IN THE COURT OF APPEALS OF IOWA

No. 1999-178 (9-402) / 98-1042
Filed December 27, 1999

STATE OF IOWA,

Appellee,

vs.

STEPHEN BLUMBERG,

Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Art Gamble, Judge

Stephen Blumberg appeals following his conviction for third-degree burglary.

AFFIRMED.

Thomas J. Jackowski of Elverson, Vasey & Peterson, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and George Karnas and Joseph Weeg, Assistant County Attorneys for appellee.

Heard by Sackett, C.J., and Zimmer, and Miller, JJ.

ZIMMER, J.

The defendant, Stephen Blumberg, appeals the judgment and sentence entered following his conviction of third-degree burglary in violation of Iowa Code section 713.6A (1997). Defendant claims the evidence was insufficient to satisfy the "intent" and "occupied structure" elements of the charge. He also contends the trial court erred in: (1) allowing evidence of his previous convictions; (2) failing to suppress evidence seized during a vehicle search; and (3) overruling his motion for a mistrial We affirm.

I. Background Facts and Proceedings. Defendant was charged with third-degree burglary based on allegations he entered a vacant building in downtown Des Moines with the intent to steal antique radiators, woodwork, and similar articles. Prior to trial, Blumberg filed four motions: a motion in limine to prevent introduction of his prior criminal record under Iowa Rule of Evidence 404(b); a motion to suppress challenging the search of a vehicle owned by his father; a motion to adjudicate law points contending the building in question was not an "occupied structure" as required under the burglary statute; and a motion to sever his trial from that of his co-defendant, Robert Madison. Only the motion to sever was sustained.

During trial, the district court denied defendant's motion for mistrial after the building's elderly owner made comments concerning the defendant as she entered the courtroom to testify. After presentation of the evidence, the district court denied defendant's motion for judgment of acquittal based on the alleged insufficiency of the

evidence. The jury found Blumberg guilty. The court sentenced him to an indeterminate term of five years in prison.

II. Sufficiency of The Evidence. Defendant asserts the evidence did not support the jury's finding of guilt. He contends the State did not prove the apartment building he entered was an "occupied structure" or that he intended to commit a theft within the building.

Our scope of review on a challenge to the sufficiency of evidence is on assigned error. *State v. Mitchell*, 568 N.W.2d 493, 502 (Iowa 1997). We consider the entire record and determine whether the jury's verdict is supported by substantial evidence. *State v. Shumpert*, 554 N.W.2d 250, 253 (Iowa 1996). Evidence is substantial if it "would convince a rational trier of fact that defendant is guilty beyond a reasonable doubt." *Id.* In this review, we consider the evidence in the light most favorable to the verdict and accept as established all reasonable inferences that support it. *Id.*

A. The Trial Record. We find the record contains substantial evidence to support the defendant's conviction. The following facts could be found from the evidence presented at trial.

Michael Lapcheske worked as the caretaker of the Murillo Building in downtown Des Moines. The building is a three-story, multi-unit apartment complex which has not had tenants since 1992 or utilities since February of 1997. Lapcheske checked on the building on December 9, 1997, and found that someone had broken in and stolen a radiator, some mantels, ceiling lights, and various antique metal items

such as door knobs, locks, window pulls, door bells, and towel racks. In addition, baseboards had been pried from the walls and left on the floor. Lapcheske did not call police but decided to stake out the building the following night, believing the individuals responsible would return for the baseboards.

Lapcheske came back to the building the next day at 5:00 p.m., conducted a brief search of the building, and returned to wait in his car. Around 9:00 p.m., he left for approximately twenty minutes to get something to eat. Upon his return, he again searched the building but found no one inside and nothing else missing. Shortly before midnight, Lapcheske observed two individuals climb a stand pipe and enter the building through a broken window on the second floor. Lapcheske approached the building and heard the sound of woodwork being pried off the walls. Lapcheske then phoned the police from a nearby convenience store and returned to the building to hear the sound of banging pipes.

Police arrived and entered the building while Lapcheske remained outside. As police went in by one door, Lapcheske observed two men run out another door. Lapcheske and the officers apprehended the men, one of whom was Blumberg. Lapcheske later found burglary tools inside the Murillo Building, including a pry bar, channel lock pliers, and screwdrivers. He also noticed that more radiators, pipes, and baseboards had been pried loose.

Following his arrest, Blumberg gave police a Minnesota driver's license identifying him as Michael Nelson. He told police he and his companion were

looking for a place to sleep. Blumberg had $276.34 in cash in his possession and his confederate had $97.01.

After Lapcheske learned that Blumberg had presented a Minnesota driver's license, he searched the area near the Murillo Building for a car with Minnesota plates. He found an older Cadillac with Minnesota plates parked in the area from which Blumberg and his companion had approached the building. The following morning, detective Ronald Foster spoke to Lapcheske and learned about the Cadillac Detective Foster went to the jail and found a key with a Cadillac emblem amongst the defendant's property. The key proved to belong to the car Lapcheske had located. Detective Foster searched the car and found several antique dealers' brochures and papers bearing the name Stephen Blumberg. Nothing in the car directly connected it to the burglary. The car, owned by defendant's father, was impounded.

B. Occupied Structure. Blumberg claims the evidence was not sufficient to prove the Murillo Building was "an occupied structure." One definition provided the jury by the district court stated that a structure is an "occupied structure" if it "is used for the storage or safe-keeping of anything of value . . . ." The court's definition is consistent with Iowa Code section 702.12. Michael Lapcheske testified that Helen Wyse, the building's owner, stored furniture, clothing, cookware, and tools there. Lapcheske acknowledged some of Wise's property had been taken or damaged before the date of the burglary, but it is clear items of value still remained. A photograph and a videotape taken after the burglary showed the building still contained a cabinet or bookcase, a refrigerator and a stove (both of which appeared to be in good

condition), as well as fireplace tools, curtains, window blinds, and kitchen items. Testimony also indicated the antique fixtures, radiators and baseboards had resale value. The State was only required to show the building was used for the storage of anything of value. *See State v. Hill*, 449 N.W.2d 626, 628 (Iowa 1989). Substantial evidence supports the conclusion the building was an occupied structure on the date of the burglary.

C. Intent. Blumberg contends the State's evidence with regard to intent was deficient.

The jury was not required to accept the defendant's version of the events. *See State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998) (noting jury free to credit or reject evidence as it chooses). Here, the jury could reasonably have rejected Blumberg's explanation for his presence in the Murillo building. He claimed he was looking for a place to sleep. However, Blumberg and his companion possessed close to $400, a sufficient amount to get a hotel room. Ample evidence supports the conclusion Blumberg and his confederate surreptitiously entered the Murillo Building at night, with burglary tools in their possession, intending to remove and steal antique fixtures and other items inside the building. A jury was justified in concluding the two men were in the process of removing radiators and baseboards from the building when their activities were interrupted by police.

In summary, we find substantial evidence was presented to prove both that the Murillo Building was an "occupied structure" and that Blumberg entered with the specific intent to commit a theft.

III. Admission of Other Crimes Evidence. Over Blumberg's objection, the district court allowed an FBI agent to testify that in 1991, Blumberg was convicted of four federal felony charges: two counts of interstate transportation of stolen property, one count of conspiracy involving interstate transportation of stolen property, and one count of possession and concealment of stolen property. The agent testified the property in question "consisted of books, windows, antiques and door knobs from various deserted homes throughout the United States." Blumberg argues this evidence should have been excluded under Iowa Rule of Evidence 404(b) because its prejudicial impact outweighed its probative value and his prior crimes were so remote in time as to render evidence of those convictions irrelevant.

Iowa Rule of Evidence 404(b) provides that "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." However, evidence of 'prior bad acts' may be admitted as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 404(b).

The analytical framework for determining whether evidence of other crimes is admissible is a two-step process. *State v. Plaster,* 424 N.W.2d 226, 229 (Iowa 1988). The district court must first determine whether the evidence of other crimes is relevant. *Id.* If the evidence is relevant, the court must then decide whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *Id.* A positive finding at the second step overcomes the prima facie admissibility of the evidence. *See State v. Bayles,* 551 N.W.2d 600, 604 (Iowa 1996) (citation

omitted). In reviewing the district court's decision to admit other crimes evidence, we reverse only if we find a clear abuse of discretion. *Id.*

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence." Iowa R. Evid. 401. "The test is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if the person knew of the proffered evidence." *Bayles*, 551 N.W.2d at 605 (citation and internal quotation marks omitted).

The consequential fact in this case is the existence or nonexistence of Blumberg's intent to steal radiators and woodwork from the vacant Murillo Building. The probability Blumberg intended to steal in this case would increase if the jury knew Blumberg had been convicted of other crimes involving stolen property that "consisted of books, windows, antiques and door knobs from various deserted homes . . . ." We believe the contested evidence was relevant to refute Blumberg's claim he entered the Murillo building without intent to commit a theft.

The district court also properly concluded the probative value of this 'other crimes' evidence was not substantially outweighed by the danger of unfair prejudice, citing Iowa Rule of Evidence 403. The Iowa Supreme Court has previously defined unfair prejudice in Rule 403 as "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *Plaster*, 424 N.W.2d at 231 (citation omitted). We find little danger of unfair prejudice. The

district court minimized any danger of unfair prejudice to Blumberg by giving a cautionary instruction explaining the limited purpose of the challenged evidence.

Blumberg argues the time lapse between his prior convictions in 1991 and the present crime committed in 1997 was so great as to render evidence of prior convictions irrelevant. Blumberg correctly points out remoteness in time may render 'other crimes' evidence irrelevant "where the lapsed time is so great as to negative all rational or logical connection between the facts thought to be proved and the remote evidence offered in proof thereof." *State v. Zeliadt*, 541 N.W.2d 558, 561 (Iowa App 1995) (citations omitted). However, our supreme court has observed that remoteness issues are defused by the fact a defendant was imprisoned during the time between the prior crime and the present offense. *See State v. Cassidy*, 491 N.W.2d 782, 786 (Iowa 1992) (citations omitted). Blumberg was in prison from 1991 until at least December of 1995. In early 1997 his parole was revoked and he served additional time before being released in April of 1997. Blumberg committed the crime in this case less than two years after he first had an opportunity to do so.

Based upon our review of the record, we cannot say the district court abused its discretion when it admitted evidence of Blumberg's other crimes.

IV. The Vehicle Search. On appeal, Blumberg claims the court erred in admitting an officer's testimony about what he observed as he inventoried the contents of the Cadillac. Blumberg contends the officer did not follow reasonable, standardized procedures in impounding the car and making an inventory of its contents. He contends the officer had a purely investigatory motive, rendering the

search unlawful. Our review of Blumberg's constitutional claim is de novo on the totality of the circumstances. *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997).

Lapcheske told detective Foster he had observed coin sleeves and some other materials he thought should be checked out lying on the floor of the Cadillac. Detective Foster located the Cadillac and observed that it was illegally parked. A citation was written for illegal parking, although the record does not reveal when this was done. Detective Foster acknowledged he had an investigatory purpose because information he received caused him to suspect the car was involved in the burglary the previous day. Foster was able to unlock the car with the key obtained from Blumberg's property at the jail. He observed coin sleeves as well as clothing and papers in the car.

The Des Moines Police Department has written and unwritten impoundment policies. Under its written policy, a vehicle may be impounded for a parking violation alone. Detective Foster decided to impound the car because he believed it was involved in criminal activity and because it was illegally parked. The department's impoundment policy requires an impounding officer to make a thorough inventory search of the vehicle and secure any valuable found. Detective Foster found trash and old clothing in the vehicle. He did not prepare an inventory because these items did not appear to be connected with the crime and he did not believe there was anything of value which should be removed for safekeeping.

During his examination of the contents of the vehicle, Foster saw two papers bearing the name "Steve Blumberg" as well as several brochures issued by antique

dealers. Foster made a list of these items but did not seize them. After Detective Foster looked through the car, it was towed from the scene. Later, Blumberg told Detective Foster he had borrowed the car, but he did not remember from whom. Further investigation revealed the owner of the car was Henry Blumberg, Stephen's father. The trial court overruled Blumberg's motion to suppress and permitted Foster to testify he had seen approximately half a dozen brochures in the car which had been issued by antique dealers, as well as papers bearing the name Steve Blumberg.

A two-pronged analysis applies to any Fourth Amendment search and seizure claim. A defendant must show a legitimate expectation of privacy in the area searched and an unreasonable invasion of that protected interest. *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995) (citations omitted) (concluding defendant had no legitimate expectation of privacy in mother's automobile in which he had only been a recent passenger). The State contends Blumberg failed to meet the first prong. We agree.

Evidence of possession or control of a vehicle at the time it is searched is necessary to create a legitimate expectation of privacy in the vehicle. *See id.* at 342-343 (stating non-owner passenger has no standing to challenge a vehicle search). Blumberg was not the registered owner of the Cadillac. He told detective Foster he borrowed the car, but did not remember from whom. The record does not reveal who drove the car to the location where it was found or whether Blumberg's confederate had a key to the car. Blumberg's mere possession of the car keys is insufficient to afford him standing to challenge the search. *Id.* Blumberg had the burden to show

that he was more than a mere non-owner passenger. *See State v. Breuer*, 577 N.W.2d 41, 45 (Iowa 1998) (citations omitted). Blumberg has not met that burden. We affirm on this issue.

Even if Blumberg had shown a legitimate expectation of privacy in the area searched, we would reach the same result. We agree with district court's conclusion that the impoundment and inventory were conducted according to reasonable standardized criteria and motivated at least in part by an administrative reason—the need to remove an illegally parked car from the street. Inventories conducted under these circumstances are reasonable and any evidence derived therefrom is admissible *See State v. Huisman*, 544 N.W.2d 433, 439-440 (Iowa 1996). The motion to suppress was correctly denied.

V. Motion for Mistrial. As she entered the courtroom to testify, Helen Wyse, the elderly owner of the Murillo building, made unsolicited comments concerning the defendant. She volunteered, "I see Mr. Blumberg." and "Mike, he's hiding behind, . . . well, he's hiding." Apparently, not all of Ms. Wyse's comments were even recorded by the court reporter. Blumberg's counsel supplemented the record outside the jury's presence with the following professional statement:

> It is my understanding that the witness made one remark that the defendant was hiding. "There he is. He's hiding. There's Mr. Blumberg." And I believe there was some reference to recognizing Mr. Blumberg from a picture she saw.

The trial court accepted counsel's description of the statement as accurate.

Defense counsel moved for a mistrial based on Ms. Wyse's comments. The trial court denied the motion, finding the comments did not rise to the level of prejudice necessary to establish a basis for mistrial. The court sustained defense counsel's motion to strike Wyse's comments and instructed the jurors "to disregard those voluntary comments that were not responsive to any question." The court's instructions included the admonition to decide the case based on the evidence and the law and evidence did not include testimony which the court had told the jury to disregard.

Our review is for abuse of discretion. *State v. Wade*, 467 N.W.2d 283, 285 (Iowa 1991). Abuse of discretion occurs only when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Bayles*, 551 N.W.2d at 604.

Generally, a trial court's action in striking improper testimony, cautioning the jury to disregard it, and giving some type of general cautionary instruction will prevent prejudice. *State v. Brown*, 397 N.W.2d 689, 699 (Iowa 1986). A defendant who claims these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of the trial court. *Id.* (citation omitted). We conclude the trial court's admonition and instructions in this case sufficed to cure any prejudice which arose from Ms. Wyse's volunteered remarks. The trial court was well within its discretion in denying defendant's motion for mistrial.

AFFIRMED.