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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

TODD MATTHEW HECK,)

Defendant-Appellant.)

Filed January 28, 1987

6-420 / 85-1104

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Appeal from the Iowa District Court for Washington County (CR 1608) - Harlan W. Bainter, Judge.

Defendant was charged with burglary in the second degree for participating in the theft of a television set from a local high school. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

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

On December 10, 1984, the Washington County Attorney filed a trial information charging defendant with burglary in the second degree pursuant to Iowa Code section 713.5 (1985). The jury trial began on March 18, 1985, and the verdict was returned on March 21, 1985. During the trial defendant took the stand and fully admitted his role in the crime, but asserted he was compelled to do so through fear of Robert Woods, who also participated in the crime. After the State had rested its case the defense requested and received an evidentiary hearing out of the presence of the jury. This evidence related to the character and reputation of Robert Woods, and defendant's defense of compulsion. The trial court ruled the evidence either already within the record or irrelevant. Following the evidentiary hearing and during the State's cross-examination of defendant, the State requested and received permission to introduce evidence of defendant's prior bad acts, relating to his relationship with Robert Woods. At the conclusion of all the evidence the matter was submitted to the jury who subsequently returned a verdict of guilty.

Defendant contends the trial court erred in: (1) allowing the State to introduce evidence of his prior participation in other area burglaries; and (2) failing to allow defense testimony relative to the character and disposition of Robert Woods.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact have the force of a special verdict and are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). This case is reviewed as tried in the court below. Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa 1979). We are not bound by the trial court's determination of law and are free to decide whether the court's findings were the result of legal error. Rouse v. State, 369 N.W.2d 811, 813 (Iowa 1985).

I. 173

Initially we address defendant's assertion that the trial court erred in allowing the State to introduce evidence of his prior bad acts. As already mentioned, the State sought and received permission to introduce this evidence subsequent to defendant's assertion of the defense of compulsion. At trial and on appeal defendant maintains this evidence should not have been admitted under the intent exception to Iowa Rule of Evidence 404(b), since it was irrelevant. While the State argues the evidence of similar prior bad acts, with the same person, tends to negate the defense of compulsion and establishes the intent needed for the crime charged. Defendant also contends even if the evidence of prior bad acts was relevant, its prejudicial effect on the jury outweighed its probative value. The State argues evidence of the defendant's willing participation with Robert Woods in other burglaries was highly probative. Also, this was not the kind of evidence which would prevent a jury from making a rational decision where, as here, a limiting instruction was given.

Iowa Rule of Evidence 404(b) provides:

> 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.

Defendant and Robert Woods committed the subject burglary on September 3, 1984. The evidence of prior bad acts, which the State was allowed to produce, related to: defendant and Robert Woods twice burglarizing the high school office of a teacher in April of 1984; defendant, Robert Woods, Jeff Batterson, and Richard Burroughs breaking into the same office in the spring of 1984; and defendant and Robert Woods burglarizing a movie theater in April 1984. At trial Robert Woods, Jeff Batterson and Richard Burroughs testified

to defendant's participation in these events. Defendant denied any participation in these burglaries. The trial court allowed this testimony because defendant's volitional action, his intent in committing the burglary on September 3, 1981, was at issue.

Defendant contends the alleged crimes had no relevancy in proving his intent in the present case. In support of his argument he uses the following language from State v. Belieu, 288 N.W.2d 895, 900-01 (Iowa 1980): "The intent exception does not apply when intent may be inferred from the nature of the act charged; it applies only when by its nature the act might have been entirely innocent." The question we must ask is whether the alleged prior crimes had any relevancy in proving defendant's intent in the present case.

The State has the burden of proving every element of the crime of second degree burglary, including intent. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970). Burglary requires an intent to commit a felony, assault or theft. Iowa Code § 713.1 (1983); State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). When defendant contests the issue of intent, "the probative value of evidence of other misconduct tending to show that the defendant may have had the requisite intent may outweigh the prejudicial effect inherent in the admission of such evidence." State v. Perry, 195 Conn. 505, 521, 488 A.2d 1256, 1265 (1985). Defendant made his intent an issue by asserting the defense of compulsion pursuant to section 704.10, which provides:

> No act, other than an act by which one intentionally recklessly causes physical injury to another, is a public offense if the person so acting is compelled to do so by another's threat or menace of serious injury, provided that the person reasonably believes that such injury is imminent and can be averted only by his or her doing such act.

Generally in burglary prosecutions intent is inferred through the commission of the crime, but here defendant's assertion of the compulsion defense struck

any such inference and brought intent forward as an issue. Defendant has opened the door as to his intent regarding this crime. When the intent necessary to commit the crime cannot be inferred, the Belieu exception does not apply. If the jury had accepted the compulsion defense, defendant's actions would have been innocent; because of this possibility the intent exception was correctly invoked.

The basic standard for admissibility of prior alleged criminal acts is relevancy. State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982). To be relevant, the other offenses of which testimony can be offered must be reasonably similar to the current act being prosecuted. State v. Fetters, 202 N.W.2d 84, 92 (Iowa 1972). "[T]he other offenses must be wrongful acts, crimes, offenses or attempted offenses of a like nature to the charge against accused." Id. Three of the four alleged criminal acts were committed in the Washington High school, all four acts were burglaries and all involved defendant and Robert Woods. With these factors in mind we find all four prior bad acts relevant to defendant's current criminal charge.

If evidence of prior bad acts is found to be relevant, then the court must consider whether the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. State v. Spargo, 364 N.W.2d 203, 208-09 (Iowa 1985). The trial court's ruling on admissibility will not be disturbed unless it is found to be an abuse of discretion. Id. at 209. In the instructions to the jury the trial court stated that the evidence of defendant's prior bad acts was admitted solely for the probative value regarding defendant's intent on the day of the trial. Considering this cautionary instruction and the similarity of the prior bad acts to the crime, we consider the facts of this case strong enough to justify the conclusion that the trial court did not abuse its discretion in allowing said evidence.

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Defendant also contends the trial court erred in failing to allow defense testimony regarding Robert Woods' character and disposition. After the State had rested, an Iowa Rule of Evidence 204 hearing was held outside the presence of the jury. At this hearing defendant attempted to introduce the testimony of two witnesses: a classmate of Robert Woods who had been threatened and intimated by him since eighth grade; and a woman who, several weeks after the burglary saw a microwave in the backseat of Robert Woods' car, at which time he threatened her if she told anyone else. The trial court held the former classmates' testimony was remote and irrelevant; and the woman's testimony irrelevant and after the fact.

The defendant sought to introduce this evidence to show the character and disposition of Robert Woods and his propensity for violent and threatening behavior. The defendant asserts since the compulsion defense was based on his fear of Robert Woods, this evidence was relevant and material. It is a generally recognized rule that relevancy is within the discretion of the trial court and an appellate court will interfere only upon a showing of an abuse of discretion. State v. Windsor, 316 N.W.2d 684, 688 (Iowa 1982). No such showing was made, therefore we will not interfere.

Further, we note, even when a ruling is erroneous, reversal is not required when no prejudice results. Id. Here substantial evidence of Robert Woods' propensity for violence and threatening behavior was shown. Defendant, Robert Woods, Jeff Batterson, and Richard Burroughs testified to: Robert Woods keeping a shotgun named "Sadie" in the backseat of his car; Robert Woods had visions of an old bearded man who would speak to him; a personality change in Robert Woods prior to the day of the crime; and Robert Woods' testimony he wanted to kill somebody, just to see what it felt like. With such testimony in the record,

we conclude the trial court's exclusion of this evidence did not prejudice the defendant.

AFFIRMED.