IN THE COURT OF APPEALS OF IOWA

No. 2-157 / 91-693

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

1116

MICHAEL ALLEN BANNISTER,

Defendant-Appellant.

Appeal from the Iowa District Court for Emmet County, Frank B. Nelson, Judge.

Defendant appeals his conviction, following a jury trial, of burglary in the first degree. **REVERSED AND REMANDED FOR NEW TRIAL.**

John G. Martens of Sanderson, Ridout & Martens, Estherville, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Lynn Fillenwarth, County Attorney, and Richard Meyer, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Defendant-appellant Michael Bannister appeals his conviction for burglary in the first degree; he contends (1) the trial court did not have sufficient evidence to submit a charge of burglary to the jury, (2) the trial court erred in allowing the State to introduce evidence of defendant's previous unrelated conviction, and (3) the trial court erred in refusing to instruct the jury regarding the lesser included offense of attempted burglary. We reverse and remand for new trial.

The State charged the defendant with burglarizing the home of his great uncle Jalmar. The facts were basically undisputed. Defendant knew his uncle well and had been at his uncle's home in the days prior to the events for which defendant was charged. Defendant had no source of income. Early one morning defendant came to Jalmar's home asking for money; defendant's uncle would not let defendant in; defendant kicked the glass in his uncle's outside door; Jalmar was injured when the glass broke. Defendant did not enter the house but flagged down a truck that took him to the police station where he reported the event.

The first issue is whether there is sufficient evidence to support a burglary charge. In ruling on defendant's motion for acquittal, the trial court recognized this was "an extremely thin case."

Defendant contends there was not sufficient evidence to show (1) he intended to break into Jalmar's residence, (2) he intended to steal from Jalmar.

The question is whether there is substantial evidence in the record to support the charge. See State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Evidence is substantial if it could convince a rational fact-finder that the defendant is guilty beyond a reasonable doubt. See State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988).

Looking at the evidence in the light most favorable to the State, the following facts can be established. The State's principal witness was Jalmar, defendant's 78-year-old great-uncle, the alleged victim. Defendant hung around Jalmar's house and drank with him. Two days before the events at issue, defendant, with friends, came to Jalmar's house to borrow $30 from Jalmar. Jalmar did not give defendant money, and defendant left without causing any trouble.

About 2:00 a.m. on the day of the incident, Estherville police officers observed defendant creating a disturbance in a convenience store. Defendant told the officers he had just been released from the Iowa State Penitentiary, he was finding life difficult outside of prison, and he wanted to go back to the penitentiary.

At about 6:30 a.m., defendant went to Jalmar's door. Defendant yelled and banged on the screen. Defendant

yelled he wanted money. Jalmar told defendant to leave. Defendant said he blew up and started kicking the screen door. He tore the screen door open by pulling the hook eye out of the door frame. He then kicked the main door. Jalmar, who was standing behind the main door, was cut on the wrist by flying glass. Jalmar told defendant to leave and he left.

At 7:54 a.m., defendant appeared at the Estherville law center. He was upset and said he thought he had killed Jalmar.

The central issue is defendant's intent when he broke the doors. On this issue the State offered Jalmar's testimony and, over objection, the State offered evidence defendant had previously been convicted of a crime involving violence toward an older man with the intent to rob him.

Jalmar testified:

> Q. My question was this: At the time that Mike kicked at that door, did you think that he was trying to threaten you to in any way to get some money from you? A. No, he didn't.
>
> Q. Now, Jalmar, did--after the door got broken and you got hurt, did you tell Mike to leave? A. That's right.
>
> Q. And then he left at that time and went running up the street, didn't he? A. Right.
>
> Q. So he never actually came in the house, did he? A. No.

An officer testified as to his interview with Jalmar immediately following the incident:

> Q. Officer, as far as your interview with Mr. Linn, did he ever say whether Mike threatened him in any manner? A. He stated no, that he hadn't.

Q. And this was right after this incident happened wasn't it? A. Yes.

Defendant contends the trial court erred and abused its discretion in admitting evidence of his previous conviction.

The other crime happened in 1987. Defendant met Pete Espy, an 82-year-old man who lived in Estherville. Defendant visited Epsy's home, drank with him, and ran errands for him. Espy gave defendant money. Defendant asked Espy for a loan and Espy refused. Defendant then assaulted Espy with a beer can. Defendant or a friend took money from Espy. Defendant admitted he had been angry with Espy and had the intent to rob Espy. Defendant pled guilty to assault while participating in a felony and served three years in prison.

The district court, while admitting evidence of defendant's prior conviction, instructed the jury they could consider evidence of defendant's prior conviction only for its bearing on defendant's specific intent to commit a theft in the present case.

The district court has discretion to admit "other wrongs" evidence, and an appellate court will reverse the district court's determination only when it finds a clear abuse of discretion. State v. Plaster, 424 N.W.2d 226, 229 (Iowa 1988).

Defendant first claims evidence of his previous conviction was not admissible under Iowa Rule of Evidence 404(b) because the previous crime was not similar to the present crime, therefore, it did not have any probative value as to defendant's specific intent. Defendant further claims even if the evidence was admissible under rule 404(b), the district court should have excluded it under Iowa Rule of Evidence 403, because its probative value was substantially exceeded by its unfair prejudicial effect.

Iowa Rule of Evidence admissible under Rule 404(b) is as follows:

> 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.

Iowa R. Evid. 404(b).

To be admitted, the evidence of other crimes must be relevant and material to some legitimate issue other than defendant's propensity to commit wrongful acts. See Plaster, 424 N.W.2d at 229.

The State contends the evidence showed defendant's propensity to extort money from older men. The trial court did not abuse its discretion in determining the evidence relevant. See State v. Storrs, 351 N.W.2d 520, 521 (Iowa 1984).

Once the district court concludes evidence is relevant to an issue in the case, it must go on to balance the probative value of the evidence against its potential prejudicial effect. See Plaster, 424 N.W.2d at 231. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403. "Probative value" is the strength and force of the tendency created by the evidence to make some consequential fact more or less probable; "unfair prejudice" is an undue tendency to suggest a decision on an improper basis, commonly though not necessarily an emotional one. See Plaster, 424 N.W.2d at 231. Rule 403 does not provide protection against all evidence which is prejudicial or detrimental to a party's case; it only provides protection against evidence which is unfairly prejudicial. See id. Evidence is unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action which may cause a jury to base its decision on something other than the established propositions in the case. Id.

The State recognizes, the trial court found, and we agree, that the State's case against defendant was not strong. The State advances this evidence was necessary because other evidence of defendant's intent was not available because Jalmar was hostile to the State's position.

The defendant argues the State was able to convict on thin evidence because the evidence of defendant's past crime inflamed the jury. We agree with defendant under the facts of this case the evidence of his prior conviction was prejudicial. The issue we need address is whether the trial court abused its discretion in determining the probative value outweighed the prejudice. See Plaster, 424 N.W.2d at 229. The question is close. We do not, however, find the trial court abused its discretion on this issue.

Defendant next claims the district court erred in refusing to instruct on attempted first degree burglary and attempted second degree burglary as lesser included offenses of first degree burglary. If it is impossible to commit a greater crime without also committing a lesser crime, the lesser crime is a lesser included offense. See State v. McNitt, 451 N.W.2d 824, 825 (Iowa 1990); State v. Jeffries, 430 N.W.2d 728, 730-31 (Iowa 1988).

The district court must instruct the jury as to all lesser included offenses. Ordinarily the district court must submit all lesser included offenses to the jury, without inquiring whether the record provides a factual basis for the submission. See Jeffries, 430 N.W.2d at 737. However, if a defendant stipulates to an element that elevates the lesser offense to the greater, the district court need not instruct the jury on the lesser. See id. In these rare cases, the evidence is conclusive that no lesser included offense was committed. Id.

The State contends there was a stipulation there was a completed breaking. The State admits defendant did not formally stipulate to the existence of a completed breaking. The State, however, says defendant's testimony that he jerked open Jalmar's screen door, put his foot through the main door, and broke the glass, is equivalent to a stipulation to the element that elevates the lesser offense to the greater offense. We disagree. The trial court should have instructed on the lesser included offense. The State also contends the defendant was not prejudiced because of the alleged stipulation. We disagree. We reverse and remand for new trial.

REVERSED AND REMANDED FOR NEW TRIAL.