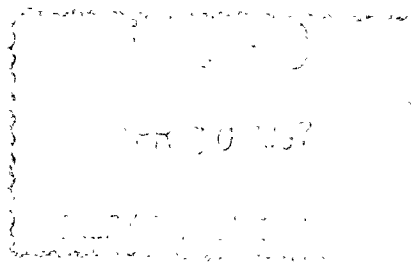
IN THE COURT OF APPEALS OF IOWA

No. 7-068 / 96-0138



STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUAN GARRIS REYNOLDS,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee County (North), R. David Fahey, Judge.

Juan Reynolds appeals his conviction, following a jury trial, for forgery in violation of Iowa Code section 715A.2(1)(a)(c) (1995). **AFFIRMED.**

Barry M. Anderson, Keokuk, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Michael Short, County Attorney, and Gordon Liles, Assistant County Attorney, for appellee.

Considered by Habhab, C.J., and Huitink and Streit, JJ.

HUITINK, J.

Defendant Juan Garris Reynolds appeals his conviction for forgery in violation of Iowa Code sections 715A.2(1)(a) and (c) (1995). We affirm.

I. Background Facts and Proceedings.

Reynolds' conviction was based on the following evidence: Reynolds wrote a $125 check on the Boughton Tree Service account with the payor signature "Jim Boughton." The check was used to purchase groceries and receive a cash payout at an Easter's grocery store in Ft. Madison. Reynolds did not have authorization to write the check. The check was returned by Burlington Bank and Trust as a "no account" check.

In September 1995, Reynolds was charged with forgery and also as a habitual offender. He filed a motion in limine seeking to prohibit the State from introducing evidence of his 1990 conviction for forgery. The district court denied his motion.

A jury trial began in November 1995. Following the close of the State's case, Reynolds moved for dismissal or directed verdict and/or substitution of a theft by check charge in lieu of the forgery charge. The motion was denied. Reynolds renewed his motion at the end of the trial. He also moved to instruct the jury on the lesser-included offense of theft by check. The court overruled Reynolds' motion.

Reynolds was found guilty of forgery. His motion for a new trial was denied. Reynolds was sentenced to serve an indeterminate term not to exceed fifteen years and to pay victim restitution and attorney fees.

Reynolds appeals his conviction asserting the trial court improperly denied his motion to dismiss the forgery charge and his request for an instruction on theft by check. He also argues the court erroneously allowed testimony concerning his prior forgery.

II. Motion to Dismiss.

The State argues Reynolds' motion to dismiss challenged the propriety of the charge rather than the sufficiency of the evidence. Accordingly, he was required to file his motion to dismiss prior to trial. Iowa R. Crim. P. 10(2), (3). The State asserts his failure to move to dismiss at the appropriate time waived his claim. Iowa R. Crim. P. 10(3). We do not agree.

The record indicates that in support of his motion, Reynolds argued there "has not been a prima facie showing of the elements of forgery." We construe his assertion to be a challenge to the sufficiency of the evidence and therefore he was not required to file his motion to dismiss prior to trial.

We do find, however, the district court properly denied Reynolds' motion. The record indicates Reynolds endorsed a payroll check in the amount of $125 at an Easter's grocery store in Ft. Madison. The check containing the payor signature "Jim

Boughton," was written on the closed account of the Boughton Tree Service. Furthermore, as discussed below, evidence was properly admitted of Reynolds' prior conviction of forgery committed under similar circumstances. The evidence was sufficient to convince the trier of fact Reynolds intended to write an unauthorized check on the Boughton Tree Service account. We affirm on this issue.

III. Jury Instructions.

Reynolds was convicted of forgery, in violation of Iowa Code section 715A.2 (a) and (c).[1] He argues it was error for the trial court to fail to instruct the jury on the lesser-included offense of theft by check in violation of Iowa Code section 714.1(6).[2]

Our review is for errors at law. Iowa R. App. P. 4; *see also State v. Coffin,* 504 N.W.2d 893, 894 (Iowa 1993).

Under Iowa law, we apply the impossibility test in determining the submissibility of lesser-included offenses. *State v. Coffin,* 504 N.W.2d 893, 894

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[1] 1. A person is guilty of forgery if, with intent to defraud or injure anyone, or with knowledge that the person is facilitating a fraud or injury to be perpetrated by anyone, the person does any of the following:

a. Alters a writing of another without the other's permission.

. . .

c. Utters a writing which the person knows to be forged in a manner specified in paragraph "a" or "b".

[2] A person commits theft when the person does any of the following:

. . .

6. Makes, utter, draws, delivers, or gives any check . . . on any bank, credit union, person or corporation, and obtains property or service in exchange therefor, if the person knows that such check . . . will not be paid when presented.

. . . .

(Iowa 1993). The lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. *State v. Jeffries,* 430 N.W.2d 728, 740 (Iowa 1988). If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater. *Id.* In using this test, we look to the statutory elements rather than to the charge or the evidence. *Id.*

The trial court first looks to the marshaling instruction in determining whether a particular crime must be submitted as a lesser-included offense of the crime charged. *State v. Turecek,* 456 N.W.2d 219, 223 (Iowa 1990). The court must decide "whether if the elements of the greater offense are established, in the manner in which the State has sought to prove those elements, then the elements of any lesser offense have also necessarily been established." *Id.* The wording of the elements need not be described in the same way as to both charges, instead, the meaning or intent of the elements of each offense must be the same. *State v. Royer,* 436 N.W.2d 637, 641 (Iowa 1989).

The marshaling instruction on forgery, Jury Instruction No. 15, submitted the following elements:

> Instruction No. 15 - The State must prove all of the following elements:
> 1. On or about August 12, 1995, the defendant uttered a check.
> 2. The defendant knew the check had been written so it would appear to be the act of one who did not authorize the act.
> 3. The defendant specifically intended to defraud another.

Reynolds asserts this instruction contains essentially all the elements of theft by check as set forth in Uniform Criminal Jury Instruction 1400.17:

> **1400.17 Theft - definition - False Check.** The State must prove all of the following elements of Theft:
> 1. On or about the ___ day of _____, 19__, the defendant did [make] [utter] [draw] [give] to (victim) a [check] [draft] [written order] in the amount of $_____.
> 2. The [check] [draft] [written order] was drawn on a (e.g., bank).
> 3. The defendant received [property] [services] [money] in exchange for the [check] [draft] [written order].
> 4. The defendant knew at the time [he] [she] gave the [check] [draft] [written order] to (victim) it would not be paid by the [bank] [other institution] because (state facts shown by evidence, e.g., insufficient funds, closed account, no account).
>
> . . .

Reynolds contends the requirement a defendant know the check was written so it would appear to be the act of one who did not authorize it, is, in substance, the same as the requirement that a defendant receive something of value knowing the check will not be paid.

We reject Reynolds' arguments on this issue. The only common element between the offenses is that both required the State to prove Reynolds uttered a check. Theft by check requires the State to prove two additional elements that are not required for the offense of forgery, to-wit: (1) that the defendant received property in exchange for the check; and (2) that the defendant knew at the time he gave the check, it would not be paid by the bank. The *intent* of the two statutes is the distinguishing factor. The intent of the forgery statute is to proscribe the act of writing an

unauthorized check while the intent of the theft by check statute is to proscribe the act of uttering a check with the knowledge of insufficient funds. We are unable to conclude, applying the impossibility test, that Reynolds was entitled to a lesser-included offense instruction. We affirm on this issue.

IV. Admission of Prior Forgery Conviction.

Reynolds asserts the district court improperly admitted evidence of his prior forgery conviction. *See* Iowa R. Evid. 404(b).[3] He asserts the evidence was impermissibly admitted to show Reynolds is a "bad person" who is more likely to have committed the crime. Reynolds disputes the State's theory that the prior conviction represented evidence of a common scheme. He also asserts the prior conviction is too remote in time to be of any probative value.

On evidentiary issues we review for abuse of discretion. *State v. Archivia,* 495 N.W.2d 364, 367 (Iowa App. 1992). In order to show abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

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[3] Iowa R. Evid. 404(b):

> **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.

The admissibility of evidence under rule 404(b) is determined by whether (1) the evidence is relevant to establish a legitimate issue in the case (other than a general propensity to commit wrongful acts); and (2) there is clear proof the individual against whom the evidence is offered committed the prior crime. *State v. Schaffer,* 524 N.W.2d 453, 455 (Iowa App. 1994). Finally, if the evidence is relevant, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Casady,* 491 N.W.2d 782, 785 (Iowa 1992).

In the present case, intent to defraud was an element of the offense charged. We conclude evidence of Reynolds' prior conviction was relevant to show intent under Rule 404(b) of the Iowa Rules of Evidence. *See Casady,* 491 N.W.2d at 788; *State v. Kern,* 392 N.W.2d 134, 137 (Iowa 1986). We reject Reynolds' argument that the remoteness of the prior conviction lessens its relevancy while enhancing the prejudice to Reynolds. The remoteness of evidence generally affects the weight rather than admissibility of the evidence. *State v. Maestas,* 224 N.W.2d 248, 251 (Iowa 1974). The fact both checks were written on the Boughton Tree account diminishes the significance of the five-year interval between the events. The prior conviction aids in establishing the specific intent element of the offense charged. Accordingly, the

district court did not abuse its discretion in concluding the probative value of the evidence outweighed the risk of prejudice to Reynolds.

AFFIRMED.