

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 27 1988

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

GEORGE RONALD HAUERSPERGER,)

Defendant-Appellant.)

Filed January 27, 1988

7-472
86-1607

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Appeal from the Iowa District Court for Linn County (No. CRF 9661-0186)

- Harold J. Swailes, Judge.

Defendant appeals from his conviction, after a jury trial, of two counts of false use of a financial instrument in the first degree. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann R. Ryan and Christie Scase, Assistant Attorneys General; and Denver D. Dillard, County Attorney, for plaintiff-appellee.

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

SACKETT, J.

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A jury found defendant, George Ronald Hauersperger, guilty on two counts of false use of a financial instrument in the first degree. See Iowa Code §715.6 (1985). Defendant appeals contending the trial court erred (1) in admitting evidence of other uncharged acts of false use of a financial instrument by defendant, and (2) in admitting hearsay evidence that two accomplices implicated defendant in statements made to a police officer investigating the case.

Defendant was charged in Count One with fraudulent use in July 1985 of a Visa credit card belonging to Robert Renk. Count Two alleged defendant fraudulently used a credit card belonging to William C. Linn in October 1985. On both occasions the Visa cards were used at Motherhood Maternity stores in Cedar Rapids, and the same employee happened to be working during both incidents. The employee identified defendant in a photographic lineup at the police station and also identified defendant at trial as the man who used the Renk and Linn credit cards.

Defendant denied he was the person who used the cards. Defendant testified the cards were stolen by his friend Robert Peery. Peery lived with defendant for part of spring 1985. Defendant watched the Peerys' youngest child on occasion and spent time with the Peerys. Peery and his wife, Anne Peery, testified defendant had enlisted them in a credit card fraud scheme he devised. Robert Peery testified he stole credit cards and gave them to defendant. Peery also testified he, Mrs. Peery, and defendant obtained and used other department store credit cards through various false applications. Defendant and the Peerys allegedly charged clothing and household items on the credit cards.

I.

Defendant contends the trial court erred in admitting evidence of other uncharged acts of false use of a financial instrument by defendant. The State

introduced evidence, through the testimony of the investigating police officer and the Peerys, of defendant's use of a credit card stolen from Eddie Rau by Robert Peery and of defendant's application for and use of numerous department store credit cards under false names. Defendant argues the evidence of his other crimes, wrongs, or acts should have been excluded under Iowa Rule of Evidence 404(b).

Rule 404(b) provides that evidence of other crimes may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa cases decided before the enactment of rule 404 recognized proof of "common scheme" as an additional exception to the general rule that evidence of other crimes is not admissible. See State v. Mendiola, 360 N.W.2d 780, 782 (Iowa 1985).

In applying rule 404, our primary task is to determine whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts. State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987). If the evidence is relevant and material for this purpose, it is prima facie admissible, notwithstanding its tendency to demonstrate the accused's bad character. Id. Evidence of the prior bad acts, if relevant under one of the exceptions listed in rule 404(b), is admissible so long as its probative value outweighs its prejudicial effect. Mendiola, 360 N.W.2d at 782.

There must be some factual issue raised to permit evidence of other crimes under the noted exceptions. State v. Wright, 191 N.W.2d 638, 640 (Iowa 1971). Defendant argues the only factual issue in the case is identity. We disagree with defendant's narrow characterization of the issues presented to the jury.

The evidence was that Robert Peery stole the Renk and Linn credit cards which were fraudulently used to buy maternity clothes for Anne Peery. The store clerk identified defendant as the card user. We find the evidence in question

established a "common scheme, enterprise, understanding, or agreement" between defendant and the Peerys. See Wright, 191 N.W.2d at 641 (quoting State v. Renslow, 209 Iowa 982, 984, 229 N.W. 225, 226 (1930)). The State was entitled to show the instant false use of a financial instrument charges were part of an ongoing scheme to fraudulently use credit cards to obtain clothing and other personal property.

The trial court instructed the jury that the other crimes evidence was relevant only to show common scheme. See 2 Iowa Uniform Jury Instructions 232 (1978). Only in extreme cases will such a cautionary instruction be deemed insufficient to remove the danger of prejudice. See State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982). We find no abuse of discretion by the trial court.

II.

Defendant contends the trial court erred in admitting hearsay evidence that the Peerys implicated him in their statements to the police.

The officer who investigated the charged crimes was asked, during his trial testimony, whether the Peerys implicated defendant in their confessions. Over defendant's hearsay objection, the officer was permitted to respond: "Yes. They did implicate George Hauersperger."

We find the improper admission of this hearsay statement was harmless error and the State has overcome any presumption of prejudice beyond a reasonable doubt. See State v. Sowder, 394 N.W.2d 368, 372 (Iowa 1986).

The Peerys testified at great length about defendant's instigation of the credit card fraud scheme and were available for and subject to cross-examination. The officer's statement that the Peerys implicated defendant was merely duplicative of other evidence in the record. See id.

Finding no basis on which to reverse defendant's conviction, we affirm.

AFFIRMED.