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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

RICHARD ALLEN LATHAM,)

Defendant-Appellant.)

Filed November 20, 1984 265

4-317
83-1097

Appeal from the Iowa District Court for Scott County--Linda K. Neuman, Judge.

Defendant appeals his conviction of second degree theft. On appeal defendant asserts that: (1) the trial court erred by allowing the State to introduce evidence the nature of defendant's eleven-year-old felony conviction; (2) the trial court abused its discretion by denying in part defendant's motion in limine; and (3) there was insufficient evidence to support trial court's submission of a flight instruction. CONVICTION VACATED AND CASE REMANDED FOR NEW TRIAL.

Charles Harrington, Appellate Defender and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

SACKETT, J.

This is an appeal by defendant following his conviction and sentence for theft in violation of Iowa Code §§714.1(1) and 714.2(2) (1981).

The defendant, Richard Allen Latham, and a co-defendant were charged by trial information on April 12, 1983, in two counts. In Count I the defendant and co-defendant were charged with Second Degree Burglary in violation of Iowa Code §§713.1 and 713.3 (1981). In Count II the defendant and co-defendant were charged with Second Degree Theft.

The defendant filed a motion in limine on June 15, 1983. In the motion in limine defendant requested that the court exclude any evidence relating to the defendant's prior felony, an eleven-year-old armed robbery conviction. Prior to trial, the court ruled that the State would be allowed to introduce evidence of defendant's prior felony for impeachment purposes. The court also ruled, however, that the State was limited to asking whether defendant had been convicted of a felony, and could not ask about the specific crime of which defendant had been convicted.

Jury trial commenced on June 13, 1983. The jury entered a verdict of not guilty on the second degree burglary charge, and a verdict of guilty on the second degree theft charge.

The defendant was employed by Emeis Electrical Service in Davenport, Iowa. The defendant was service manager in charge of the service department. The defendant testified that it was not unusual for him to work late at Emeis. On occasion he had stayed at Emeis until almost 3 a.m., on any given Friday night. On or about the evening of March 18, 1983, the defendant went to Emeis at approximately 10:30 p.m. The defendant testified that he took the co-defendant with him to Emeis to show Wailand some of the defendant's projects. The defendant testified that he and Wailand stayed at Emeis until approximately 1:45 a.m., at which time police arrested the two. The defendant testified that he had

noticed four tires on the roof of an adjacent building. The defendant told Wailand about seeing the tires, and asked Wailand if he would want to look at them and see what kind of tires they were. The defendant and Wailand climbed up to look at the tires. They found twelve truck tires on the roof. The defendant knew the tires were semi-truck tires, but did not know anything else about them. Wailand dropped two tires down to the defendant. A night watchman heard footsteps on the roof of the adjacent building. He called the owner and then called the police.

When the police arrived, around 1:30 a.m., they found Wailand on the roof lowering something. The officers then took Wailand into custody. The officers entered Emeis Electrical Service. They found approximately seven tires inside Emeis. One tire was in the alley; four tires were still on the roof.

In the basement area of Emeis the officers found the defendant wedged in an old coal chute. The defendant was then placed under arrest. According to the defendant's testimony, he and Wailand were checking out the tires to see if they were good or bad. They took the tires down from the roof to see them better in the light of the service area. They had not known what they were going to do with the tires. Wailand testified that he and the defendant had not talked about what they would do with the tires, and that he did not know what they were going to do with the tires. Wailand further testified that he believed the defendant would have turned the tires in if they had been new. Defendant testified he thought the tires belonged to Firestone since Firestone was located nearby.

I. Introduction of Defendant's Eleven-Year-Old Armed Robbery Conviction.

In a motion in limine prior to trial the defendant's attorney moved that the State should not be allowed to introduce in any manner defendant's eleven-year-old conviction for armed robbery. The trial court overruled the motion in limine in part and granted it in part. The court ruled that the State could inquire as to whether defendant had been convicted of a felony for impeachment purposes only.

Also, the court ruled that the State was limited in its inquiry as to whether the defendant had been convicted of a felony, but could make no specific reference to his conviction for the substantive crime of "armed robbery."

The defendant took the stand at trial. On direct examination of the defendant the following testimony was elicited: " . . . And then I heard the yell of 'Davenport Police,' at which time I thought it was [co-defendant Wailand]. And I did mention the fact—I yelled up to him—I said, 'What are you trying to do, scare me?' And he looked over the wall at me and said, 'No, it's for real.'" During cross-examination of the witness/defendant, the following was produced:

> Q. Did you yell at him? A. Yes.
> Q. What did you yell? A. I asked him—I says, "Are you trying to scare me?
> Q. Why would you be scared if you were just checking out some tires to see if you should return them to Firestone? A. It was late at night, sir.
> Q. And you are up on the roof of another building taking tires. A. Yes.
> Q. And you were scared about doing that, weren't you? A. I wasn't scared of doing it, no. I wasn't scared at the time. Anytime the police are—anytime I hear them mention the police, yes, it does scare me.
> Q. Why? A. It just scares me.
> Q. You are just always scared of the police? A. There is a fear there.
> Q. Why do you have a particular fear of the police? A. I am just scared of the police, sir.

Then the State asked the following question: "You don't want to tell me why? Eleven years ago you were convicted of an armed robbery?" The defendant answered, "Yes, sir." The State thus mentioned the substantive crime of which the defendant had been convicted. The defendant alleges that this is a violation of the court's ruling on the motion in limine. The defense contends that this amounts to error. We agree.

The State claims that even though the motion in limine was violated by the prosecutor's reference to the armed robbery conviction, the error was not preserved. Defense counsel failed to object to the form of the question with its specific reference to the substantive crime involved instead of merely the felonious nature of the crime. The general rule in Iowa with regard to preserving

error for violation of a motion in limine was discussed in the case of State v. Garrett, 183 N.W.2d 652 (Iowa 1971). The supreme court ruled that trial courts should employ motions in limine as an exception rather than a rule. "The motion should be used, if at all, . . . [to point] out the objectionable material and [show] why the material is inadmissible and prejudicial." Id. at 654. The court should reserve ruling on the motion and let the trial proceed in the usual fashion. The judge should wait until an objection is made as the evidence in question is about to be admitted. A ruling on the motion should be made after holding an evidentiary hearing. Id.

An exception to this general rule was also articulated in Garrett at 654-55. No objection needs to be made at trial where the motion is granted pursuant to a hearing which is evidentiary in nature, and where the trial court is completely apprised of the factual situation and nothing occurs at trial to make the evidence in question more or less admissible. See also Gustafson v. Iowa Power and Light Co., 183 N.W.2d 212, 214 (Iowa 1971).

> "A ruling [on a motion in limine] only granting or denying protection from prejudicial references to challenged evidence cannot preserve the inadmissibility issue for appellate review. But if the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during the trial." State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979).

Before we reach the question of whether the facts of this case are governed by the general rule or its exception, we must first decide whether the motion in limine was properly granted in the first place. In other words, there is the issue of whether evidence of the eleven-year-old armed robbery conviction was properly admissible in the face of the motion. In State v. Martin, 217 N.W.2d 536, 541-42 (Iowa 1974) the supreme court held that Iowa Code §622.17 places the discretion as to admissibility of evidence of prior felony convictions with the trial court . .

> "***for the purpose of attacking the credibility of any witness, including an accused under Code §622.17, evidence that he has been previously convicted of a felony is admissible only if (1) the felony involved dishonesty or false statement, and (2) the judge determines any danger of

> unfair prejudice does not substantially outweigh the probative value of such prior felony conviction, taking into account such factors as (a) nature of the conviction, (b) its bearing on veracity, (c) its age, and (d) its propensity to improperly influence the minds of the jurors."

State v. Miller, 229 N.W.2d 762, 769 (Iowa 1975). The trial court judge outlined her reasons for granting in part the defendant's motion in limine. She found that the offense fits the type that can be used for impeachment; that it involved dishonesty and that eleven years was within a reasonable time so that it is still probative of the issue of credibility. However, in the opinion of the court no specific mention could be of the substantive crime. Our reading of the record reveals that the remoteness in time of the prior felony conviction was viewed by the trial court to be of no particular relevance to the issue of admissibility based on relevancy. We will express our concerns with this assumption of the trial court later in our opinion.

We now return to the issue of whether defendant fell within the general rule regarding preservation of error for violation of a motion in limine, or whether we need to apply the exception to the rule. Before trial, the court heard argument from both sides as to the propriety of granting or denying defendant's motion. This discussion outside the hearing of the jury amounted to an evidentiary hearing. The judge's decision to grant in part the motion in limine went to the ultimate issue to be decided. The defendant fell within the exception to the rule regarding preservation of error and as such was not required to make an objection at trial when mention was made by the State of the armed robbery conviction. Error was properly preserved.

The State's mention of the substantive offense in violation of the motion in limine granted in part by the trial court amounted to prosecutional misconduct. The defendant claims that he is entitled to a new trial because of the actions on the part of the State, and we agree.

Prosecutional misconduct does not require a new trial unless it appears to have been so prejudicial as to deprive the defendant of a fair trial. State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982). This court has held in the past that a trial court has considerable discretion in determining whether misconduct of counsel is prejudicial. State v. Serr, 322 N.W.2d 96, 102 (Iowa Ct. App. 1982). The trial court was aware of the evidence that both parties to this lawsuit hoped to see introduced at trial. The trial judge, in granting a motion in limine, made it clear that she did not want mention made of the substantive crime involving a prior felony conviction suffered by the defendant. It appears that the trial court was aware of possible prejudice that would occur should evidence of the prior armed robbery conviction come before the jury. This court reverses exercise of the trial court's discretion to determine whether misconduct of counsel is prejudicial only where the lower court has clearly abused its power. Id. In C.J.S. we find the following language to be helpful to a determination of this issue:

> Generally, prejudicial misconduct of the prosecuting attorney depriving the accused of a fair hearing by the jury may warrant a new trial unless the accused failed to make timely objection and invoke the ruling of the court or unless the prejudice was such as could have been and was obviated by the admonition of the court to the jury to disregard the matter.

24 C. & S. Criminal Law §1442(a)(1961). In subsection (b) it is stated that "[s]ince prior crimes cannot be proved to show probability of guilt of the offense charged, . . . an attempt to introduce evidence of convictions of other crimes will require a new trial in the absence of occasion to impeach accused's credibility in this manner." Id. at §1442(b). "It has been held that such an attempt is so highly improper that nothing will cure the error except a new trial; State v. Baum, 47 Utah 7, ___, 151 P. 518, 520 (1915); and that it is immaterial that the improper conduct was not objected to . . ." Id.

The defendant in this case did not put his credibility into issue so as to allow evidence of the substantive crime of his earlier felony conviction under either

Iowa R. of Evid. 404[1] or 609,[2] though we recognize that credibility is always at issue under rule 607. State v. Frost, 244 N.W.2d 556, 560 (Iowa 1976).

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[1] "Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim.

(A) In criminal cases. Subject to Iowa R. Evid. 412, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosection to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in any case where the victim is unavailable to testify due to death or physical or mental incapacity to rebut evidence that the victim was the first aggressor;

(B) In civil cases. Evidence of character for violence of the victim of assaultive conduct offered on the issue of self defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) Character of witness. Evidence of the character of a witness, as provided in Iowa R. Evid. 607, 608, and 609.

(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.

[2] Rule 609. Impeachment by evidence of conviction of crime.

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime involving dishonesty or false statement shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime constituted a felony, aggravated misdemeanor, or other crime punishable by imprisonment in excess of one year pursuant to the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

***."

The introduction into evidence of the substantive crime involved in the eleven year old felony had a prejudicial effect that outweighed its probative value. Its introduction violated Iowa R. of Evid. 609(b) and was inadmissible. Its improper introduction was not, and could not have been, cured by an admonishment to the jury or with a limiting instruction. We therefore vacate the conviction of defendant Latham because of the introduction of the substantive crime involved in an eleven year old robbery conviction and the prosecutional misconduct surrounding the introduction of such evidence. We remand this case for a new trial.

II. Submission Of A Flight Instruction To The Jury.

In a second assignment of error the defendant contends that there was not sufficient evidence to justify submission of a flight instruction to the jury. We find that there was substantial evidence in the record to support the instruction in question.

This court, in the case of Hamilton v. Luckey, 315 N.W.2d 823 (Iowa Ct. App. 1981), stated that "[t]o sustain [a] court's submission of an issue to the jury, there must be substantial evidence in the record to support the instruction given to the jury." Id. at 825 (citing Wroblewski v. Linn-Jones Services, Inc., 195 N.W.2d 709, 711 (Iowa 1972)). There is a duty imposed upon the trial court to instruct with reasonable fullness or all the issues which have supportive evidence in the record. Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 383 (Iowa 1972). A mere "scintilla" of evidence is not sufficient to warrant authorization of an issue allegedly arising out of evidence introduced into the record. Id.

According to the defendant's own testimony at trial, when he learned that police had arrived at the scene he went into the Emeis Electrical building. Defendant then went down into the basement and climbed up into a coal shute which was no longer in use. This was done with the admitted purpose of hiding

from police. Defendant claims that he hid out for fear of being shot, not to avoid being found or prosecuted. Defendant's subjective reasoning for hiding is not conclusive of the issue as to whether a flight instruction should be given. It is for the jury to determine, while considering all the underlying circumstances, whether Mr. Latham hid in the coal shute because of his "consciousness of guilt." See State v. Wimbush, 150 N.W.2d 653, 656 (Iowa 1967). Evidence of escape from custody and flight of an accused is admissible as an incriminating circumstance. Id. The instruction[3] regarding defendant's possible flight from prosecution was properly given.

CONVICTION VACATED AND CASE REMANDED FOR NEW TRIAL.

All judges concur except Donielson, J., who dissents.

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[3] Instruction 19a read as follows:

If you find that one or both of the offenses charged in the Trial Information was committed and that the Defendant Richard Allen Latham concealed himself for the purpose of avoiding or retarding prosection, then such concealment is a circumstance you may consider in determining your guilt or innocence of this Defendant. The credit and weight, if any, to be given such circumstance is for the Jury to determine from a consideration of all of the evidence in this case.

DONIELSON, J. (dissenting)

I respectfully dissent from the majority's determination in division I. The trial court has considerable discretion in determining whether the conduct of trial counsel is prejudicial. State v. Serr, 322 N.W.2d 96, 102 (Iowa Ct. App. 1982). I do not believe there was an abuse of discretion in this case. As the majority indicated, in granting the motion in limine, the trial judge "made it clear that she did not want mention made of the substantive crime." Yet, in the same respect, the judge was perfectly aware of her ruling when mention was made of the offense during trial and when she denied the motion for a new trial. Defense counsel was under no obligation to object to the violation of the court's ruling in order to preserve error. However, since no objection was made and the judge did not make a ruling sua sponte, it is reasonable to assume the judge changed her mind. This is particularly true in light of the fact that a posttrial motion was made based on the mention of the substantive crime and the motion was overruled by the court. The fact that a trial judge changes her mind can hardly be characterized as an abuse of discretion.

I also disagree with the majority's assertion that the defendant did not put his credibility at issue so as to allow evidence of the substantive crime. The defendant's credibility was clearly at issue due to the fact that he took the stand and testified. See State v. Walker, 218 N.W.2d 915, 918 (1974). Thus, it was entirely within the trial court's discretion to, in effect, overrule her previous ruling concerning the motion in limine and allow mention of the substantive crime. Finding no error, I would affirm.