IN THE COURT OF APPEALS OF IOWA

No. 2-387 / 11-0915
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD FLOYD O'NEAL,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Paul B. Ahlers, District Associate Judge.

Donald O'Neal appeals his conviction for driving while barred, claiming the district court erred in allowing the State to impeach a defense witness with prior convictions under Iowa Rule of Evidence 5.609(a). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, and Randall J. Tilton, County Attorney, for appellee.

Heard by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

In this appeal from a conviction for driving while barred, we are asked to decide a once settled question left open by our supreme court in *State v. Harrington*, 800 N.W.2d 46, 51 n.4 (Iowa 2011)—whether the crime of theft is a crime that per se involves "dishonesty or false statement" under Iowa Rule of Evidence 5.609(a)(2). We must also decide whether a witness's prior drug conviction was properly admitted under rule 5.609(a)(1). After considering both issues, we conclude the decision of the district court should be affirmed.

I. Background Facts and Prior Proceedings.

On January 20, 2011, at around 1:50 p.m., a deputy sheriff was patrolling the small town of Alden, Iowa. He observed a light brown Chevy 1500 pickup truck driving towards him on a street that passes by the town's library and post office. The truck had rust over the wheel wells and a homemade ladder rack in the back. The deputy recognized the truck as belonging to Donald O'Neal, whom he had known for several years. O'Neal did not have a valid driver's license.

As the truck passed by the deputy, he saw O'Neal was driving. Although O'Neal was wearing a hooded sweatshirt, the deputy said he "got a clear view of his face" and goatee as the truck went by.

The deputy followed the truck to O'Neal's house but was unable to see him get out of the truck. He secured a warrant for O'Neal's arrest, which he executed almost one month later. O'Neal was charged with driving while barred.

At the jury trial on the charge, O'Neal's friend testified that on a Thursday in late January 2011, he picked O'Neal up at 6:00 a.m. The friend drove O'Neal to his house in Boone where they worked all day until 5:00 p.m. Though the

friend was not completely certain, he thought that occurred on January 20th. But he admitted it could have been January 27th instead.

On cross-examination, this witness acknowledged he had been convicted of possession of psilocybin mushrooms with intent to deliver in 2010 and fifth-degree theft in 2009.

O'Neal's girlfriend also testified on his behalf. She stated that at around 1:30 p.m. on January 20th, she was driving O'Neal's truck. She remembered passing by a sheriff's car after returning some movies to the library and mailing job applications at the post office. She stated that she was wearing a gray skullcap, which covered her hair, as well as a blue hooded sweatshirt. She remembered the windows of the truck were foggy because she did not let it warm up before driving. Despite this rather detailed testimony, O'Neal's girlfriend testified she was not one-hundred percent sure of the date.

On rebuttal, the deputy testified there was no way he could have confused O'Neal's girlfriend for him. He stated, "It was Donnie O'Neal. He had facial hair and it wasn't a female."

The jury found O'Neal guilty. He filed post-trial rulings challenging the district court's admission of his alibi witness's prior drug conviction under Iowa Rule of Evidence 5.609(a)(1) and theft conviction under rule 5.609(a)(2). The court denied the motions and entered judgment against O'Neal. This appeal followed.

II. Scope and Standards of Review.

We review rulings on the admission of prior crimes evidence under rule 5.609(a) for an abuse of discretion. *State v. Redmond*, 803 N.W.2d 112, 117

(Iowa 2011); *Harrington*, 800 N.W.2d at 48. "A court abuses its discretion when its discretion is based upon erroneous application of the law or not supported by substantial evidence." *Harrington*, 800 N.W.2d at 48.

III. Discussion.

Iowa Rule of Evidence 5.609(a), which controls the admissibility of prior convictions for impeachment purposes, provides:

> *a*. *General rule*. For the purpose of attacking the credibility of a witness:
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> (1) Evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to rule 5.403, if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
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> (2) Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

The rule sets forth a "two-prong analysis for prior convictions: (*a*)(1) governs felony crimes generally and vests the district court with discretion in admitting prior convictions, while (*a*)(2) applies only to crimes involving dishonesty or false statement and requires the automatic admissibility of these prior convictions for impeachment purposes." *Harrington*, 800 N.W.2d at 50. This two-prong analysis has long been disregarded by our courts based on common law cases predating the adoption of rule 5.609, as recently recognized by the Iowa Supreme Court in *Redmond*, 803 N.W.2d at 119-21 and *Harrington*, 800 N.W.2d at 49.

In *Redmond*, the court examined the history of prior conviction admissibility as it existed before the adoption of Federal Rule of Evidence 609 in

1974 and our rule 5.609 in 1983. 803 N.W.2d at 119-20. The legal landscape of this area of law in Iowa was controlled by *State v*. *Martin*, 217 N.W.2d 536, 542 (Iowa 1974), which set forth the following framework:

> [F]or the purpose of attacking the credibility of any witness, including an accused . . . , 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.

Though this framework differs from that required by rule 5.609, it has continued to guide our courts' decisions. *See Redmond*, 803 N.W.2d at 120 (citing *State v*. *Daly*, 623 N.W.2d 799, 802 (Iowa 2001), *State v*. *Axiotis*, 569 N.W.2d 813, 816 (Iowa 1997), *overruled by Harrington*, 800 N.W.2d at 51, and *State v*. *Hackney*, 397 N.W.2d 723, 726 (Iowa 1986) as cases that continued to employ the *Martin* factors in reviewing admissibility of prior convictions for impeachment purposes). *Redmond* stated our reliance on *Martin* and its progeny must end, explaining that although rule 5.609(a) and *Martin* "embrace many of the same principles," the discrete framework of the rule and "*Martin*'s more generic analysis have tenuously coincided, at times causing precedent inconsistent with the rule's language." *Id.* at 121. Because of these inconsistencies, *Redmond* held that our "jurisprudence must move past *Martin*'s framework and embrace the comprehensive approach instructed by Iowa Rule of Evidence 5.609." *Id.*

We are asked to further this change with respect to crimes falling within the ambit of rule 5.609(a)(2). Though we find O'Neal's argument appealing, we

decline to adopt it for reasons that will follow. We begin, however, with his rule 5.609(a)(1) argument concerning his alibi witness's felony drug conviction.

A. Admissibility of Drug Conviction Under Rule 5.609(a)(1).

Rule 5.609(a)(1) "applies to a witness's prior convictions that: (1) are punishable by death or imprisonment in excess of one year, (2) do not involve dishonesty or false statement (governed by rule 5.609(*a*)(2)), and (3) are within ten years (governed by rule 5.609(*b*))." *Id.* The rule distinguishes between a defendant-witness's prior convictions and an ordinary witness's prior convictions. *Id.* We are concerned with the latter category as it applies to O'Neal's alibi witness and his 2010 conviction for possession of psilocybin mushrooms with intent to deliver, an offense punishable by more than one year in prison. *See* Iowa Code § 124.401(1)(c)(8) (2011).

For ordinary witnesses, rule 5.609(a)(1) provides that a prior conviction "shall be admitted" unless excluded by the balancing test of rule 5.403 because the conviction's "probative value is substantially outweighed by the danger of unfair prejudice." O'Neal argues the district court erred in its application of this balancing test "[g]iven the lack of direct impeachment value of the felony drug conviction and the likelihood the jury would use the conviction for improper purposes." We do not agree.

We begin by measuring the probative value of the conviction, which was low even though it occurred relatively close to when the witness testified. *Cf*. *Redmond*, 803 N.W.2d at 123 (noting the ten-year limitation in rule 5.609(b) "suggests older convictions become less probative"). A prior conviction's probative value is measured by the degree to which it undermines the witness's

testimonial credibility. *Id.* at 122. Drug convictions have little bearing on a witness's veracity. *See State v. Parker*, 747 N.W.2d 196, 208 (Iowa 2008).

Despite the relatively low probative value of the conviction, we agree with the district court that its admission was unlikely to improperly influence the jury. *See Redmond*, 803 N.W.2d at 124 ("Prejudicial effect is the extent of the risk that the jury may misuse the prior conviction evidence to decide the case on an improper basis."). Though there are few subjects more potentially inflammatory than narcotics, *see Parker*, 747 N.W.2d at 209, the risks normally associated with admission of such evidence are not present here.

The extent to which prior convictions are prejudicial depends on whether the impeached is the accused or another witness. *See Redmond*, 803 N.W.2d at 122 ("The salient feature of rule 5.609(*a*)(1) is the distinction between defendants and witnesses."). If the prior conviction is that of the accused, the jury may assume guilt through propensity to commit a crime or infer the defendant is a bad person deserving of punishment. *See id.* at 124. Because the impeached was merely a witness in this case, the jury's finding of guilt would not have been influenced by those same assumptions. *See id.* at 122 (noting an accused's prior convictions may be excluded in situations that would not justify exclusion concerning other witnesses). Nor does O'Neal explain how the jury could have used evidence of his witness's prior drug conviction for an improper purpose. *See* Charles Alan Wright & Victor James Gold, 28 *Federal Practice and Procedure: Evidence* § 6134, at 239 (1993) [hereinafter Wright & Gold] (noting the burden of proving that prejudice substantially outweighs probative value is on

the objecting party). Evidence of prior drug convictions is not always prejudicial. *See*, *e.g.*, *State v. Nelson*, 791 N.W.2d 414, 426 (Iowa 2010).

For these reasons, we find no abuse of discretion in the court's decision to allow the State to impeach O'Neal's alibi witness with evidence of his felony drug conviction. *See* Wright & Gold, § 6134 at 244 (stating that because the rule "permits exclusion only where prejudice 'substantially outweighs' probative value, conviction evidence offered against witnesses other than the accused rarely should be excluded"); *see also Redmond*, 803 N.W.2d at 121 (noting rule 5.609(a)(1) "operates as a rule of admission as to an ordinary witness's prior felony convictions"). We turn next to the witness's theft conviction, which requires us to examine rule 5.609(a)(2).

B. Admissibility of Theft Conviction Under Rule 5.609(a)(2).

Rule 5.609(a)(2) is phrased as a mandatory command: "Evidence that any witness has been convicted of a crime *shall* be admitted if it involved dishonesty or false statement, regardless of the punishment." Iowa R. Evid. 5.609(a)(2) (emphasis added). "On its face, the rule's language leaves the district court no discretion." *Harrington*, 800 N.W.2d at 50. Thus, prior convictions that "involve dishonesty or false statement are automatically admissible for impeachment purposes." *Id.* at 51 (overruling case law requiring a balancing test before such convictions are admitted).

Our supreme court's common law cases have repeatedly held theft is a crime of dishonesty. *Id.* (citing *State v. Latham*, 366 N.W.2d 181, 184 (Iowa 1985); *State v. Willard*, 351 N.W.2d 516, 518 (Iowa 1984); *State v. Zaehringer*,

325 N.W.2d 754, 756 (Iowa 1982); *State v*. *Miller*, 229 N.W.2d 762, 769-70 (Iowa 1975)). These cases reason

> that theft falls within the plain meaning of the term dishonesty, and we quoted former Chief Justice Burger, then on the United States Court of Appeals for the District of Columbia, in observing "'[i]n common human experience acts of deceit, fraud, cheating, or *stealing*, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity.'" *Miller*, 229 N.W.2d at 769 (quoting *Gordon v*. *United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)) (emphasis added). It has been settled law in this state that convictions for theft and burglary with intent to commit theft are crimes of dishonesty.

Id.

The State hangs its hat on this passage and the cases cited in it in arguing the alibi witness's fifth-degree theft conviction was a crime involving dishonesty. The issue is not so simple, however, as the court in *Harrington* observed in a footnote:

> We are aware that our longstanding construction of the term "dishonesty" is derived from common law cases predating our adoption of the Iowa Rules of Evidence in 1983. We also recognize that the legislative history associated with Federal Rule of Evidence 609, states the term "dishonesty or false statement"
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> > means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.
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> Fed. R. Evid. 609 note to subdivision (a) (1974). Many federal and state courts have wrestled with and reached different results as to whether theft and burglary convictions are crimes that per se "involve dishonesty or false statement" under the framework of Federal Rule of Evidence 609 and corresponding state rules. We reserve this potential issue for a case where it is properly argued.

Id. at 51 n.4 (citations omitted).

The issue was properly argued in this case.[1] But we do not believe that we, as an intermediate appellate court, are at liberty to overturn longstanding precedent from the Iowa Supreme Court consistently recognizing theft as a crime that per se involves dishonesty. *See State v*. *Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."); *State v*. *Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent."). We do, however, agree with O'Neal that this precedent is at odds with the federal courts' narrow interpretation of the rule. *See Harrington*, 800 N.W.2d at 49 n.1 (relying on federal courts' interpretations of comparable federal rule in interpreting our rule 5.609(a)(2)).[2]

The divergence results from the two different meanings attached to the word "dishonesty." As one federal circuit court of appeals has explained:

> In the dictionary, and in everyday use, "dishonesty" has two meanings. . . . In its broader meaning, "dishonesty" is defined as a breach of trust, a "lack of . . . probity or integrity in principle," "lack of fairness," or a "disposition to . . . betray." *Webster's Third New International Dictionary* 650 (1986 unabridged ed.). This dictionary states, under the heading "synonyms," that "dishonest may apply to

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[1] The State's error preservation arguments are without merit, as O'Neal clearly raised the issue in his pretrial motion in limine and post-trial motions for new trial and in arrest of judgment.

[2] We observe the federal rule, which once mirrored our rule, was amended in 2006 and again in 2011. It now reads:

> (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
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> . . . .
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> (2) for any crime regardless of punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

Fed. R. 609(a)(2). Iowa has not yet adopted these amendments, which the State asserts lessens the import of the federal courts' interpretation of the rule.

> any breach of honesty or trust, as lying, deceiving, cheating, stealing, or defrauding." *Id.* . . .
>
> In its narrower meaning, however, "dishonesty" is defined as deceitful behavior, a "disposition to defraud . . . [or] deceive," *id.*, or a "[d]isposition to lie, cheat, or defraud," *Black's Law Dictionary* 421 (5th ed. 1979). . . . Everyday usage mirrors the dictionary: we use "dishonesty" narrowly to refer to a liar, and broadly to refer to a thief.

United States v. *Brackeen*, 969 F.2d 827, 829 (9th Cir. 1992). Although the text of Rule 609 does not indicate precisely what Congress meant by the term "dishonesty," the legislative history does in its reference to crimes "in the nature of crimen falsi." *Id.* at 829-30.

The term "crimen falsi" "generally refers to crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves some element of deceitfulness, untruthfulness, or falsification bearing on witness' propensity to testify truthfully." Black's Law Dict. 335 (5th ed. 1979). Thus, while crimes such as "robbery, burglary and theft are ordinarily considered to be dishonest, . . . the term as used in Rule 609(a)(2) is more restricted" and limited to "prior convictions involving some element of deceit, untruthfulness or falsification which would tend to show that an accused would be likely to testify untruthfully."[3] *United States v*. *Seamster*, 568 F.2d 188, 190 (10th Cir. 1978). "Because this rule is quite inflexible . . . it was inevitable that Congress would define narrowly the words 'dishonesty or false statement,' which, taken at their broadest, involve activities

[3] The notes accompanying the 2006 amendment, which added the language about readily determining whether the elements of the crime required proof of dishonesty or false statement, stated the amendment was "meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under subdivision (a)(2)" to include "only those crimes in which the ultimate criminal act was itself an act of deceit." Fed. R. Evid. 609, note to 2006 Amendments.

that are part of nearly all crimes." *United States v*. *Hayes*, 553 F.2d 824, 827 (2d. Cir. 1977).

That theft does not always involve an element of deceit, untruthfulness, or falsification can be seen in the alternative ways the offense can be committed in Iowa. *See* Iowa Code § 714.1. Federal courts have recognized this fact. *See*, *e.g*., *United States v*. *Yeo*, 739 F.2d 385, 388 (8th Cir. 1984) (observing that "although theft is not, of necessity, a crime of dishonesty or false statement, it may nevertheless be admissible under Rule 609(a)(2) if in fact the crime was committed by fraudulent or deceitful means"). State courts have not.

For example, in *People v*. *Spates*, 395 N.E.2d 563, 568 (Ill. 1979), the Illinois Supreme Court rejected the federal courts' narrow reading of the rule, reasoning:

> [W]ere we to limit the types of misdemeanor convictions which are admissible to impeach to the Crimen falsi offenses and crimes of deception, as argued by the defendant, we would restrict the rule to the point where its use would be extremely rare. This we refuse to do. We therefore hold that theft is a crime falling within proposed Rule 609(a)(2), involving dishonesty or false statement.
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> Support for our holding is obtained by reference to Webster's Third New International Dictionary 650 (1971) where "dishonest" is defined as a "breach of honesty or trust, as lying, deceiving, cheating, Stealing, or defrauding. . . ." Assuming that the drafters of the Federal rules of evidence intended the natural meaning of their words, we can perceive no reason why proposed Rule 609(a)(2) should not encompass both theft, as an act of dishonesty, as well as perjury, as an act of false statement. This interpretation is especially justified since the rule is written using the disjunctive conjunction "or," designating that either of two alternatives would fall within the rule. Since crimes involving affirmative misstatements are presumably included by the phrase "false statement," crimes involving Conduct that is dishonest, of which theft is surely one, are included by the term "crimes involving dishonesty."
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> Yet another reason for holding theft to be a crime of dishonesty is the fact that under the Illinois theft statute . . . , one of

> the four types of theft defined is theft by deception. . . . We do not deem it prudent . . . to require a court to look behind a conviction to ascertain the specific type of theft upon which the conviction was based, differentiate between the four types of theft and make a determination as to which types involve dishonesty, for the purpose of impeachment of a witness. Not only is such a procedure cumbersome, but it is collateral to the immediate controversy. The more sensible approach is that a conviction for theft, of whatever type, will be admissible to impeach the credibility of a witness.

(Internal citations omitted); *accord State v*. *Page*, 449 So.2d 813, 815-16 (Fla. 1984).

Like the Illinois Supreme Court, our supreme court has been wary of requiring trial courts to delve too deeply into whether a particular offense involves dishonesty based on the manner in which it was committed.[4] *See Zaehringer*, 325 N.W.2d at 758 (rejecting an "underlying facts" approach to admissibility of prior convictions because such an approach "would spin off satellite minitrials delving into contested details surrounding a prior crime"); *See also State v*. *Gavin*, 328 N.W.2d 501, 502 (Iowa 1983) (noting "[w]e have used the 'elemental' test to determine whether specific categories of crimes met the *Martin* criteria of dishonesty"). But both *Zaehringer* and *Gavin* were pre-rule 5.609(a) cases based on the *Martin* analysis that was later disavowed in *Redmond*.

Regardless of which path our supreme court will follow, we do not believe admission of the witness's theft conviction prejudiced O'Neal. *See* Iowa R. Evid. 5.103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .").

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[4] We note there is no indication in this record of what type of fifth-degree theft the witness had been convicted of. At least one federal court has stated the burden of producing facts demonstrating the particular conviction involved fraud or deceit rests on the party seeking to admit the evidence, here the State. *See Yeo*, 739 F.2d at 388.

O'Neal argues differently, asserting he was prejudiced because this case "pitted the credibility of defense witnesses against that of a law enforcement officer." *See Redmond*, 803 N.W.2d at 127 (finding improper admission of defendant's prior harassment conviction was not harmless where the victim testified to one version of the events and the defendant to another). However, the credibility of the defense witnesses, even without evidence of the prior convictions, was shaky at best.

O'Neal's friend admitted he was not certain what day O'Neal spent with him at his house, testifying, "I couldn't say the exact date. I know it was a Thursday in January." When asked whether he "firmly believe[d] that the date was January 20, 2011," he responded, "I believe it was that date more than any other date." But he acknowledged it could also have been one week later.

The testimony of O'Neal's girlfriend was similarly uncertain. She testified that she was not "100 percent sure" she was driving O'Neal's truck on January 20th because it "was just [like] any normal other day." When asked how sure she was, she answered, "85 percent." She also acknowledged that she had read the deputy's report before testifying at trial, perhaps explaining her rather detailed testimony about an otherwise innocuous day.

In contrast to the dubious testimony of these two witnesses, the deputy testified he was certain O'Neal was driving the truck: "It still wasn't her. It was Donnie O'Neal. He had facial hair and it wasn't a female." He said the truck passed within ten feet of him, allowing him a clear look at O'Neal's face and goatee.

In light of the foregoing, we do not believe a substantial right of O'Neal was affected by the admission of his alibi witness's fifth-degree theft conviction.

***IV*. *Conclusion*.**

We affirm the judgment of the district court, leaving the question of whether the crime of theft remains a crime that per se involves dishonesty or false statement to be decided by our supreme court.

AFFIRMED.