FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-555 / 98-668
Filed January 12, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DWIGHT REED,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Reed appeals from the judgment and sentence entered upon a jury verdict finding him guilty of criminal trespass, second-degree criminal mischief, and habitual violator. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Ray Walton, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Vaitheswaran, JJ.

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STREIT, P.J.

Our system of justice demands defendants accused of crimes be convicted for what they did, not for the kind of people they are. In Dwight Reed's trial for felonious criminal mischief and burglary in the third degree, the trial court admitted evidence of his prior criminal convictions as well as those of his corroborating witness, Arthur Cherry. The jury found Reed guilty of criminal mischief in the second degree and criminal trespass. He now appeals, claiming the trial court erred in admitting his prior convictions. Because the prejudicial effect of such admission outweighed its probative value, we overturn Reed's conviction and remand for new trial.

I. Background Facts & Proceedings.

The defendant Dwight Reed lived with his girlfriend, Patricia Sallis, and her children. Their relationship was rocky. Their perpetual disagreement culminated in Sallis surreptitiously removing the key to the front door from Reed's key chain. She told him if he stayed out late he would not be allowed back into the home. Early the next morning, Reed told Sallis he was moving out.

Late that night, Sallis heard a thump on the house and discovered the headlights on her car were on. She called the police. When the police arrived, they found a hat similar to one owned by Reed near the car. The next morning, while at work, Sallis again discovered her car's headlights on. A few hours later, Reed materialized at Sallis's workplace. Not wanting to speak with him, she waved him

away and returned to work. During a mid-afternoon break from work, Sallis found her car lights on again and the car completely covered in food and clothing from her home. She quickly returned home finding it trashed. The vandal had poured paint on the carpets, on Sallis's clothes, and on her dog; ripped the refrigerator door from its hinges; tipped over plants; strewn Sallis's personal items throughout the house; and removed various items from the home. The police arrested Reed, charging him with burglary and felonious criminal mischief.

Prior to trial, Reed sought in limine to preclude the State from introducing evidence of his prior criminal convictions as well as those of his alibi witness, Arthur Cherry. The court ruled defendant Reed's prior convictions for willful injury and going armed with intent were admissible. The court further ruled witness Cherry's previous criminal convictions for sexual abuse and theft were admissible. Based on this ruling, defense counsel at trial sought to soften the impact of such evidence by introducing the convictions of Reed and Cherry during their direct examination. Reed testified he had entered the home on the day of the break-in to retrieve his clothing, but when he arrived the home was already vandalized. He claimed his earlier appearance at Sallis's workplace was to alert her of the problem at home. Reed's longtime chum, Arthur Cherry, corroborated the story. The jury found Reed guilty of criminal trespass and second-degree criminal mischief. He was sentenced as an habitual offender.

Reed now appeals, claiming the trial court erred in permitting the admission of the prior convictions as they were far more prejudicial than probative, and his trial counsel was ineffective if error was not properly preserved.

II. Error Preservation.

A. Reed's Felony Drug Conviction. During pretrial motions, Reed's trial counsel affirmatively stated he had no objection to the admission of Reed's prior conviction for attempt to deliver crack cocaine. He stated, "[Reed] has a prior felony conviction within the last ten years and that it is a drug problem, and that's certainly, I think, impeachable." "The rule is well established that failure to object to evidence . . . when the grounds for objection . . . are first apparent precludes the party from asserting on appeal admission of evidence was error." *State v. King*, 225 N.W.2d 337, 341 (Iowa 1975). Error which is not preserved is waived. *See State v. Farnum*, 554 N.W.2d 716, 719 (Iowa App. 1996). Because error is not preserved, we will not address the merits of Reed's previous felony drug conviction.

B. Reed's Convictions for Going Armed with Intent & Willful Injury. "Pulling the sting" is a common trial tactic employed by many defendants. It involves volunteering potentially damaging evidence on direct examination in order to lighten the dramatic impact of the State's eliciting such information on cross-examination. Such a tactic is designed to demonstrate the defendant is being candid, thus building rapport with the jury. Reed, furnished with the trial court's pretrial order permitting the State to offer his previous convictions for impeachment, decided to pull the sting

of such evidence by admitting those convictions during direct examination. The State claims such a tactic waives Reed's ability to litigate the admission of his prior convictions.

Normally, a defendant waives any claim of evidentiary error if he introduced the arguable evidence.[1] *See State v. Vincik*, 436 N.W.2d 350, 354 (Iowa 1989). Permitting a defendant to pull the sting of potentially damaging evidence while still preserving the admission of such evidence for appellate review would appear to hamper both the State's ability to formulate its case and the trial court's ability to reevaluate its pretrial order. *United States v. Cobb*, 588 F.2d 607, 613 (8th Cir. 1978). The State would no longer have the opportunity to forego the use of the prior convictions, consequently avoiding any risk of reversal, if it otherwise presented a strong case or "felt the facts and circumstances adduced at trial failed to justify the conviction's probative value as outweighing its prejudicial effect." *Id.* Likewise, the trial court would be stripped of the ability to evaluate the tenor of the trial and to

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[1] The function of a motion in limine is not to secure a ruling on the admissibility of evidence. *Twyford v. Weber*, 220 N.W.2d 919, 922-23 (Iowa 1974). Rather, its primary purpose is to preclude reference to potentially prejudicial evidence prior to a trial court's definitive ruling on its admissibility at an appropriate time. *Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa App. 1997). What often occurs, however, is the trial court goes beyond merely ruling as to reference preclusion, and addresses the ultimate issue of admissibility. *See State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa App. 1997). When a court undertakes the ultimate question of admissibility in the motion in limine, contrary to the general rule, error is preserved and an attendant trial objection is not necessary. *Id.* Although an attendant trial objection is not necessary, it does not follow that the party who received the adverse ruling could offer the evidence and preserve error. *See State v. Schmidt*, 312 N.W.2d 517, 517-18 (Iowa 1981).

retract its ruling based on the prejudicial effect such evidence would have regarding those specific proceedings. *Id.*

Although the State's position is well reasoned and in accord with numerous state and federal jurisdictions, Iowa permits a defendant to both pull the sting and still preserve evidentiary issues for appeal if the trial court has made a ruling allowing the evidence. *Compare United States v. Ohler*, 169 F.3d 1200, 1202 (9th Cir. 1999) (ruling a defendant pulling the sting constitutes waiver),*United States v. Einfeldt*, 138 F.3d 373 (8th Cir. 1998) (same), *United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997) (same), *State v. Idlebird*, 895 S.W.2d 656 (Mo. Ct. App. 1995) (same), *State v. Azure*, 591 P.2d 1125 (Mont. 1979) (same), *Rhea v. State*, 572 P.2d 246 (Okla. Crim. App. 1977) (same), *and Johnson v. State*, 981 S.W.2d 759 (Tex. Ct. App. (1998) (same), *with State v. Jones*, 271 N.W.2d 761, 765 (Iowa 1978) (allowing a defendant to both pull the sting and preserve error). Absent our supreme court's indication to the contrary, the rule in *State v. Jones* remains the law of this state. *Jones*, 271 N.W.2d at 765. Error is preserved.

III. Standard of Review.

We review a district court's decision to admit a prior conviction for an abuse of discretion. *State v. Roby*, 495 N.W.2d 773, 775 (Iowa App. 1992). To show an abuse of discretion, one must generally show the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State*

v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

IV. The Merits.

A. Reed's Convictions. Reed claims the district court abused its discretion in ruling his prior convictions for willful injury and going armed with intent admissible. The trial court in denying Reed's motion in limine ruled:

> The Defendant's criminal history will be allowed with the exception of the Operating Without Owner's Consent, which was approximately twenty-five years ago. The other Willful Injury and Going Armed with Intent [convictions]—even though they're outside the ten-year limitation under the rule—will be allowed. *They tend to show some type of predisposition towards violence,* and the court believes that although they are prejudicial, that their probative value outweighs any prejudice that may result.

(Emphasis added.)

Under Iowa Rule of Evidence 609, a defendant's prior criminal convictions, if punishable by imprisonment in excess of one year, are admissible if: (1) the court finds the probative value of the evidence outweighs its prejudicial effect to the accused and (2) more than ten years have not elapsed since the date of the conviction, save a few exceptional circumstances. *See* Iowa R. Evid. 609(a)(1) & (b). Contrary to the general rule that prior convictions and other bad acts are irrelevant, felony convictions within the ten-year time limitation are considered inherently relevant to

the credibility of a testifying defendant or witness. Fed. R. Evid. 609 advisory committee's note (1972 proposed rules).[2]

Despite the inherent probative value of such convictions, their prejudicial effect on the defendant may still warrant their exclusion. Iowa R. Evid. 609(a). The quantum of prejudice necessary, however, to exclude the convictions depends on the party that committed the crime. The prior convictions of a witness *other than the accused* "may be excluded if [their] probative value is *substantially* outweighed by the danger of unfair prejudice." Iowa R. Evid. 403 & 609(a)(1). Evidence the *accused* has been convicted of a crime "shall be admitted if the probative value of the evidence outweighs its prejudicial effect to the accused." Iowa R. Evid. 609(a)(1). Consequently, if a defendant's prior convictions are offered, the prejudice threshold is considerably lower and need only tip the scale by a preponderance in order to be excluded; whereas any other witness's prior convictions must be substantially more prejudicial than probative. The special balancing provided to defendants is in response to the acute potential of unfairness which may result. Fed. R. Evid. 609 advisory committee's note (1990 amendment). "In determining whether the probative value of evidence of a prior conviction outweighs its prejudicial effect, the trial court should consider such factors as: (1) the nature of the conviction; (2) the conviction's

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[2] Because Iowa Rule of Evidence 609 mimics its Federal Rule counterpart, we may turn to both the Federal Advisory Committee Notes and federal case law to assist in formulating the appropriate analysis. *See State v. Hackney*, 397 N.W.2d 723, 726 (Iowa 1986).

bearing on veracity; (3) the age of the conviction; and (4) its tendency to improperly influence the jury." *State v. Axiotis*, 569 N.W.2d 813, 816 (Iowa 1997).

Despite the inherent relevance of Reed's prior convictions, the prejudice in permitting such evidence into the record outweighed its probative value. The violent nature of Reed's convictions for willful injury and going armed with intent does reflect somewhat negatively on his credibility. *See United States v. Burston*, 159 F.3d 1328, 1335 (11th Cir. 1998) (finding "a murder conviction says something far different about . . . credibility than evidence of a conviction for a minor drug offense"). Yet, the convictions were not the type normally accomplished by deception or fraud. Hence, they did not impugn Reed's veracity. Furthermore, his convictions for willful injury and going armed with intent were over ten years old.[3] *See State v. Roby*, 495 N.W.2d 773, 775 (Iowa App. 1992) (ruling convictions over ten years are presumably more prejudicial than probative). This extended temporal distance further weakens the probative strength of such evidence. *See* Fed. R. Evid. 609 advisory committee's note (1974 enactment note to subdivision (b)). Finally, given the violent nature of his earlier crimes, Reed's convictions could tend to improperly influence the jury. *See State v. Liggins*, 524 N.W.2d 181, 188-89 (Iowa 1994) (ruling evidence of cocaine delivery is inherently prejudicial as it invites the jury to punish drug dealers).

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[3] We need not address whether the admission of those convictions exceeding the ten-year time limit met the prescriptions of Iowa Rule of Evidence 609(b). We can adequately address their admission under the general rule of 609(a)(1).

Weighing the *Axiotis* factors, we find Reed's convictions tipped the scale in favor of exclusion. Admission of Reed's convictions were not probative as they did not impugn his credibility. Rather, as the trial court concluded, they served as evidence of his "predisposition towards violence." The court's conclusion invited the jury to convict not based on evidence adduced at trial, but on Reed's previous transgressions. A basic precept of our criminal justice system is a person is presumed innocent until the State proves the accused committed the criminal act. Implicit in this precept is society convicts people for what they did, not for what kind of people they may be or the bad acts that haunt their past. When evidence of an accused's previous wrongs come before a jury, even for the legitimate purpose of judging credibility, the natural inclination is to convict merely because the defendant is a bad man. Tempting the jury to act upon such natural inclinations defeats the procedural safeguards implemented to ensure criminal defendants receive fair trials. Our rules merely ask the court to weigh this cost of evidence against the benefit of being better able to judge the defendant's credibility as a witness. If this cost outweighs the benefit, the scale is tipped in favor of exclusion.

The trial court did not analyze whether the probative value of the evidence was unfairly prejudicial. It merely concluded the probative value outweighed the prejudicial effect. Although we will affirm the trial court if any basis exists for doing so, we will not do so in this case where we find the evidence of Reed's prior convictions of minimal probative value and the threat of unfair prejudice great. *See*

Quigley v. Wilson, 474 N.W.2d 277, 280 (Iowa App. 1991). It was an abuse of discretion to admit the evidence.

B. Cherry's Conviction.[4] Reed claims the district court abused its discretion in ruling Cherry's eighteen-year-old convictions for sexual abuse and theft as well his four-year-old conviction for sexual abuse admissible. The trial court in denying Reed's motion in limine ruled:

> Mr. Cherry's record—and to be honest, when you showed it to me—I made a cursory glance of it—my reaction of his record is that there are simple misdemeanors and that the main concern were the two Sexual Abuse convictions that Mr. Cherry has, and the Court will allow impeachment of Mr. Cherry based upon any criminal record that can be substantiated with convictions that he may have received through the years.

The appropriate analysis for admission of a witness's prior felony or dishonesty-based conviction depends primarily on the age of such conviction. *See* Iowa R. Evid. 609. For Cherry's four-year-old sexual abuse conviction to be *improperly* admitted, the prejudicial effect to Reed must substantially outweigh the conviction's probative value. *See* Iowa R. Evid. 609(a)(1) (referring to Iowa Rule of Evidence 403 for application of the appropriate balancing test). For Cherry's eighteen-year-old convictions for sexual abuse and theft to be *properly* admitted, the converse must be true—"the probative value of the conviction supported by specific

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[4] Although resolution of the admissibility of Cherry's convictions are not necessary, we will nevertheless address the propriety of their admission as the issue will likely resurface on retrial.

facts and circumstances" must substantially outweigh the convictions' prejudicial effect. *Id.* § 609(b).

1. Cherry's Four-Year-Old Sexual Abuse Conviction. The trial court properly admitted Cherry's four-year-old sexual abuse conviction as the prejudicial effect to Reed did not substantially outweigh its probative value. *See id.* § 609(a)(1). The degree of prejudicial effect a defendant may suffer greatly subsides when admitting the convictions of a mere witness. Fed. R. Evid. 609 advisory committee's note (1990 amendment). Generally, admission of a witness's prior convictions will not result in substantial prejudice absent the witness bearing "a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness." *Id.* Furthermore, application of the *Axiotis* factors enumerated in Part IV.A does not establish the conviction as substantially more prejudicial. Although the conviction does not have significant bearing on veracity and may have the tendency to inflame the jury, it is relatively recent and the seriousness of the conviction reflects poorly on his credibility. Therefore, given the wash in applying the *Axiotis* factors and the nominal prejudicial effect of this witness's convictions, we find the court properly admitted Cherry's four-year-old conviction for sexual abuse.

2. Cherry's Eighteen-Year-Old Sexual Abuse and Theft Convictions. The probative value of Cherry's eighteen-year-old convictions does not substantially outweigh their prejudicial effect. Because time erodes the probative value of evidence, Iowa Rule of Evidence 609(b) presumes convictions over ten years old are

more prejudicial than probative. *State v. Roby*, 495 N.W.2d at 775. To rebut this presumption, admission need not only be in the interest of justice, but the trial court must point to specific facts and circumstances in support of its admission. *See* Iowa R. Evid. 609(b); *State v. Hackney*, 397 N.W.2d 723 (Iowa 1986). Only under exceptional circumstances will rule 609(b) permit the admission of such temporally removed convictions. *State v. Roby*, 495 N.W.2d at 775-76.

Turning first to Cherry's eighteen-year-old sexual abuse conviction, we fail to see any exceptional circumstances to rebut the rule 609(b) presumption. The serious nature of Cherry's sexual abuse conviction may very well comment on his credibility; however, the conviction is eighteen years old, did not involve dishonesty, and may tend to improperly inflame a jury. *See State v. Axiotis*, 569 N.W.2d at 816. Given the conviction's age, its subject matter, and the perpetrator's relationship to the case; the probative value is minimal and the prejudicial effect weak. Yet to be admitted, the probative value of the conviction must *substantially* outweigh its prejudicial effect. Finding the scale precariously balanced does not permit admission of Cherry's eighteen-year-old conviction for sexual abuse.

Like Cherry's sexual abuse conviction, his theft conviction also fails to rebut the presumption created in rule 609(b). Although the theft conviction does bear directly on Cherry's honesty and it is not the type of crime that would likely incite the jury, the conviction is still eighteen years old and appears to be only a simple misdemeanor. *See id.* Once again the probative value and the prejudicial effect are

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equally nominal. Such a balance does not rebut the presumption of rule 609(b). It was error to admit the evidence.

V. Conclusion.

It was error to admit Reed's convictions for willful injury and going armed with intent. Rule 609(a)(1)'s strict balancing between prejudicial effect and probative value requires the scale need only tip in favor of prejudice by a preponderance. The *prejudicial effect* Reed suffered tipped that scale. The conviction is overturned, and a new trial is ordered. Because this case is remanded for a new trial, we additionally address the trial court's propriety in admitting Cherry's prior convictions. In applying the various balancing mechanisms prescribed in rule 609, we find Cherry's four-year-old conviction for sexual abuse properly admitted while the admission of his eighteen-year-old convictions for sexual abuse and theft improper.

REVERSED AND REMANDED FOR NEW TRIAL.

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