IN THE COURT OF APPEALS OF IOWA

No. 0-456 / 99-0557
Filed November 20, 2000

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CLETUS F. JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

On appeal from his convictions for first-degree robbery, first-degree burglary, and delivery of a controlled substance, defendant contends he was denied a fair trial by the State's use of prior, unrelated other crimes evidence. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

On appeal from his convictions for first-degree robbery, first-degree burglary, and delivery of a controlled substance (cocaine), Cletus Johnson contends he was denied a fair trial by the State's use of prior, unrelated other crimes evidence. We reverse and remand for new trial.

I. Factual Background and Proceedings. On the evening of March 21, 1998, Johnson and Troy Redd were together at the Jet Lounge in Waterloo, Iowa. Two women, Larsie Epps and Rebecca Worth, joined them at the bar and after several minutes, the four returned to Epps's apartment on Lincoln Street in Waterloo. Worth and her boyfriend, Shawn Nosko, lived across the hallway from Epps in another apartment. Nosko was sleeping in his apartment when Johnson, Redd, Epps, and Worth returned to the building. At some point, Nosko entered the hallway and overheard Worth make a comment to Johnson and Redd that he interpreted to be sexual in nature and made him jealous. Nosko said, "Fuck you, bitch" to Worth and returned to his apartment. Johnson and Redd then entered Nosko's apartment, assaulted both Nosko and Worth, and robbed Nosko at gunpoint. Johnson and Redd were arrested later, however, the gun was never recovered.

During trial in this matter, the State sought to introduce evidence of a prior incident on the same evening on Arlington Street in Waterloo. The facts, as they were introduced at trial in the present matter, were as follows: Earlier in the evening, Redd and Carmel Dolan went to a bar called Pat's Tap together. While at Pat's Tap, Dolan observed Redd talking to another man. She testified at trial

she thought Redd called the other man "Mike." After Dolan and Redd returned to Dolan's apartment, Redd became angry with Dolan's neighbor, Bill Pierce, because Pierce spent several hours that day with Dolan in her apartment. Redd told Dolan he was going to call his "brother-in-law" and she overheard him say into the phone "bring the gun because he was going to kill Bill." Approximately fifteen minutes later, the same man Dolan saw with Redd in Pat's Tap arrived at her apartment with a shotgun. Although she stated she got a good look at the man, she was unable to definitively identify him as Johnson during trial. Redd and the other man went to Pierce's apartment and fired several shots through the front door. Pierce was inside his apartment at the time and did not see either man. Redd and the other man then fled the scene. Johnson and Redd were ultimately charged with terrorism based on the events at the Arlington Street residence. Trial on the terrorism charge occurred after the trial on the current charges. A jury convicted Redd of terrorism but acquitted Johnson. The Arlington Street incident and the Lincoln Street incident occurred within three hours of each other and were geographically separated by approximately three blocks.

On appeal, Johnson challenges the admission of evidence of the Arlington Street incident at his trial for the Lincoln Street incident, claiming the Arlington Street incident constitutes inadmissible evidence of prior bad acts. The State claims the evidence fits under one of the exceptions to the general rule of excluding evidence of prior bad acts contained in Iowa Rule of Evidence 404(b).

II. Standard of Review. We review evidentiary issues for an abuse of discretion. *State v. Query,* 594 N.W.2d 438, 443 (Iowa App. 1999).

III. Merits. Iowa Rule of Evidence 404(b) provides evidence of "other crimes, wrongs or acts" is inadmissible to prove the defendant acted in conformity with the character the acts may show, but it is admissible for other purposes, such as to prove motive, identity, or intent. *See* Iowa R. Evid. 404(b). The exceptions to rule 404(b) are based upon the relevancy of certain evidence to the proof of some fact or element in issue other than the defendant's criminal disposition. *State v. Aricivia,* 495 N.W.2d 364, 367 (Iowa App. 1992). Evidence of prior bad acts is admissible if: (1) the evidence is relevant to establish a legitimate issue in the case; and (2) there is clear proof the individual against whom the evidence is offered committed the prior bad act. *State v. Most,* 578 N.W.2d 250, 253 (Iowa App. 1998). Commission of prior acts need not be established beyond a reasonable doubt. *State v. Spargo,* 364 N.W.2d 203, 210 (Iowa 1985). The purpose of the clear proof rule is to prevent jury speculation or inference drawn on mere suspicion. *State v. Alderman,* 578 N.W.2d 255, 258 (Iowa App. 1998). Relevant prior bad acts evidence may nevertheless be excluded if its probative value is outweighed by its potential for unfair prejudice. *See* Iowa R. Evid. 403.

The State argues the Arlington Street incident was relevant and necessary to establish the use of a gun in the Lincoln Street incident and to establish the identity of the perpetrators of the Lincoln Street incident. Relevant evidence is evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence. Iowa R. Evid. 401. The Arlington Street evidence is arguably relevant to show it is more likely the Lincoln Street incident was committed with a shotgun by Johnson and Redd. This is particularly true because the Arlington Street incident occurred close in time and location to the Lincoln Street incident and had similar characteristics, such as leaving a bar with women, returning to their apartments and then acting in a violent manner toward the male companions of the women. The State is correct in its assertion the evidence of the Arlington Street incident was relevant.

We must also consider whether there was clear proof Johnson committed the prior acts at the Arlington Street incident. The State presented the Arlington Street evidence through the testimony of three witnesses. The first was Officer Richard Gehrke, who responded to the call of shots fired at the Arlington Street residence. He testified regarding the shotgun shells found at the scene and bullet holes in Pierce's door. He did not testify as to the identity of the men who fired the shots. The State also presented Pierce's testimony. He was unable to identify either of the men involved in the terrorism because he had been hiding inside his apartment at the time of the shooting. The final witness the State presented regarding the Arlington Street incident was Dolan. While Dolan testified she was able to get a good look at the man who accompanied Redd, she was unable to identify him as Johnson during trial:

> Q: All right. I'm going to ask you if you see him in the courtroom here today? A: I can honestly say I don't know.
> Q: All right. I'm going to ask you to look at the person to my right here, all right?

MR. WALTON [PROSECUTOR]: May the record reflect I'm gesturing to Cletus Johnson?

THE COURT: The record may so reflect.

Q: Can you tell us if this person to my right has any similarities to the person you saw?

* * * * *

A: He resembles him.

Dolan's statement Johnson "resembles" the man she saw with Redd earlier in the evening does not rise to the level of clear proof. The witness testified she thought Redd called the other man "Mike." The record indicates Johnson was dating and living with Redd's sister; therefore possibly explaining Redd's call to "his brother-in-law" from Dolan's apartment. However, on cross-examination, Dolan admitted, in her written statement to police officers on the night of the incident, she stated Redd made the call to his wife's brother (rather than his sister's husband). She also admitted she told the police the other man with Redd at her apartment that night was named Mike Alexander. Mere suspicion someone was involved in a crime does not rise to the level of clear proof. *See State v. Johnson,* 224 N.W.2d 617, 620 (Iowa 1974). "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. . . . As part of this burden, the State must present clear proof the defendant was culpable in the other acts in question. Crimes of third persons are not relevant." *Id.* (citations omitted).

Case law indicates the clear proof burden is met when the defendant can be positively identified as the suspect in the other crimes or acts. *See Spargo,* 364 N.W.2d at 209 (defendant clearly identified by witness who observed actions constituting prior bad act); *Most,* 578 N.W.2d at 253 (defendant's prior

convictions introduced as evidence); *State v. Zeliadt,* 541 N.W.2d 558, 561 (Iowa App. 1995) (victim testified she had seen the defendant on numerous occasions and was able to clearly identify him as the perpetrator in both the incident on trial and in previous other incidents); *State v. Goodson,* 516 N.W.2d 30, 33 (Iowa App. 1994) (defendant clearly identified by police officers).

Johnson is a case that is factually similar to the present case. The defendant and his brother were convicted of robbing a retail store. During the trial, the State sought to introduce evidence of two other robberies in the area that occurred during the same approximate time. In the first incident, the defendant was clearly identified by witnesses and pleaded guilty to the crime. The court held proof of this offense was clear and held the district court did not abuse its discretion by admitting it. *Johnson,* 224 N.W.2d at 620. However, no witness was able to identify the defendant as one of the men involved in the second incident. The court held the evidence fell short of clear proof, allowing the jury to speculate as to whether the defendant was culpable in the second incident. *Id.* The court went on to comment "since defendant's participation in the incident was not shown, it cannot be argued evidence of that incident came within any other exception to the general rule against admissibility of evidence of other crimes." *Id.* The court reversed and remanded for a new trial.

Evidence of Johnson's participation in the Arlington Street incident is weak. Dolan was only able to testify Johnson resembled the man she saw with Redd both at Pat's Tap and at her apartment, even though she testified she got a good look at him. The jury most likely had to speculate as to Johnson's

involvement in the crime. Taking the evidence presented as a whole, it is only apparent there was a man with Redd earlier in the evening before the Lincoln Street incident who had similar characteristics to Johnson, but who might have been called Mike, who could have been either Redd's sister's husband or Redd's wife's brother. It is clear Redd and another man shot holes into Pierce's door with a shotgun but it is not clear who that other person was.

Even if prior bad acts evidence is relevant, we must consider whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Alderman,* 578 N.W.2d at 258. In making this determination, we consider the following factors: (1) the actual need for the evidence in view of the issues and the other available evidence; (2) the strength of the evidence showing the prior bad acts were committed by the accused; (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven; and (4) the degree to which the jury will probably be roused by the evidence improperly. *Zeliadt,* 541 N.W.2d at 562.

The evidence of Johnson's participation in the Arlington Street incident was not strong. On the other hand, the evidence he was involved in the Lincoln Street incident was overwhelming. Every witness who testified identified him as being one of the perpetrators during the incident and acknowledged the presence of a weapon. Consequently, the State's actual need to use the Arlington Street evidence in proving the Lincoln Street offense was not great. But for its tendency to prove Johnson was the type of person who would commit the Lincoln Street offenses, the Arlington Street evidence did not strongly support his guilt of the

crimes for which he was convicted. Additionally, as discussed above, there was little evidence showing Johnson was actually at the Arlington Street apartments. No witness put Redd and Johnson together that evening until after the Arlington Street incident when another witness, Michael Anderson, testified he saw them together at the Jet Lounge. Because the evidence Johnson participated in the Arlington Street incident was weak, we cannot conclude it tends to prove Johnson and Redd acted in concert with a gun at the Lincoln Street incident. Finally, we conclude the evidence of terrorism on Arlington Street would tend to rouse the jury against Johnson because of the violent nature of the incident. Accordingly, we conclude the danger of unfair prejudice outweighs the probative value of the prior bad acts evidence in this case. The district court abused its discretion in admitting evidence of the Arlington Street incident during Johnson's trial for the Lincoln Street incident.

REVERSED AND REMANDED FOR NEW TRIAL.