



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)		
Plaintiff-Appellee,	)	Filed October 22, 1986	475
vs.	)		
JOHN FRANK ROTH,	)	<u>6-182</u>	
Defendant-Appellant.	)	85-663	

Appeal from the Iowa District Court for Cedar County (No. 28872) - James E. Kelley, Judge.

Defendant appeals from his conviction for first-degree murder asserting that the trial court erred in not permitting defendant to introduce evidence of his wife's 1965 conviction of second-degree murder. **REVERSED AND REMANDED.**

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Ann DiDonato, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

SNELL, J.**476**

On December 27, 1984, the fully clothed body of Martien ("Tina") Marie Harper was found on a gravel road near Clarence, Iowa. Tina Harper died from gunshot wounds to the forehead, chest, and rear base of the skull. Ms. Harper was the defendant's step-daughter and the natural daughter of defendant's wife, Sharon Roth.

Prior to trial the State, by motion in limine, successfully excluded evidence that defendant's wife was convicted in 1965 on a second-degree murder charge in a case in which the victim was shot with a firearm of the same caliber as the weapon used to kill the victim in the present case. See State v. Hildebrandt, 136 N.W.2d 265 (Iowa 1965) (per curiam); State v. Miller, 259 Iowa 188, 142 N.W.2d 394 (1966) (appeal of codefendant). On March 21, 1985, following a jury trial, defendant was convicted of the first-degree murder of his step-daughter. The State's evidence of the actual crime was entirely circumstantial. Defendant throughout the trial sought to show that Sharon Roth, the victim's mother, had committed the crime.

The defendant claims that the district court's ruling granting the State's motion in limine erroneously applied the law and denied him his constitutional right to a fair opportunity to defend against the State's charge. We agree and consequently reverse the defendant's conviction and remand for a new trial.

The defendant's first argument is that Sharon's conviction is admissible to show her knowledge of firearms. He contends that this theory is supported by Iowa Rule of Evidence 404(b). That rule states:

Other crimes, wrongs, or acts. 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.

The district court ruled that the rule 404(b) exceptions relied upon by the defendant's argument are limited to proofs of the defendant's state of mind or identity. As Sharon's conviction is not pertinent to those areas, the district court reasoned, rule 404(b) excludes it from evidence. We disagree with the district court's application of this evidentiary rule to the facts of this case. We note initially that the State's repeated argument in the present case that we should defer to the district court's discretion in the admission and exclusion of evidence misses the mark. While we agree that generally the district court is vested with broad discretion in these matters, see, e.g., State v. Thompson, 326 N.W.2d 335, 337 (Iowa 1982), that court has no discretion allowing it to incorrectly apply the law. As that is what we find the district court did here, we need not defer.

In the overwhelming majority of cases involving the application of our rule 404(b), as well as those involving the application of Federal Rule of Evidence 404(b) which is identical to Iowa's, at issue is evidence of a defendant's prior criminal conviction or other "bad act." See, e.g., United States v. Frederickson, 601 F.2d 1358 (8th Cir. 1979). The present case places rule 404(b) in a different context, where a criminal defendant seeks to place into evidence a witness's prior conviction in order to show her knowledge of firearms, implicate her in the murder, and thereby cast a reasonable doubt upon his alleged guilt. In the few cases that address the admissibility of the crimes or acts of a witness, not a defendant, the applicability of rule 404(b) is unclear. In United States v. Morano, 697 F.2d 923 (11th Cir. 1983), the Eleventh Circuit Court of Appeals held that rule 404(b) does not specifically apply when the evidence at issue is of an offense committed by someone other than the defendant. Id. at 926. Nevertheless, the court went on to state that "although Rule 404(b) does not control this situation, the exceptions listed in the Rule should be considered

in weighing the balance between the relevancy of this evidence and its prejudice under Rule 403." Id.

The Eighth Circuit Court of Appeals, however, directly applied rule 404(b) to a similar set of facts in United States v. Earley, 657 F.2d 195 (8th Cir. 1981). In Earley, a criminal defendant attempted to admit evidence that an accomplice who had testified for the government under a plea bargaining agreement had on an earlier occasion fired three shots into a stray dog he had already killed. The defendant argued that the evidence was similar and relevant to the crime with which he was charged because of postmortem firearm wounds suffered by the victims. Therefore, the defendant argued the evidence was admissible on the issue of identity; that is, whether the defendant or the accomplice fired the fatal shots. In holding that the district court had not abused its discretion in excluding the evidence, the Eighth Circuit noted that the evidence was neither reasonably close in time nor sufficiently similar in nature to warrant admission under rule 404(b).

While the direct applicability of rule 404(b) appears to be unsettled, it is evident to us that the exceptions listed therein are to be considered by a court in its determination of the admissibility of evidence of a non-defendant witness's prior crimes, wrongs, or acts. That much is common to both Morano and Earley. The district court in the present case apparently felt constrained to find the evidence of Sharon's prior conviction inadmissible under rule 404(b) because of its view that rule 404(b)'s exceptions are limited to "proofs relating to the defendant's state of mind or identity." As we hold today that those exceptions are not so limited, we find the district court's ruling to be the result of an erroneous application of the law.

Regardless of whether we follow Earley and directly apply rule 404(b) to the facts of this case or follow Morano and simply consider the exceptions

to that rule in the balance of factors under rule 403, we believe the same analysis is to be followed. Under both options, our concern is with a balance of the evidence's relevance with the prejudicial effect.

Our analysis in the typical rule 404(b) case, wherein the State attempts to introduce the prior crimes or acts of a criminal defendant, is well illustrated by the cases. In order for evidence to be relevant for purposes of its admissibility under rule 404(b), the evidence must be relevant to one or more of the issues for which exceptions are recognized. State v. Walsh, 318 N.W.2d 184, 185 (Iowa 1982). Even if the proffered evidence is relevant, however, for purposes of rule 404(b) "it may still be excluded under Rule 403 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the [fact finder].'" State v. Munz, 355 N.W.2d 576, 579 (Iowa 1984) (quoting Iowa R. Evid. 404(b), advisory committee comment) (brackets in quote). This weighing of relevance and prejudice is the same analysis applied under rule 403 which states that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

See State v. Williams, 360 N.W.2d 782, 787 (Iowa 1985).

In the present case, we think the proffered evidence is relevant to both Sharon Roth's knowledge of firearms and the possible bias, prejudice, or motivation behind the testimony of John Roth, Jr. With respect to the former issue, the defense established by the defendant at trial was specifically accusatory toward Sharon, attempting to cast doubt on defendant's guilt by showing that Sharon committed the murder. Sharon Roth was prosecuted and convicted of second-degree murder on the theory that she had fired the fatal shot from a gun. Her codefendant, Dan Miller, was prosecuted on the theory that he aided

and abetted Sharon. Miller, 259 Iowa at 191-94, 142 N.W.2d at 396-97. We think that Sharon's conviction of second-degree murder in the shooting death of a former acquaintance is relevant to the sole defense of the defendant, particularly on the issue of Sharon's knowledge of firearms. The relevancy of the evidence on this point is highlighted on one hand by Sharon's testimony that she had little knowledge about guns and had never fired a gun and, on the other hand, by John Roth, Sr.'s constitutional "right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297, 308 (1973); see State v. Zachringer, 280 N.W.2d 416, 419-21 (Iowa 1979).

Given our determination of the evidence's relevance, we must next consider and decide whether this relevance is "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the [fact finder]." Munz, 355 N.W.2d at 579; Iowa R. Evid. 403. For purposes of this balance under rule 403, "prejudice" relates to the likelihood of inciting the jury to an irrational decision based upon an improper bias. See Fed. R. Evid. 403, advisory committee note. This is a pivotal concern in the typical 404(b) case as the evidence in those cases generally is of a criminal defendant's prior criminal conviction or other connection with criminal conduct. See, e.g., Williams, 360 N.W.2d at 786-87. In such a case, there is a substantial potential for violation of the general rule that "one crime cannot be proved by proof of another." State v. Schlak, 253 Iowa 113, 115, 111 N.W.2d 289, 291 (1961). In the present case, we cannot say that the probative value of the evidence at issue is substantially outweighed by the concerns enumerated in rule 403. Accordingly, Sharon's conviction should be admitted into evidence on the issue of her knowledge of firearms.

The State contends that any error here was harmless as the defense presented other evidence to the effect that Sharon was familiar with firearms.

That evidence was the testimony of the defendant, his mother, and the corroborating, although not eyewitness, testimony of a state trooper that Sharon had fired a shotgun at a truck in which the defendant and his mother were driving. The trooper's testimony was only that the defendant had reported the shooting and that the truck was marked by what appeared to be an impact mark from a gunshot. This evidence is not as probative on the issue of Sharon's knowledge of firearms as evidence of her conviction for second-degree murder in a shooting death. Given the defendant's constitutional right to defend against the State's accusations, we cannot say that error here was harmless.

The defendant also argues that this evidence is relevant to his contention that the testimony of John Frank Roth, Jr. was motivated by fear of his mother. The trial court held that this evidence was "too remote in time to be probative on the issue of [John Jr.'s] fear" under Rule 609(b). The application of this rule by the trial court is erroneous, as that rule deals with the admissibility of a witness's prior criminal conviction for the purpose of attacking the credibility of that witness. This is not the situation, however, presented to us by this case. Here, the defendant seeks to admit evidence of one witness's prior conviction for the purpose of challenging the veracity of testimony given by a witness other than the person convicted.

The primary interest secured by the confrontation clause of the sixth amendment to the United States Constitution is the right of cross-examination. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974). The scope of cross-examination of a State's witness should be extended liberally on behalf of a defendant charged with a grave offense. State v. Cuevas, 288 N.W.2d 525, 530 (Iowa 1980). This is because one of the rights of a jury trial is the right to have the credibility of witnesses determined by the jury. Graham v. Chicago & Northwestern Ry. Co., 143 Iowa 604, 615, 119 N.W. 708,

711 (1908). Generally, there are no limitations on the rule that the credibility of a witness is to be determined by the jury. State v. Frank, 298 N.W.2d 324, 329 (Iowa 1980). The trial court's discretion in limiting cross-examination should not be exercised so as to exclude matters vital and proper to the defense of the accused. State v. Rowe, 238 Iowa 237, 243, 26 N.W.2d 422, 425 (1947). The permissible subjects of the cross-examination include the witness's credibility, bias, or interest in the case. Cuevas, 288 N.W.2d at 530. Partiality of a witness is subject to exploration at trial and is always relevant as affecting the weight of that witness's testimony. Davis, 415 U.S. at 316, 94 S. Ct. at 1111, 39 L. Ed. 2d at 354. We agree with the Seventh Circuit Court of Appeals that evidence of a witness's fear may be presented as a means of demonstrating a witness's bias, thereby tending to discredit him. United States v. Cerone, 452 F.2d 274, 288 (7th Cir.), cert. denied, 405 U.S. 964, 92 S. Ct. 1168, 31 L. Ed. 2d 240 (1972).

In light of these considerations, we think that the evidence at issue, in addition to its admissibility on the issue of Sharon's knowledge of firearms, is also admissible as relevant to the possible bias, prejudice, or motivation behind John Jr.'s testimony. Accordingly, we reverse the defendant's conviction and remand for a new trial.

REVERSED AND REMANDED.

Hayden and Donielson, JJ., dissent; Sackett, J., specially concurs.

HAYDEN, J. (dissenting)

I respectfully dissent from the majority opinion for the following reasons.

I.

In deciding whether the evidence fits into one of the exceptions set out in Iowa Rule of Evidence 404(b), we have adopted a two-prong test. "First, the evidence must be relevant to one or more of the issues for which exceptions are recognized, and second, its probative value must outweigh the prejudicial effect engendered by showing the defendant has committed other crimes." State v. Hendebink, 334 N.W.2d 344, 346 (Iowa Ct. App. 1983) (quoting Walsh, 318 N.W.2d at 185).

In an arson and insurance fraud case the Eleventh Circuit Court in United States v. Morano, 697 F.2d 923 (11th Cir. 1983), considered whether Federal Rule of Evidence 404(b) (identical to Iowa's) applies to exclude evidence involving an extraneous offense committed by someone other than defendant. The Court held that 404(b) does not specifically apply because the evidence involved an offense not committed by the defendant. Morano, 697 F.2d at 926. Even though Rule 404(b) does not control, the court held that the exceptions listed in the rule should be considered in weighing the balance between the relevancy of this evidence and its prejudice under Rule 403. Id.

In order to be relevant, there must be such connection between the offense charged and the other offense that the latter can be reasonably said to establish the first or some essential fact in issue. State v. Zuch, 267 N.W.2d 52, 54-55 (Iowa 1978). The other offense charged must be reasonably similar to the crime charged when similarity is necessary to establish the relevancy of the evidence under the exception relied on, State v. Cuevas, 282 N.W.2d 74 (Iowa 1979), and the remoteness of the prior offense raises a question of relevancy. State v. Maestas, 224 N.W.2d 248, 251 (Iowa 1974); United States v. Fredrickson, 601

F.2d 1358, 1365 (8th Cir. 1979), cert. denied, 444 U.S. 934, 100 S. Ct. 281, 62 L. Ed. 2d 193 (1979) (under Federal Rules of Evidence 404(b), evidence of other crimes to establish knowledge must be similar in kind and reasonably close in time to the instant charge).

Evidence of Sharon Roth having fired a gun 20 years ago could hardly be determined relevant and material to the issue of her present day knowledge of firearms. I find this information fails the first part of the two-prong test.

II.

I observe that Sharon Roth's conviction for second-degree murder was in 1965, which was seven years before Junior was born. Therefore, it is too remote in time to be of probative value regarding Junior's purported fear of his mother or why he testified as he did at trial. The trial court did not abuse its discretion in refusing defendant to present this evidence for this purpose.

III.

Regarding the use of criminal convictions to impeach witnesses, Iowa Rule of Evidence 609(a) and (b) provides in pertinent part:

(a) 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.

(b) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. . . . (emphasis added)

Sharon Roth's murder conviction is clearly not a crime involving dishonesty or false statement per 609(a), and it definitely occurred more than ten years since the date of her conviction or release from confinement for that conviction per 609(b). The ten-year period was adopted under the premise that after ten years from confinement or conviction the probative value regarding a person's credibility has diminished to the extent that it should not be admissible. Iowa R. Evid. 609 (Fed. R. Evid. 609, Report of House Committee on the Judiciary). As pointed out in Rule 609(b), the court may allow such evidence if it determines that "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." The trial court did not reach this conclusion. The trial court did not abuse its discretion in failing to do so. The trial court is vested with broad discretion concerning the admission of evidence at trial. State v. Thompson, 326 N.W.2d 335, 337 (Iowa 1982). An abuse of discretion will not be found unless the action of the court is clearly unreasonable under the attendant circumstances. State v. Harrington, 349 N.W.2d 758, 861 (Iowa 1984); State v. DeBerg, 288 N.W.2d 348, 351 (Iowa 1980).

I would affirm.

Donielson, J., joins this dissent.

SACKETT, J. (specially concurring)

I concur with the majority in its result. However, I would find the evidence of Sharon Roth's prior conviction for second-degree murder is admissible based on relevancy grounds under Iowa R. of Evid. 403 and would hold this evidence is not bound by the constrictions of Iowa R. of Evid. 404(b) and 609(a). Rule 404(b) provides:

Other crimes, wrongs, or acts. 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.

Rule 404(b) is directed to evidence of past acts used against the defendant. Iowa cases in which 404(b) issues have been raised have dealt with the attempt to use such evidence against the accused or a party to the action and not a witness. See State v. Spargo, 364 N.W.2d 203 (Iowa 1985); State v. Mendiola, 360 N.W.2d 780 (Iowa 1985); State v. Williams, 360 N.W.2d 782 (Iowa 1985); State v. Howell, 290 N.W.2 355 (Iowa 1980); State v. Coburn, 244 N.W.2d 560 (Iowa 1976); State v. Fetters, 202 N.W.2d 84 (Iowa 1972). I would determine as the court did in United States v. Morano, 697 F.2d 923, 926 (11th Cir. 1983), that rule 404(b) does not apply because the evidence at issue involves an extraneous offense committed by someone other than the defendant. I agree with the majority that the purposes for which evidence of a defendant's past criminal conviction are admissible do serve as useful factors in the court's determination of the relevancy of evidence of a witness' past criminal conviction under Rule 403.

I would also find the evidence of Sharon's prior conviction is not bound by Iowa R. of Evid. 609. Generally, evidence of a witness' criminal conviction is governed by the constructions of Iowa R. of Evid. 609. Rule 609(a) provides:

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.

Rule 609 limits evidence of past criminal convictions when such evidence is used to impeach the credibility of a witness. In the instant case, however, defendant did not seek to admit evidence of Sharon's past criminal conviction for second-degree murder to attack her credibility. Rather, defendant sought to admit the evidence to establish her knowledge of firearms in order to rebut the state's evidence on the identity of the person who killed Martien Harper, Sharon Roth's daughter.

With the exception of the testimony of the parties' 13-year-old son, who changed his testimony after talking to his mother, the evidence identifying the defendant as the person who killed Harper was circumstantial. In the record before us the circumstantial evidence would also link Sharon to the crime.

Defendant claimed his wife caught him and Sharon's daughter having an affair. He claimed his wife subsequently told him she had murdered her daughter. There were no witnesses to the murder.

The evidence showed Sharon's daughter died from multiple gun shot wounds — three to the chest, three to the forehead and one to the base of the skull. Sharon was convicted of shooting a man named Walter Adams with a .22 caliber pistol, the same caliber as the weapon used to kill the decedent in the instant case. Adams was shot through the heart but did not die immediately. See State v. Miller, 259 Iowa 188, 191-92, 142 N.W.2d 394, 396 (1966).