

**IN THE COURT OF APPEALS OF IOWA**

No. 0-622 / 09-1711  
Filed September 9, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JUSTIN ROBERT DERBY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Plymouth County, Edward A. Jacobson, Judge.

Justin Robert Derby appeals his convictions and sentences for various offenses, contending the district court erred by overruling his motion in limine to exclude evidence of his prior convictions for purposes of impeachment.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Darin J. Raymond, County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

**DOYLE, J.**

Justin Robert Derby appeals his convictions and sentences for burglary, forgery, and escape from custody. He contends the district court erred by overruling his motion in limine to exclude evidence of his prior convictions for purposes of impeachment. Because we find Derby failed to preserve his claim, we affirm.

***I. Background Facts and Proceedings.***

Derby was charged with third-degree burglary, five counts of forgery, and escape from custody. With respect to every charge, the State alleged that Derby was a habitual offender. He ultimately pled not guilty to all of the charges, and the cases were set for a jury trial.

On the morning of trial, Derby's attorney made an oral motion in limine to exclude evidence of prior convictions. Specifically, Derby argued that Iowa Rules of Evidence 5.403, 5.404(b), and 5.609 (2009) would not permit the State to impeach him with evidence of his prior convictions for forgery and burglary, if he chose to testify. The State resisted the motion. The district court sustained the motion to the extent that the State would not be allowed to present evidence of prior convictions on its direct presentation or the questioning of its own witnesses. However, the district court overruled Derby's motion "to the extent that it seeks to bullet-proof . . . the defendant from being impeached." The court explained:

Obviously, I don't know what answers the defendant might give to what questions he might be asked. But at this point in time, based upon anticipated testimony from him, if he chooses to testify, his prior convictions, together with the curative instruction, is the way the court will proceed.

The matter proceeded to trial. Derby did not testify. The jury found Derby guilty as charged. Derby admitted to prior convictions sufficient to make him a habitual offender. Derby was sentenced as a habitual felon on all charges to seven concurrent fifteen-year sentences, all subject to a three-year mandatory minimum.

Derby now appeals.

## ***II. Discussion.***

On appeal, Derby contends the district court erred by overruling his motion in limine to exclude evidence of his prior convictions for purposes of impeachment. The State argues that Derby failed to preserve his claim because he failed to testify at trial. Derby acknowledges our supreme court has previously ruled that a defendant cannot claim error in a district court's ruling on a motion in limine permitting use of prior convictions for impeachment purposes unless the defendant testifies and objects at trial. *See State v. Brown*, 569 N.W.2d 113, 117-18 (Iowa 1997). He admits he did not testify at trial. However, he requests we reverse *Brown* and find that the district court erred.

Although a ruling on a motion in limine may obviate the need for an objection in certain cases, this is not such a case. *See id.*; *cf. State v. Daly*, 623 N.W.2d 799, 800 (Iowa 2001) (ruling was sufficiently definitive as to avoid necessity for objection at trial). As Derby points out, in *Brown*, the Iowa Supreme Court was specifically faced with the question of whether a defendant could challenge a pretrial ruling in the abstract. *Brown*, 569 N.W.2d at 118. The court affirmed its previous holding that

a defendant must take the stand and testify and the prosecutor must use the statement to impeach before the defendant can raise a constitutional claim . . . .

*Id.* The court set forth its reasons for so holding:

“First, to hold otherwise would permit an accused to create an alleged error by merely announcing he would have taken the stand but for the trial court’s prior finding that the statement was voluntary.” [*State v. Davis*, 328 N.W.2d 301, 306 (Iowa 1982)]. It is easy for an accused to claim he or she would have taken the stand. A reviewing court cannot know whether the accused elected not to testify because of the district court’s ruling or whether the witness chose not to testify for some other tactical reason. *Id.* at 306-07.

Moreover a reviewing court cannot be sure the prosecutor would actually have impeached the accused with the prior statement. *Id.* at 307. The State may have changed its tactics or strategy at trial and decided not to impeach the accused with the prior statement. *Id.*

Finally “[t]he best way to transform this problem from the theoretical to the actual is to require that a defendant actually testify in order to raise the constitutional issue and demonstrate prejudice.” *Id.* Only after an accused testifies will a reviewing court have an adequate record to determine whether the accused was prejudiced. *Id.* Until then a reviewing court can only speculate regarding what would have occurred at trial if the defendant had taken the stand. *Id.*

*Brown*, 569 N.W.2d at 118. Ultimately, the court in *Brown* concluded *Brown* could not claim error in the district court’s ruling on his motion in limine because he did not testify in that case. *Id.*

Like the defendant in *Brown*, Derby did not testify at his trial. *Id.* Thus, we find *Brown* is controlling here. Because Derby failed to preserve his claim, we affirm his convictions and sentences.

**AFFIRMED.**