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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 21, 1984
vs.	)	3-339 69528 & 69529
LEONARD LOYAL WILLARD,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County - Robert E. Ford, Judge.

Defendant appeals from his conviction for theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2), challenging: (1) the State's questioning of a witness about the witness's prior felony conviction; (2) the legality of the seizure of allegedly stolen property; and (3) the sufficiency of the evidence. Error occurred in permitting the State to cross-examine defendant's witness regarding a prior conviction for a crime which was the same crime for which defendant was tried. REVERSED AND REMANDED FOR NEW TRIAL.

J. R. Norris, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., and Schlegel and Hayden, JJ, but decided en banc.

SNELL, P.J.

Defendant Leonard Loyal Willard appeals from his conviction for theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2) challenging the following: (1) trial court's allowance of questions asked by the State to impeach a witness concerning the witness's prior felony conviction; (2) the legality of the seizure of allegedly stolen property; and (3) the sufficiency of the evidence. The property stolen was a wrecker unit consisting of a Holmes 480 twin boom model mounted on a 1975 Chevrolet one-ton truck.

I. Impeaching by Prior Felony Conviction. At trial, the defendant called Robert Slimmer as a witness. Defendant asked Slimmer questions about the type of equipment allegedly stolen by defendant and common attachments to that equipment. On cross-examination, the prosecutor asked Slimmer whether he knew defendant. Slimmer replied that he was acquainted with defendant. The prosecutor asked Slimmer where he was employed. Slimmer explained he was self-employed, selling tools and operating a wrecker out of his own house. At that point, the following exchange took place:

> Q. [by the prosecutor] Mr. Slimmer, have you ever been convicted of a felony? A. Yes.
>
> Q. And did that involve stolen motor vehicles?
>
> Mr. Matias: [counsel for defendant] Your honor, we object to the form of the question as going into matters that are not covered by further contravention of Chapter 622.

A discussion took place off the record. The court overruled the objection and defendant answered "yes" to the question. The prosecutor then asked Slimmer if he had been arrested by Ralph Klein of the Iowa Highway Patrol, who had been a witness earlier in the trial, testifying as to his investigation in this case. Defendant again objected to the question; the objection was overruled. Slimmer conceded that Klein was with some other Highway Patrol officers at the time of Slimmer's arrest.

Defendant asserts that the prosecutor's questioning went beyond the scope of permissible use of previous felony convictions to impeach a witness and that the trial court erred in allowing it.

Our review is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). Iowa Code section 622.17 states: "A witness may be interrogated as to his previous conviction for a felony. No other proof is competent, except the record thereof." Iowa Code § 622.17 (1981). The State claims that the defendant's objection that the question "contravened" section 622.17 was too broad; the defendant should have further specified that the question's probative value was outweighed by the prejudicial impact. The State argues that an objection to the prejudicial impact of a question is a separate objection which should be specifically presented to the court in order to preserve the issue for review, citing the case of State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979). However, the Mark case is not applicable here because it involved the question of whether an objection to evidence as irrelevant and immaterial would preserve an issue regarding the prejudicial effect of the evidence outweighing its probative value. The Mark court found that an objection to the relevancy and materiality of evidence did not adequately alert the court to any prejudicial effect problems. In the instant case, an objection that the prosecutor's question contravened section 622.17 properly alerted the court to the nature of the objection because the question was obviously made for impeachment purposes signalling the applicability of section 622.17. Error was preserved.

Defendant contends that inquiry into the nature of the previous conviction is impermissible where, as here, it is of a type similar to the crime with which defendant is charged because it suggests an alliance between the witness and the defendant.

The State argues that the witness in this case was only acquainted with defendant, that the witness testified to matters concerning only the technical

aspects of the stolen property and not to any knowledge of defendant's activities, and that the jury would be unlikely to infer an alliance between defendant and the witness under these circumstances.

The Iowa Supreme Court has held that:

> for the purpose of attacking the credibility of any witness, . . . evidence that he has been previously convicted of a felony is admissible only if (1) the felony involved dishonesty or false statement, and (2) the judge determines any danger of unfair prejudice does not substantially outweigh the probative value of such prior felony conviction, taking into account such factors as (a) nature of the conviction, (b) its bearing on veracity, (c) its age, and (d) its propensity to improperly influence the minds of the jurors.

State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974).

The State in effect claims that the trial court did not abuse its discretion by allowing inquiry into the witness's prior felony conviction because defendant was not prejudiced by the evidence elicited. This argument was discarded by the supreme court in State v. Brewer, 247 N.W.2d 205 (Iowa 1977), holding that the Martin rule applies to any witness, whether or not that witness is the accused. Id. at 213.

The policy reasons underlying the Martin decision were explained as follows:

> The duty imposed upon the trial court . . . is, upon timely request, to weigh "probative value" against the "probability . . . of undue prejudice" and to exclude evidence only when "probative value is substantially outweighed by . . . substantial danger of undue prejudice." . . . That the prior conviction was based on conduct the same or substantially similar to that presently charged militates against admissibility of the prior because it enhances the danger of undue prejudice.

State v. Martin at 543 (quoting with approval People v. Delgado, 32 Cal. App. 3d 242, 248-49, 108 Cal. Rptr. 399, 404-05 (1973)).

In the case at bar, the credibility of defendant's witness was attacked by showing that the witness had been convicted of theft of a motor vehicle, the same crime for which defendant was on trial. Beyond that, the prosecutor showed that the witness was arrested by an officer who earlier testified as to his investigation

of defendant's crime. The suggestion is obvious that the crime of the witness is the same crime as that which defendant is alleged to have committed. Under these circumstances, we cannot say that the probative value of the evidence of the witness's prior conviction is not outweighed by the prejudicial effect of the fair trial to which defendant is entitled. Admission of this evidence constitutes reversible error. See State v. Martin at 542. See also State v. Underwood, 248 Iowa 443, 445, 448, 80 N.W.2d 730, 732-34 (1957).

II. Legality of the Seizure. At the close of the State's case, the defendant moved that the court order the jury to return a verdict of not guilty, claiming the State had failed to prove a prima facie case and that the allegedly stolen property had been illegally seized. Consequently, the testimony of the two police officers in the case should not have been admitted based on the "fruit of the poisonous tree" doctrine. The court overruled the motion; defendant claims the court thus committed error.

Rule 11 of the Iowa Rules of Criminal Procedure states: "A person aggrieved by an unlawful search and seizure may move to suppress for use as evidence anything so obtained . . . ." Iowa R. Crim. P. 11(1) (1983). Such a motion must be made within forty days after arraignment or in a motion in limine no later than nine days before the trial date. Iowa R. Crim. P. 10(4) (1982) and 11(1) (1983). The defendant did not make a motion to suppress. Furthermore, defendant did not object to testimony concerning the evidence when the testimony came forth at trial. We find that defendant's objection to the evidence, made in a motion for directed verdict, came too late to preserve error for our review.

III. Sufficiency of the Evidence. Defendant alleges the trial court erred in finding that there was sufficient evidence to support the finding of guilt. Our examination of this record shows that the trial court's ruling was correct.

REVERSED AND REMANDED FOR NEW TRIAL.

All judges concur, except Donielson, J., who specially concurs.

DONIELSON, J. (specially concurring)

I agree that defendant's conviction must be reversed. I write separately because I partially disagree with the majority's analysis of the issue involving impeachment of a witness by a prior felony conviction.

Part of the majority's rationale for reversal on this issue was that the State elicited on cross-examination the fact that Slimmer had a prior felony conviction involving stolen motor vehicles, the same offense for which defendant is now charged. While recognizing that this similarity militates to some degree against the admissibility of Slimmer's prior conviction, State v. Martin, 217 N.W.2d at 543, I do not believe that this factor alone requires reversal. There is no question but that theft is a felony that reflects upon truth and veracity and is therefore admissible for impeachment purposes. State v. Conner, 241 N.W.2d 447, 454-55 (Iowa 1976). I cannot accept defendant's assertion that the State is precluded from inquiring into the nature of the prior felony. If the only admissible prior felonies are those which involve truth or veracity, the jury is entitled to know what felony is involved so as to be able to make a better determination how that prior conviction affects the witness's present credibility. In fact, it is clear that, under federal law, a witness may be cross-examined about the specific nature of a felony of which he may have been previously convicted. See, e.g., United States v. Bogers, 635 F.2d 749, 751 (8th Cir. 1980); United States v. Dow, 457 F.2d 246, 250 (7th Cir. 1972). See also McCormick on Evidence § 43, p. 88 (2d ed. 1972).

I concede that the State could have elicited this information from Slimmer in a more artful manner than blatantly asking "did that [prior conviction] involve stolen motor vehicles?" For example, the State could have simply asked Slimmer what he was convicted of. A more objective phrasing of the inquiry such as this would have lessened any prejudicial effect. Even as the question was actually asked, however, I do not believe the trial court would have abused its discretion by allowing this testimony if there had been nothing else. See Conner at 454.

Defendant is entitled to a fair trial, but not a perfect one. State v. Gibb, 303 N.W.2d 673, 686 (Iowa 1981).

Moreover, I believe we must trust in and not underrate the jury's ability to perform one of its more important functions—determination of a witness' credibility—and its ability to properly make such a determination, in cases such as this, by examining the nature of a witness' prior felony conviction and deciding how that nature impacts, if at all, upon his credibility. For example, we should give the jury enough credit to realize, with proper instructions, that there is a significant difference between convictions for assault and embezzlement as aids in determining someone's propensity or lack thereof to truth and veracity and, therefore, whether testimony from that person is credible. I consider this question to be somewhat similar to that of character testimony—a defendant or defendant's witness may testify as to his good character, but in doing so, he leaves the door open to rebuttal evidence from the prosecution tending to negate that good character. See McCormick on Evidence § 191, p. 456 (2d ed. 1972).. In this case, Slimmer's prior conviction was for a felony unquestionably raising issues of truth and veracity. Defendant was certainly entitled to call on Slimmer as a supporting witness; in doing so, however, I believe defendant opened the door for the State to attempt to impeach Slimmer's testimony by making the jury aware of his prior theft conviction.

I do agree, however, that the State went too far in asking Slimmer if, in that prior felony, he had been arrested by the same officer as was involved in investigating the present case. This added circumstance adds nothing to the jury's ability to determine Slimmer's credibility and instead strongly leads to the implication that Slimmer and defendant were involved in the same or substantially similar crimes. I therefore agree that defendant's conviction must be reversed and the cause remanded for a new trial.