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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

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| STATE OF IOWA, | ) | |
| Plaintiff-Appellee, | ) | Filed November 24, 1981 |
| vs. | ) | |
| DONALD WILLIAM BAKER, | ) | 1-268/63639 |
| Defendant-Appellant. | ) | |

Appeal from Scott District Court - C. H. Pelton, Judge.

Defendant appeals from judgment entered on his conviction by a jury for operating a motor vehicle while under the influence of alcoholic beverages in violation of section 321.281, The Code 1979, claiming error in admitting evidence regarding a prior conviction. AFFIRMED.

Jorge Gomez, Jr. of Gomez, Feuerbach, May & Pries, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant appeals from judgment entered on his conviction by a jury for operating a motor vehicle while under the influence of alcoholic beverages in violation of section 321.281, The Code 1979. We affirm.

The defendant, Donald William Baker, was arrested for operating a motor vehicle while under the influence of alcohol. The defendant was convicted by a jury. Defendant appeals that conviction, claiming the trial court committed reversible error in allowing the prosecution on cross-examination to expound upon the defendant's prior felony conviction, which the defense attorney initially elicited from the defendant on direct examination. The scenario was as follows:

> Direct examination of defendant by defense counsel, Mr. Schulz:
>
> Q. Don, have you ever been convicted of a felony?
>
> A. Yes, I have, sir.
>
> Q. When did this happen?
>
> A. About 19 years ago, 20 years ago.
>
> Q. How old were you?
>
> A. Twenty years old.
>
> Cross-examination of defendant by the County Attorney, Mr. Wozniak:
>
> Q. Now, you've mentioned that you've been convicted of a felony, is that correct?
>
> A. Yes, I have.
>
> Q. And what was that for?
>
> MR. SCHULTZ: Objection, your Honor. That's irrelevant and immaterial.
>
> MR. WOZNIAK: No it's not once you opened the door.
>
> THE COURT: You opened the door. You can answer the question.
>
> THE WITNESS: B & E, sir.
>
> BY MR. WOZNIAK:
>
> Q. Is that breaking and entering?
>
> A. Yes, it is.
>
> Q. Were you sentenced on that charge?
>
> A. Yes, I was.
>
> Q. What were you sentenced to?

A. One to 10.

Q. Where?

A. Anamosa.

Q. How long did you serve?

A. Twenty-four months.

Q. Did you successfully complete that term?

A. Yes, I did.

Q. Ever have your parole revoked?

A. On that charge?

Q. Yes.

A. No, did not.

The defendant relies primarily upon State v. Martin, 217 N.W.2d 536 (Iowa 1974), and argues that the trial court erred by allowing the prosecution to question defendant as to the exact nature of a prior felony conviction. We disagree.

The testimony set out above indicates that on direct examination by his own attorney, defendant admitted that he had been convicted of a felony 19 or 20 years ago. We believe the trial court was correct when it said that the defendant thereby had "opened the door" for the state to cross-examine the defendant about this prior conviction. The defendant is correct that in cases such as this, where the defendant has opened the door, "trial inquiries regarding prior convictions are still permitted but appropriately limited by the standard" enunciated in State v. Martin, 217 N.W.2d 536, 544 (Iowa 1974).

Our opinion, adverse to the defendant, is premised upon the belief that this case is procedurally distinguishable from Martin in the following ways. In Martin, the burden of initiating the outside hearing and balancing process by proper motion or objection was placed on the defendant, who actually carried that burden by making proper motions and objections at both the pretrial stage and during the trial. The Martin trial court was thus repeatedly urged to take action by the defendant. If we accepted defendant's argument in this case, we would take Martin one step further and place the burden of initiating the outside hearing on a trial judge, who was alerted only by a single objection during the course of the trial, which was in our view, at the very best, a questionable objection.

Martin requires that the issue be appropriately raised. Id. In the instant case the

defense attorney merely objected to the state's cross-examination as "irrelevant and immaterial." We conclude this objection was not sufficient to raise the issue. Martin suggests that when the issue is raised at the pretrial stage, "on proper motion," the court should "grant a pretrial hearing." Id. at 543. When the issue develops in the course of a trial it is suggested that "a hearing outside the presence of the jury should be held so the judge can weigh and resolve relevant factors regarding admissibility." Id. at 543-44. From our reading of Martin we believe that when the trial court overruled defendant's objection during the course of the trial, the defendant had the burden to make a proper motion requesting a hearing outside the presence of the jury. We find that the trial judge properly ruled on defendant's objection; he was under no obligation to call "time out" and hold a Martin-type hearing during the course of the trial when defendant failed to request such a hearing. Such a hearing would serve two beneficial purposes: (1) it would specifically identify for the trial court the grounds for defendant's objection; (2) it would effectively preserve error for review by an appellate court.

In conclusion, even if the Martin balancing process is applicable to this case, the defendant failed to appropriately raise the issue. On this basis we affirm the trial court's ruling, which was made during the heat of battle between the defense and prosecution. Furthermore, the cross-examination in this case was modest; it was restricted to only the conviction that defendant admitted to during direct examination. In this respect, the cross-examination was not as broad as in Martin. The information actually obtained by the cross-examination was somewhat rehabilitating to the defendant's credibility in that it brought out the fact that the defendant had completed his one to ten year prison sentence in two years, and successfully completed his period of parole supervision. It thus tended to emphasize that he had been a law-abiding citizen for nearly twenty years. This is of questionable prejudice to the defendant and does not require a new trial.

AFFIRMED.

All judges concur except Snell, J., and Oxberger, C.J., who dissent.

SNELL, J. (dissenting)

I respectfully dissent. Although defendant's counsel on direct examination produced the information that defendant had been convicted of a felony, this does not grant the State carte blanche further inquiry. There is no reason to force the defendant to state that the conviction was for breaking and entering. The defendant's credibility has already been shown by his admission of the felony. The objection that further inquiry is irrelevant and immaterial is the specific objection and should have been sustained. See Ladd, Objections, Motions and Foundation Testimony, 43 Cornell L. Q. 543, 546 (1958).

The fact that this conviction was twenty years old itself is sufficient to foreclose its admissibility. In case of doubt, however, the probative value should be tested by the court at an in camera hearing. See State v. Martin, 217 N.W. 536 (Iowa 1974). There was no need for this to be requested by defense counsel. The trial court knew exactly what the issue was. It should have acted, if in doubt, to prevent error and assure a fair trial.

None of these prejudicial errors is assuaged by the majority's suggestion that it doesn't much matter because defendant was shown to have served his time and successfully completed his parole supervision.

Oxberger, C.J., joins this dissent.