

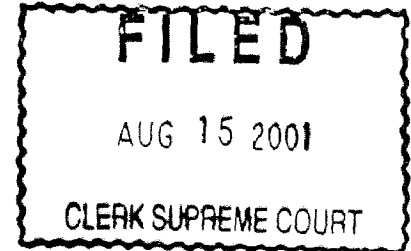
IN THE COURT OF APPEALS OF IOWA

No. 1-413 / 99-1158
Filed August 15, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL ANTHONY GATES,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Michael Gates appeals from judgment and sentence entered by the district court upon a jury verdict finding him guilty of delivery of a controlled substance, cocaine base, as a second offender. **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, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., Habhab, J., and C. Peterson, S.J.*

*Senior judges assigned by order pursuant to Iowa Code section 602.9206

(1999).

HAYDEN, S.J.

On May 5, 1999 a Black Hawk jury found defendant, Michael Gates, guilty of delivery of a controlled substance, cocaine base. He admitted to the court this was his second offense. He was sentenced under Iowa Code sections 124.407(1)(c) and 124.411 (1997).

The Waterloo police had received complaints of drug dealing in front of the Old Timers Bar in Waterloo, Iowa. On December 9, 1998, Waterloo police officers Dill, Krogh, and Payne set up a surveillance of the Old Timers Bar. Dill and Krogh were in a marked vehicle parked behind the bar in an alley a block away. Payne was in a field east of the bar approximately 200 yards away, watching the front through military binoculars.

Payne saw Curtiss Shaw approach and speak to a man in orange shoes and orange clothing. Officer Payne identified this man as Michael Gates, the defendant in this case. Payne observed some sort of an exchange take place between Shaw and Gates. He did not see crack cocaine or money exchange hands. He saw Shaw put something in his pocket. As Shaw began to leave Payne radioed officers Dill and Krogh and they stopped Shaw a half block from the bar. Shaw consented to a search of his clothing and the officers found a tiny rock of crack cocaine. Shaw informed them he had bought the rock for \$9.00 from a man in front of the bar.

Officer Dill stated Shaw identified defendant as the man who sold him the crack. However, Shaw testified at his deposition and at trial that it was the officers who pointed to defendant and said "that is the man you bought the crack from." Defendant drove away from the bar and officers Dill and Krogh stopped

him. Defendant consented to a search of his person and car. No drugs were found in the search. The officers found \$230 in bills in defendant's pocket plus some cash in his wallet. Defendant refused to go to the police station and give a statement that night. Shaw was taken to the station. The officers wrote down his statement and had him sign it. Shaw testified he could not read or write.

During the trial, the court permitted testimony be given and exhibit evidence admitted, over defense objections, about defendant's arrest on the night of July 31, 1991. That arrest was also for selling crack cocaine. Michael Gates pled guilty to that charge in July 1992.

In jury instruction No. 17(a) a limiting instruction was given to the jury as follows:

Evidence has been received concerning other wrongful acts alleged to have been committed by defendant. The defendant is not on trial for those acts.

This evidence must be shown by clear proof, and can only be used to show motive, intent, absence of mistake or accident, common scheme, or identity of person charged.

If you find other wrongful acts (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing motive, intent, absence of mistake or accident, common scheme, or identity of person charged.

The arresting officer, Ann Meyer, testified in detail about the circumstances leading to defendant's arrest in July 1991 for selling crack cocaine. Her testimony and documentary evidence were admitted over defendant's objections.

The prosecutor in her closing summation to the jury stated, "The previous case [defendant's 1991 arrest] also proves that the defendant has a conscious

awareness, that he had knowledge that it was crack cocaine; and it also proves in fact who was the seller on December 9th of 1998." She went into great detail about defendant's July 1991 arrest for selling crack cocaine. She told the jury:

Now, you can either rely on Mr. Shaw, or you can rely on Officer Payne or you can rely on both. Or you can rely on the other officers, or you can rely on Sergeant Meyer to convict this defendant. It doesn't matter on which you rely.

Defendant appeals and alleges the district court erred in allowing evidence of the prior conviction. We reverse and remand for new trial.

ISSUE. Did the trial court abuse its discretion in admitting evidence of defendant's prior delivery of crack cocaine conviction?

Challenges to the admission of evidence are reviewed only for abuse of discretion. *State v. Query*, 594 N.W.2d 438, 443 (Iowa Ct. App. 1999). Iowa Rule of Evid. 403 is captioned, "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time." Although relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, or it would consist of the needless presentation of cumulative evidence. Iowa R. Evid. 403.

Rule 404(b) provides:

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 the case of *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001), the Iowa Supreme Court recognized certain categories of permissible objectives for proof of prior criminal acts. These categories included:

(1) motive, (2) intent, (3) absence of mistake or accident, (4) 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, (5) identity of the person charged with commission of a crime.

Casteneda, 621 N.W.2d at 440 (citations omitted).

Under Rule 404(b) we continue to recognize that there must be some factual issue raised to permit evidence of other crimes, wrongs, or acts under the noted exceptions. *Id.* If the evidence meets this test, it is prima-facie admissible, even though the evidence's tendency is to demonstrate the defendant's bad character. *Id.*

In determining whether the challenged evidence is admissible, the district court must employ a two-step analysis. *Id.* The court must first decide whether the evidence is relevant. *Id.* If it is not relevant, then the challenged evidence is inadmissible. Iowa R. Evid. 402 (evidence which is not relevant is not admissible). If the court finds that the challenged evidence is relevant, the court must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. *Casteneda*, 621 N.W.2d at 440. An affirmative finding in this balancing process precludes admissibility of even relevant evidence. *Id.* In employing the two-step analysis the district court must exercise its discretion. *Id.* We will reverse its decision only when we find a clear abuse of discretion. *Id.*

Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R.

Evid. 401. We determine defendant's arrest in July 1991 is relevant to his December 9, 1998 arrest, the case before us.

The State contends Gates' 1991 arrest was relevant to establish his knowledge and identity. It claims the earlier arrest was reasonably similar to the 1998 incident, and it was not too remote in time. It also asserts the evidence was not unfairly prejudicial, and any error in the admission of such evidence was harmless.

This court has held the following factors must be considered in making a rule 403 determination:

(1) the actual need for the evidence in view of the issues and other available evidence, (2) the strength of the evidence showing that the prior bad acts were committed by the accused, (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven, and (4) the degree to which the jury will probably be roused by the evidence improperly.

State v. Most, 578 N.W.2d 250, 254 (Iowa Ct. App. 1998). Where prior crimes evidence is offered, the court must consider the strong tendency for the jury to use it for an improper purpose. *Id.* (Citation omitted).

The Iowa Supreme Court held, 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 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).

In *Castaneda*, the Iowa Supreme Court held even had the district court given a correct limiting instruction it would not have removed the unfairly

prejudicial nature of a witness's testimony concerning defendant's prior bad acts. *Casteneda*, 621 N.W.2d at 442.

In the appeal of *State v. Hardy*, 492 N.W.2d 230, 234 (Iowa Ct. App. 1992), this court held that because of substantial unfairly prejudicial nature of prior assault convictions, a curative instruction that the jury could consider the evidence for the limited purpose of showing defendant's intent was inadequate to alleviate the unfair prejudice.

In this case when officer Meyer testified about defendant's 1991 arrest, over defense objection, she testified in detail about attempting to arrest Gates. He started to fight with officer Meyer. She testified she knew the defendant and he knew her. She advised him of information that they had received, he was selling crack cocaine and might have some on him. She told him she had to do a pat-down search of his person. He indicated he would not allow this unless the officers had a search warrant. The officers were going to pat-down defendant and Meyer told him he would be placed under arrest. She stated, "At that time he started to fight with us. I had my arm on his right arm. Intentionally or not, I don't know which, he punched me in the lower jaw."

Officer Berumez attempted to assist Meyer in controlling Gates. Officer Meyer testified;

We tried to put him up against the wall of the Rendezvous so we could restrain him. He was flailing and fighting with us. The third officer there, Officer Harrington, was trying to hold the crowd off. We had a lot of people coming out with pool cues, telling us to let the brother go or there would be a riot. We took him to the ground.

At this time the defense attorney objected again that the information did not go to identify or motive. The court sustained this objection. Meyer continued testifying

there was a struggle and there were injuries to the officers. The court had given the defendant's attorney a standing objection to officer Meyer's testimony.

Defendant Michael Gates, was charged and pled guilty to delivery of a controlled substance, to wit: cocaine base, arising from the 1991 incident. That is the same crime that he is charged with now, except being a second offender.

At the outset of officer Meyer's testimony in the present case, the trial court informed the jury they were going to hear some testimony and evidence concerning matters that occurred in 1991. The court stated:

It's for limited purposes only. It's not to show a person's predisposition nor to show a person is of good or bad character. It's merely to show certain limited reasons, motive, intent, identity, state of mind; and you will be receiving a further instruction on that.

In this case, the first factor under *Axiotis* (nature of the conviction) and it's fourth factor (tendency to improperly influence the jury) are of particular concern. *Axiotis*, 569 N.W.2d at 816. The 1991 charge and later guilty plea was for exactly the same crime for which he was currently on trial (delivery of a controlled substance, to-wit: cocaine base). This fact and the probative value of officer Meyer's testimony about defendant's arrest, ensuing fight and injuries to the officers was substantially outweighed by the danger of unfair prejudice.

These facts could very likely have a substantial effect on a jury, which, although instructed not to do so, could reasonably be expected to misuse the evidence as substantive proof of guilt. See *State v. Daly*, 623 N.W.2d 799, 803 (Iowa 2001).

We determine admission of this evidence was not harmless.

We reverse Michael Gates conviction and remand for new trial.

REVERSED AND REMANDED FOR NEW TRIAL.