FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	**Filed January 29, 1986**
Plaintiff-Appellee,	)	
vs.	)	5-563 85-536
JAMES S. CUSTARD,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Pottawattamie County, Paul H. Sulhoff, Judge.

Defendant appeals his judgment and sentence upon his conviction on the charge of first-degree burglary. **AFFIRMED.**

Thomas J. Miller, Attorney General; Elizabeth Ciebell, Assistant Attorney General; and Joseph B. Reedy, Assistant County Attorney, for plaintiff-appellee.

Gary K. Anderson of Anderson & Wheeler, Council Bluffs, for defendant-appellant.

Heard by Oxberger, C.J., Snell, and Hayden, JJ.

The defendant has appealed from his conviction of burglary in the first degree, claiming error regarding an instruction given to the jury and in the presentation of evidence of prior convictions. We affirm.

The defendant, James Custard, was arrested September 4, 1984, after he allegedly entered the house of Carl Herron. The trial information alleged further that Custard had a dangerous weapon in his possession, in violation of 713.3 of the Code. Herron testified that two men armed with rifles entered his house, threatened and struck him. His son identified the defendant as one of the men. Custard said a dispute had existed between himself and Herron. Herron's son and Custard's stepson had been in a fight. Custard said he drove to Herron's house with another man, Jack Anderson. He said he and Anderson went to the house, knocked, and left when there was no answer. Custard said as he returned to his truck, he heard a loud noise from the Herron house, realized Anderson was not with him, and went back to the house. He says he then got Anderson and left.

On January 20, 1985, the Pottawattamie County Attorney amended the trial information to indicate Custard had, during the burglary, represented he was in immediate possession of a firearm, displayed a firearm in a threatening manner, or was armed with a firearm. February 11, Custard filed a motion in limine to prevent the State from introducing evidence of "other crimes, wrongs, or acts" committed by Custard. The case was submitted to the jury and, while deliberating, the jury sent out a question concerning an instruction. A supplemental instruction was sent to the jury after approval by the State and defendant's attorney.

The defendant's first claimed error is that the trial judge erred in denying his motion in limine. We agree with the State that the defendant did not preserve error by objecting to the question and, even if he had, the record confirms that no evidence of prior convictions was presented to the jury. Granting or denying a motion in limine is not error in itself; rather, it occurs when the matter is improperly presented at trial. State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982). If the court makes an unequivocal ruling on the motion, objection does not need to be renewed at trial to preserve error. Id. However, if the court has not unequivocally ruled, then objection must be made when the evidence in question is presented in order to preserve error. State v. Latham, 366 N.W.2d 181, 183 (Iowa 1985).

In the instant case when the court ruled on the motion in limine, it stated it was overruling the motion in limine "at this time" and told the defendant "to make the proper objections" during the trial. This is not the unequivocal type of ruling referred to in Harlow and Latham.

Further, no evidence was presented of prior crimes. Instead, the question was asked during cross-examination, "Isn't it a fact that in the past that when you drink, you have a propensity to be violent?" Defendant responded, "When I have had a large amount, I have had problems, yes." No mention was made of prior crimes, and this question was well within the ability of the State to rebut defendant's contention that he was a peaceful person and acting as a "good Samaritan" when he entered the Herron house. Iowa R. Evid. 404(a)(1).

Custard also objects to Instruction 15 and the supplemental instruction given to the jury following their question. The jury had been informed in Instruction 15 the State must prove the elements of burglary, including that at the time defendant entered the house, he had in his possession a dangerous

weapon or that after he entered, the defendant intentionally inflicted physical injury on Carl Herron. The jury asked if they had to be unanimous about one or the other alternative. The court instructed the jury that part of the jury could conclude one alternative occurred and part of the jury could conclude the other alternative occurred, but all twelve jurors must agree one of the alternatives occurred.

The defendant says that the State never properly amended the trial information to charge Custard with intentionally injuring Herron and that the original trial information only accused him of possessing or displaying a firearm. The jury's confusion as reflected in their question shows they might have found defendant not guilty if only one alternative was presented.

The record clearly reflects, however, that defendant made no objection to the instruction. In fact, the attorney for the defendant and for the State specifically approved the instruction. The record shows the following exchange between the court, defendant's attorney Mr. Swanson, and the State's attorney, Mr. Reedy:

> THE COURT: In other words, part of the jury could conclude that a 5-a occurred and part of the jury could conclude that 5-b occurred, but all 12 of you must agree that either 5-2 or 5-b occurred before the State has sustained the burden of proving that element. What does the the defendant think of that?
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> MR. REEDY: That is sufficient.
>
> MR. SWANSON: I liked it before you started talking about splitting, but I'm not going to object.

Defendant must object and obtain a ruling from the court in order to preserve error. Linge v. Ralston Purina Co., 293 N.W.2d 191, 195 (Iowa 1980).This is nothing for this court to review on the issue.

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