the specific nature of the prior felonies. The supreme court held in Willard that such questioning was permissible if the probative value outweighed the prejudicial impact. While prejudicial, the probative value of the evidence outweighed any prejudicial impact it would have on the defendant. The defendant testified that he was not involved in the burglary. His testimony was directly contradicted by the State's witnesses, including two other parties who were testifying as part of a plea bargain. The defendant's credibility became a determinative factor and the jury was entitled to have all the relevant information relating to the defendant's moral character and truthfulness. We, therefore, hold that, since the probative value of this evidence outweighed its prejudicial impact, the trial court did not abuse its discretion in allowing the State to inquire into the specific nature of the defendant's prior felony convictions.

The defendant also contends the use of his burglary trial testimony against him at his subsequent trial on the habitual offender charge denied him due process of law. He argues that the State's introduction of the burglary transcript forced him into making a choice of not testifying at the burglary trial in order to preserve a meaningful right to trial on the habitual offender charge, or, testifying at trial and effectively surrendering the right to trial on the habitual offender charge. He urges us to hold that an accused's trial testimony can never be used against him at a subsequent hearing to determine habitual offender status.

We find no merit in defendant's argument. The Supreme Court has held that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. Harrison v. United States, 392 U.S. 219, 222, 88 S.Ct. 2008, 2010, 20 L.Ed.2d 1047, 1051 (1968). A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives. Harrison, 392 U.S. at 222, 88 S.Ct. 2008 at 2010, 20 L.Ed. 2d 1047 at 1051. This waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. Id.

> The criminal process, like the rest of the legal system is replete with situations requiring "the making of difficult judgments" as to which course to follow. McMann v. Richardson, 397 US, at 769, 25 L Ed2d, at 772. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by the token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

McGautha v. California, 402 U.S. 183, 213, 91 S.Ct. 1454, 1470, 28 L.Ed.2d (1971) 711, 729.

We find that the defendant has not shown that any of the policies behind his right to due process were impaired to an "appreciable extent." The basic policy behind the due process right is fundamental fairness. See Auxier v. Woodward State Hosp. School, 266 N.W.2d 139, 142 (Iowa 1978). In this case, the admittance of Neeley's trial testimony was not unfair. After the introduction of the prior testimony, the State introduced evidence relating to each of the prior convictions. The State presented the law enforcement officers involved in the arrest and the court personnel involved in the entry of the felony convictions against Neeley. The State produced overwhelming evidence, without the prior testimony, that Neeley had, in fact, been convicted of two prior felonies. See

State v. Smith, 282 N.W.2d 138, 143 (Iowa 1979) (only issue in habitual offender trial is the defendant's identity as one convicted of two prior felonies).

Furthermore, the Supreme Court has recognized that, unless the defendant is compelled to testify because of the introduction of inadmissible evidence, the use of his prior trial testimony in subsequent criminal proceedings is permissible. The Constitution does not always forbid that a difficult choice be made by a defendant. In this case the defendant was not compelled to testify in order to rebut inadmissible evidence. He testified to contradict the stories of his two accomplices who were pointing an accusatory finger at him. Certainly the defendant faced a difficult choice, but having to make that choice was not fundamentally unfair, and did not deprive him of his due process rights.

AFFIRMED.