IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 27, 1979
vs.	)	
MONTE WAYNE HARPER,	)	191 / 62503
Defendant-Appellant.	)	

Appeal from Clinton District Court - Nathan Grant, Judge.

Defendant appeals conviction for false use of a financial instrument in violation of section 715.6, Supplement to the Code 1977. Affirmed.

John J. Wolfe, Jr., Clinton County Public Defender, Clinton, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, G. Wylie Pillers, III, Clinton County Attorney, and Mervin D. Woodin, Assistant County Attorney, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals conviction for false use of a financial instrument in violation of section 715.6, Supplement to the Code 1977. For reversal, defendant contends trial court incorrectly admitted into the record evidence concerning an earlier forgery incident in which defendant was allegedly involved. We affirm.

I.

An information filed April 24, 1978, charged defendant with false use of a financial instrument in violation of section 715.6, Supplement to the Code 1977. Defendant filed a motion in limine requesting no reference be made to a check allegedly forged and cashed by him at complainant's gas station on April 4, 1978, which was 10 days before check in question was cashed; the trial court did not formally rule on this motion prior to trial. The State and defendant agreed to a stipulation regarding testimony of Edward R. Crowley, against whose account the checks were written, since Crowley could not be present at trial due to medical and business reasons. The stipulation declared if Crowley had been present, he would have testified as follows:

> My residence at 1501 East Elm Street, Davenport, Iowa was burglarized in the spring of 1978 and check blanks and other banking records were taken therefrom. A check numbered #338 and dated April 15, 1978 and made payable to Isaac Dwayne Felty in the amount of $15.00 which was attempted to be delivered to Frank Corson in DeWitt, Iowa /was not prepared by myself nor by anyone pursuant to my authority and I have at no time authorized Monte Wayne Harper to possess or execute a check on my behalf and I have never at any time authorized Monte Wayne Harper to do so.

These facts were admitted into evidence at trial.

Defendant objected to testimony concerning the April 4 check as incompetent and irrelevant. He also objected to admission of a bank debit memo that referred to the April 4 check as forged, and to an affidavit by Crowley that stated the signature was not of his making. Defendant objected to these documents as irrelevant and not within the business record exception to the hearsay rule, § 622.8, The Code 1977, because they were not prepared in the ordinary course of business. The trial court admitted the evidence subject to the objection. The jury returned a guilty verdict and the trial court sentenced defendant to serve not more than ten years in prison.

II.

Defendant argues the trial court violated the rule that evidence of other crimes is ordinarily irrelevant and inadmissible when it allowed evidence relating to the April 4 forged check to come into the record. Defendant concedes such evidence, if true, could come in under the exception to the general rule as tending to "prove a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other," State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978); State v. Wright, 191 N.W.2d 638, 639-40 (Iowa 1971). A dispute arises, however, as to whether satisfactory proof was introduced that defendant had forged the April 4 check.

It has been stated:

> The proof of similar transactions involving crime must be clearly shown. Mere suspicion is not enough. The evidence must be such that there can be no room for speculations in the minds of the jury whether the similar crimes attempted to be shown were actually committed or not. State v. Armstrong, 183 N.W.2d at 208. However, commission of such other offenses need not be established beyond a reasonable doubt to be admissible. State v. Hopkins, 192 N.W.2d at [747] 749.

State v. Fetters, 202 N.W.2d 84, 92 (Iowa 1972).

After reviewing the evidence in the record, we conclude sufficient evidence was introduced to satisfy this standard. Defendant admitted cashing the April 4 check. The stipulated testimony of Crowley negates the possibility he signed the check or authorized defendant to do so in his behalf. These two items, taken in conjunction, clearly show defendant forged and cashed the April 4 check. Defendant's proffered explanation for this situation could create a reasonable doubt in the minds of the jury but is too speculative to overcome the weight of the evidence. See State v. Coburn, 244 N.W.2d 560, 564 (Iowa 1976).

Once it is established the defendant committed the prior crimes, the standard of admissibility is relevancy. McDaniel, 265 N.W.2d at 921. The trial court, however, must exercise discretion to determine whether the probative value of relevant evidence is substantially outweighed by danger of undue prejudice. Johnson, 224 N.W.2d at 621. The circumstances surrounding the April 4 check were clearly relevant to the charged crime because of the similarities between them and those concerning the April 15 check. See State v. Gibson, 228 Iowa 748, 753, 292 N.W. 786, 788 (1940); State v. McWilliams, 201 Iowa 8, 9, 206 N.W. 114, 115 (1925). We do not believe the probative value of this evidence was outweighed by any prejudice suffered by defendant. The trial court properly overruled defendant's efforts to exclude evidence concerning the April 4 forgery.

III.

Defendant also contends the trial court erred in admitting a debit form with a bank notation and an affidavit allegedly signed by Crowley. Defendant argues these documents are inadmissible hearsay because they do not qualify under the business records exception. We agree but find the error harmless.

Section 622.28, The Code 1977, authorizes admission of writings like these if the judge finds: They were made in the regular course of business at or about the time of the event recorded; the sources of information from which they were made and the method and circumstances of their preparation were such as to indicate trustworthiness; and that they are not excludable under some other rule of evidence. State v. Lain, 246 N.W.2d 238, 242 (Iowa 1976). Evidence must be introduced to warrant such findings. Id. Corson testified the debit slip and affidavit were part of the books and records of the company. There was, however, no testimony they were made in the ordinary course of business either by Corson in his business or by the bank; the State also failed to establish that the methods and circumstances of their preparation would indicate trustworthiness. See State v. Welsh, 245 N.W.2d 290, 295 (Iowa 1976); State v. Fisher, 178 N.W.2d 380, 382 (Iowa 1972); State v. Anderson, 159 N.W.2d 809, 814 (Iowa 1968). We find these two writings were not admissible as business records under section 622.28, The Code 1977.

However, the trial court's error is not grounds for reversal since defendant was not prejudiced by it. The information in the debit slip and affidavit was also introduced in Crowley's stipulated testimony and defendant's admission he had cashed the April 4 check, and thus, was merely cumulative. The presumption of prejudice due to erroneous admission of hearsay is overcome where substantially the same evidence is properly in the record. State v. Johnson, 272 N.W.2d 480, 482 (Iowa 1978). We find no reversible error in the trial court's rulings.

The judgment of the trial court is affirmed.

AFFIRMED.

Oxberger, C. J., and Snell, J., dissent.

OXBERGER, C.J. (dissenting)

The majority states the erroneous admission of the bank debit slip and affidavit was not prejudicial because those exhibits contained information already introduced evidence through Crowley's stipulated testimony and defendant's admission he cashed the April 4 check.

Crowley's stipulated testimony, however, did not refer to the April 4 check as forged. His statement the check "was not prepared by myself nor by anyone pursuant to my authority" related only to the April 15 check. Crowley's further statement "I have at no time authorized Monte Wayne Harper to possess or execute a check on my behalf and I have never at any time authorized Monte Wayne Harper to do so" may relate to the April 4 check but does not state it was forged. Nor did defendant admit the April 4 check was forged.

Thus, the debit slip brought new matters into evidence -- specifically that the April 4 check was forged. I would hold the erroneous admission of the check was prejudicial to defendant. He was charged with forgery. The jury would assume bank officials have special expertise in determining check forgeries. New trial should be granted since defendant was prejudiced by the introduction of inadmissible hearsay.

Snell, J., joins this dissent.