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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )

Plaintiff-Appellee, ) Filed March 31, 1986

vs. ) 316

MELVIN KEITH KELLY, ) 5-691
85-168

Defendant-Appellant. )

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Appeal from the Iowa District Court for Black Hawk County (No. 22070) - George L. Stigler and Peter Van Metre, Judges.

The defendant appeals his conviction for robbery in the first degree, asserting that the trial court erred by admitting evidence implicating him in other robberies committed within weeks of the crime charged. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; and James Metcalf, Black Hawk County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

Defendant Melvin Keith Kelly was charged with first-degree robbery for participating with James Robinson in the robbery of the Savage Food Center in Waterloo, Iowa, on December 30, 1983. At trial, James Robinson was the State's primary witness. He testified that he had moved in with his sister and defendant, his brother-in-law, shortly before Christmas of 1983. Robinson brought a .25 automatic handgun with him.

Robinson testified that soon after his move, defendant talked with him about robbing the Imperial gas station located three blocks from defendant's home. Defendant told him that "there was some ladies down there, and he said if I went in there with the gun, you know, that the ladies would be frightened and I could get the money, you know . . . ." According to Robinson, on December 27, 1983, defendant drove him in defendant's Chrysler New Yorker to the Imperial gas station where Robinson committed an armed robbery. He procured three to four hundred dollars. Defendant waited for Robinson in back of the gas station and then they drove to defendant's home to divide up the money. Robinson also stated that defendant returned to the Imperial station after the robbery and questioned the employees about Robinson's performance. Defendant told Robinson that the employees described Robinson as scared and told him that he did not get all of the money.

A couple days later, defendant spoke with Robinson about committing a robbery of the Savage Food Center because there was "more money in it." This store is located two or three blocks from the Imperial gas station. Robinson testified that the robbery was defendant's idea once again. Early on the morning of December 30, 1983, defendant drove Robinson to the Savage Food Center where Robinson again went in alone and committed an armed robbery. Afterwards, defendant picked Robinson up and they drove to defendant's house.

Defendant instructed Robinson to hide in the attic until all of the money was counted. Defendant told Robinson that $2,800 was taken and they split the sum two ways.

Robinson also testified that on January 27, 1985, defendant's brother, Larry Kelly, drove Robinson to the Savage Food Center in Larry's girlfriend's car. Larry went inside and decided against committing a robbery. They picked up defendant and then Larry cased Muether's Super Valu and concluded that "everything was cool." Muether's is located directly across the river from Savage Food Center and the Imperial gas station. Robinson testified that it was Larry Kelly's idea to rob Muether's and defendant just went along. Larry provided Robinson with sunglasses, a scarf, and a pink pillowcase for transporting the stolen money.

When Robinson went into Muether's, he stated that both defendant and Larry were in the car. Inside Muether's, one of the employees grabbed Robinson's gun, jumped over the counter, and chased him outside. When Robinson reached the car, Larry was there. The two drove to defendant's mother's house, where Larry was also living, and Robinson hid in the garage for a few hours. Then defendant and his sister took him to the home of a friend where Robinson remained until his arrest a couple days later.

Linda Harrington is the bookkeeper and head cashier for Savage Food Center. She testified that she was robbed at gunpoint on December 30, 1983, by a black man, five foot five or six, in his teens, and wearing a mask. She stated that she gave the robber around $3,800. An employee at a restaurant a couple buildings down the block from the Savage Food center testified that on the morning of December 30, 1983, he observed a black male running from the grocery store to a car which he identified as defendant's.

Dorothy Meyers, an employee at the Imperial gas station, testified that she was robbed at gunpoint by a young black man wearing a stocking cap on December 27, 1983. Another gas station employee testified that within a week after the robbery, defendant came into the station and asked about Robinson's performance during the robbery. An employee at a shop across the street from the Imperial gas station observed on December 27, 1983, a black man sitting in a car, which she identified as defendant's. Shortly thereafter, another black man wearing a stocking hat ran down the street from the gas station, got into the car, and they sped off.

Anthony Muether also testified regarding Robinson's attempted robbery of his store on January 27, 1984. Larry Kelly testified that he pled guilty to the Muether robbery and that defendant had no part in it.

The trial court instructed the jury regarding the evidence of the other robberies as follows:

> The State has offered evidence regarding similar offenses alleged to have been committed by the defendant. He is not on trial for those offenses and you may not and should not consider or speculate on whether he is guilty or innocent of those matters.
>
> Although evidence of this nature is allowed, it may be used only to show; motive, intent, plan, knowledge or identity.
>
> If you find the evidence that other similar offenses occurred which were so closely connected in time and were committed in the same or similar manner as the offense charged, so as to form a reasonable connection between them, then and only then may such other offenses or transactions be considered for the purpose of establishing motive, intent, plan, knowledge or identity.
>
> With regard to the morning of January 27, 1984 and in regard to James Calvin Robinson and Larry Kelly driving around the Savage food store trying to decide whether to rob it, the evidence is uncontroverted that the defendant, Melvin Keith Kelly, was not involved to any degree in this particular venture and you should and may not consider it as evidence against him. You may and should

consider it as evidence of the credibility of James Calvin Robinson.

The jury returned a verdict of guilty against defendant. Judgment was entered on the conviction and defendant was sentenced to a term of incarceration not to exceed twenty-five years.

Defendant had filed a pretrial motion in limine requesting that the trial court prohibit testimony referring to robberies on December 27, 1983, and January 27, 1984. The court held that the evidence of these other crimes would be admissible to establish "motive, intent, preparation, knowledge and identity." The court's decision was based on representations by the prosecutor that defendant was involved in all of the robberies.

During trial, defendant's counsel vigorously objected to Robinson's testimony regarding the robberies on December 27, 1983, and January 27, 1984. The trial court overruled the defense objections. At the close of the State's evidence, and again at the end of trial, defendant's motions for mistrial based on the admission of Robinson's testimony were also denied by the court.

On appeal, defendant contends that the trial court erred by admitting the evidence concerning the other robberies. He also contends that his trial attorney rendered ineffective assistance by failing to preserve an issue. Prior to trial defendant had filed a challenge to the jury panel, alleging that Black Hawk County authorities had violated Iowa Code section 609.4 by using voter registration lists rather than precinct population to decide how many persons from each precinct would be called for jury duty. The district court did not rule on this challenge, and defendant contends his trial attorney rendered ineffective assistance by failing to demand a ruling.

**I. Robinson's Testimony.** In reviewing the trial court's exercise of discretion in admitting the testimony regarding the other robberies, we first consider

the basis upon which relevance of the evidence may be found. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979). The general rule is that "one crime cannot be proved by proof of another." Id. "The purpose of the rule is to exclude from the jury's consideration evidence which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question." Id. However, evidence of other crimes may escape the rule's prohibition if it is relevant to prove other than the defendant's criminal disposition. Id.

Iowa Rule of Evidence 404(b) codifies the general rule:

> **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.

In order to be relevant to the issues, the other offenses must be reasonably similar to the act on which the prosecution is based. State v. Fetters, 202 N.W.2d 84, 92 (Iowa 1972). "There must be such connection between the offense charged and the other offenses that the latter can reasonably be said to tend to establish the first, or some essential fact in issue. In other words, the other offenses must be wrongful acts, crimes, offenses or attempted offenses of a like nature to the charge against the accused." Id.

Defendant was charged with first-degree robbery. It was, therefore, a necessary part of the State's case to prove beyond a reasonable doubt that defendant possessed the specific intent to commit a theft or aided and abetted with the knowledge that the principal possessed such specific intent. See Iowa Code § 711.1-.2 (1985). The State is entitled to present evidence sufficient to meet its high burden of proof on each element of the criminal offense. State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982).

In this case, we must address the robberies that Robinson testified about separately. The December 27, 1983, robbery described by Robinson meets the test of relevancy. Robinson's testimony indicates that he robbed the Imperial gas station at defendant's inspiration. Defendant drove Robinson to the station in his car and he waited outside while Robinson entered the store with a .25 caliber handgun. When Robinson returned to the car with the money, defendant drove them to his house where they split the proceeds. Likewise, in the present situation, defendant instigated the robbery in the same area of Waterloo, drove Robinson to the store in the same car, waited while Robinson entered the store and robbed an employee at gunpoint, and afterwards drove Robinson to his house to divide the money.

Clearly, Robinson's testimony established the commission of a prior crime which occurred in a manner reasonably similar to that with which defendant is presently charged. See State v. Fetters, 202 N.W.2d 84, 91-92 (Iowa 1972) (accomplice testimony detailing circumstances of other breaking and enterings in which defendant participated was admissible to establish defendant's intent to commit larceny); see also State v. Johnson, 237 N.W.2d 819, 820-22 (Iowa 1976) (evidence of defendant's participation in similar "tilltapping" crime ten days before crime charged held admissible to prove defendant's intent and explain his presence at crime scene). We find that Robinson's testimony is relevant, not only to prove defendant's intent, but also to prove motive, identity, preparation, and knowledge.

While we agree with the trial court's conclusion that the testimony regarding the December 27 robbery is relevant, "we must also decide if trial court abused its discretion in determining whether any danger of unfair prejudice created by the evidence substantially outweighed its probative value." Cott, 283 N.W.2d at 329. Defendant, as the complaining party, must show that the trial court's

action was "unreasonable in the light of attendant circumstances." Id. Factors to be considered in balancing prejudicial effect against probative value include the actual need for other-crimes evidence in the light of the issues and the other evidence available to prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility. McCormick, Handbook of the Law of Evidence § 190 (2d ed. 1972).

Generally, cautionary or limiting instructions will be sufficient to remove the danger of prejudice from the admission of other-crimes evidence. Conner, 314 N.W.2d at 429. Here, the trial court gave the jury a cautionary instruction explaining the limited purposes for which the evidence of defendant's previous robbery could be considered. This is not the extreme case referred to in Conner, where such a limiting instruction would be insufficient to remove the danger of prejudice.

We believe that the probative value of Robinson's testimony outweighs the possibility of prejudice to defendant. We conclude that the trial court's ruling to admit Robinson's testimony regarding the December 27, 1983, robbery cannot be termed unreasonable in light of the attendant circumstances or an abuse of discretion.

However, the January 27, 1984, robbery presents a different situation. Robinson's testimony regarding the robbery has absolutely no relevance to defendant's intent, motive, preparation, knowledge, or identity because it is undisputed that defendant was not involved in the planning or perpetration of that crime. Despite the fact that this evidence was inadmissible, we cannot agree with defendant's argument that it so prejudiced his case as to require reversal. The

jury was instructed that defendant was not involved to any degree in the robbery on January 27, 1984, and they, therefore, should not consider it as evidence against him. We conclude that this instruction was sufficient to remove any danger of prejudice.

**II. Ineffective Assistance.** Defendant next contends that his trial counsel rendered ineffective assistance by failing to demand a ruling on the defense challenge to the jury panel. The challenge was grounded in the failure of authorities in Black Hawk County to make up the jury panel list in accordance with Iowa Code section 609.4. The Iowa Supreme Court has recently determined in three different cases that identical challenges to Black Hawk County jury selection procedures had no merit. State v. Myers, No. 85-389, slip op. at 2 (Iowa Sup. Ct. Jan. 15, 1986); State v. Walk, No. 85-415, slip op. at 2 (Iowa Sup. Ct. Jan. 15, 1986); Cooper v. State, No. 84-1281, slip op. at 6 (Iowa Sup. Ct. Jan. 15, 1986). We can only conclude that defendant's trial counsel did not render ineffective assistance by failing to pursue a meritless claim.

**AFFIRMED.**