

IN THE COURT OF APPEALS OF IOWA

No. 8-560 / 07-1617
Filed August 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRADLEY ALLEN REYNOLDS,
Defendant-Appellant.

Appeal from the Iowa District Court for Lyon County, Robert J. Dull,
District Associate Judge.

Appeal from conviction of assault causing bodily injury. **REVERSED AND
REMANDED.**

Martha McGinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney
General, and Carl Peterson, County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

SACKETT, C.J.

The defendant-appellant, Brad Reynolds, appeals from his conviction of assault causing bodily injury, following a jury trial. He contends the court erred in allowing prior-bad-acts evidence, in giving a modified jury instruction, and in refusing to give a requested instruction. We reverse appellant's conviction and remand.

I. Background

The appellant was arrested following an altercation with the man who married his ex-wife. Before trial, the State requested an evidentiary ruling that would allow it to present evidence appellant had "harassed, threatened, assaulted, and intimidated the victim" on several occasions in the past. The appellant unsuccessfully resisted the motion. At trial, the victim testified to a number of past incidents involving appellant including spitting, verbal threats and taunts, aggressive gestures, and one incident that resulted in a no-contact order. Trial counsel objected on relevance and hearsay grounds. The appellant offered testimony of several witnesses concerning his peaceful character. The appellant testified he struck the victim in self-defense, after the victim hit him in the back of the head.

Before submission of the case to the jury, appellant requested that the court include Iowa Criminal Jury Instructions 200.34, concerning prior bad acts evidence, and 200.38, concerning character and reputation evidence. The court denied the request for the instruction on character and reputation and gave a

modified version of the prior-bad-acts instruction. The jury found the appellant guilty of assault causing bodily injury.

II. Scope and Standards of Review

We review each issue presented according to its appropriate standard. Concerning the admission of the prior crimes evidence, review of evidentiary rulings generally is for an abuse of discretion. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001).

Challenges to jury instructions are reviewed for correction of errors at law. *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006). Review of a district court's failure to give a jury instruction is for an abuse of discretion. *State v. Piper*, 663 N.W.2d 894, 914 (Iowa 2003). Error in instructing a jury does not merit reversal unless it results in prejudice. *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

III. Analysis

Jury Instructions. The appellant contends the court erred in refusing to give the uniform Iowa Criminal Jury Instruction 200.34 on similar crimes. The stock instruction language provides:

Evidence has been received concerning other wrongful acts alleged to have been committed by the defendant. The defendant is not on trial for those acts.

This evidence must be shown by clear proof, and can only be used to show [motive] [intent] [absence of mistake or accident] [common scheme] [identity of person charged].

If you find other wrongful acts (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other

wrongful acts be considered for the purpose of establishing [motive] [intent] [absence of mistake or accident] [common scheme] [identity of person charged].

Iowa Criminal Jury Instruction 200.34 (2006). The appellant requested the uniform instruction. The court gave the following modified instruction:

Evidence has been received concerning other wrongful acts alleged to have been committed by the defendant. The defendant is not on trial for those acts.

This evidence must be shown by clear proof, and can only be used to show intent.

If you find other wrongful acts occurred, then and only then may such other wrongful acts be considered for the purpose of establishing intent.

At issue on appeal is the court's omission of much of the third paragraph. In particular, appellant challenges the omission of "were so closely connected in time" because more than half of the acts introduced occurred at least three years prior to the fight at issue. The State argues none of the cases listed as authority for the instruction have any requirement the prior bad acts be "closely connected in time."

Although we do not find "closely connected in time" in any of the cases listed as authority for the instruction, the length of time between the prior acts and the incident at issue is a factor that courts have considered. See, e.g., *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (noting "temporal separation was three years, further casting doubt on the weight of this evidence"); *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992) (holding remoteness of evidence affects its weight). We think it was error for the court not to include some reference in an instruction to the effect a jury should give to the temporal separation of the prior events from the incident at issue.

Of more concern to us, however, is the omission of any requirement that the prior events be “the same or similar” in manner to the current incident or that there be a “reasonable connection” between them. The instruction as given leaves the jury free to consider any prior acts for the purpose of showing intent. Although district courts have “rather broad discretion” in how jury instructions are worded, if “the choice of words results in an incorrect statement of law or omits a matter essential for the jury’s consideration,” error results. *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994). “Error in giving a jury instruction does not merit reversal unless it results in prejudice to the defendant.” *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004). In the case before us, we conclude the omission of essential elements from the instruction, coupled with the blanket admission of all the proffered prior-bad-acts evidence prejudiced appellant. Accordingly, we reverse appellant’s conviction and remand this matter to the district court. We do not address appellant’s other jury instruction claim concerning uniform instruction 200.38 because the court in any new trial would have to examine the evidence introduced to determine whether an instruction on appellant’s character is appropriate.

Prior Bad Acts. The appellant also challenges the district court’s blanket admission of evidence of prior incidents between appellant and the victim. Prior to trial, the State sought an evidentiary ruling permitting introduction of evidence appellant had “harassed, threatened, assaulted, and intimidated the victim” on several occasions in the past. The court ruled “the evidence set out in the notice or additional minutes of evidence is deemed admissible.” At trial, the victim

testified to a number of past incidents involving appellant including spitting, verbal threats and taunts, aggressive gestures, and one incident that resulted in a no-contact order. The evidence was allowed over defense counsel's objections at trial. On appeal, the appellant argues the evidence was improperly admitted and he suffered prejudice. Although we have reversed the appellant's conviction based on prejudicial error in instructing the jury, we address this claim to provide some guidance in any new trial.

A number of recent Iowa cases have addressed prior-bad-acts evidence, both in the context of Iowa Rules of Evidence 5.404(b) and 5.403, but some also including an analysis under rule 5.103(a). See, e.g., *State v. Parker*, 747 N.W.2d 196, 209-10 (Iowa 2008); *State v. Taylor*, 689 N.W.2d 116, 125-26 (Iowa 2004); *State v. Sullivan*, 679 N.W.2d 19, 25, 30 (Iowa 2004); *State v. White*, 668 N.W.2d 850, 853-55 (Iowa 2003); *State v. Rodriguez*, 636 N.W.2d 234, 239-40 (Iowa 2001).

The obvious danger in admitting prior-bad-acts evidence is that:

despite instructions, the jury might misuse the evidence and give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime charged, or even that he ought to be imprisoned without too much concern for present guilt or innocence, than they will to the legitimate bearing of the past [actions on intent or motive].

Parker, 747 N.W.2d at 210 (quoting 1 John W. Strong, et al., *McCormick on Evidence* § 42, at 168-69 (5th ed. 1999)). The jury may “base its decision on something other than the established propositions in the case.” *White*, 668 N.W.2d at 855 (quoting 1 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 403[03], at 403-33 to 403-40 (1986) (now found at 2 Joseph M. McLaughlin,

Weinstein's Federal Evidence § 403.04[1][c], at 403-40 to 403-44 (2d ed. 2001)).

The State's desire in this case that the jury use the evidence of prior, similar acts as proof of appellant's propensity to act as he has in the past is clear from this exchange between the prosecutor and the victim:

Q. So is his behavior that you've testified to on [the day of the current incident] consistent or not consistent with his past behavior? A. Very consistent.

This goes directly against the prohibition in rule 5.404(b): "Evidence of other . . . acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Iowa R. Evid. 5.404(b). We believe the court abused its discretion in granting the State's pretrial request for a determination the evidence of appellant's prior interactions with the victim was admissible. This is not to say the evidence was inadmissible, but we conclude the blanket determination without analyzing each instance under our rules of evidence was not proper.

As noted above, our supreme court has set forth the analysis under rules 5.404(b), 5.403, and 5.103(a) in recent cases. Rule 5.404(b) requires consideration of the purpose for which the prior bad acts evidence is offered and "seeks to exclude evidence that serves no purpose except to show the defendant is a bad person, from which the jury is likely to infer he or she committed the crime in question." *Rodriguez*, 636 N.W.2d at 239. Two of the more common non-propensity purposes the State claims for prior bad acts evidence are to show motive or intent. See, e.g., *Taylor*, 689 N.W.2d at 125; *White*, 668 N.W.2d at 854. The prior acts must be demonstrated by "clear proof." *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997).

Once a court determines the proffered evidence is relevant for a legitimate not-propensity purpose under rule 5.404(b), the court must then assess whether the evidence's "probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403. 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 [that] may cause a jury to base its decision on something other than the established propositions in the case.

Rodriguez, 636 N.W.2d at 240 (citations omitted). The outcome of this balancing test determines the admissibility of the evidence. *Sullivan*, 679 N.W.2d at 30. From our review of the record, we are unable to determine the district court evaluated each prior bad act offered under rules 5.404(b) and 5.403.

Our analysis does not end here, however, because error may not be based on a ruling that admits or excludes evidence "unless a substantial right of the party is affected." Iowa R. Evid. 5.103(a). A court may improperly admit evidence without requiring reversal. *Id.* The "harmless-error" analysis under this rule, however, is a broader test than the rule 5.403 balancing, and we "presume prejudice under this approach unless the contrary is affirmatively established." *Parker*, 747 N.W.2d at 209. One consideration in our analysis under rule 5.103(a) is the strength of the other evidence, that is, if there is overwhelming evidence of a defendant's guilty, the improper admission of prior-bad-acts evidence is less likely to be found prejudicial. *See id.* at 210; *State v. Martin*, 704 N.W.2d 665, 673 (Iowa 2005); *State v. Holland*, 485 N.W.2d 652, 656 (Iowa 1992). In the case before us, we cannot say the evidence is overwhelming. The only eyewitness evidence is from the defendant and the victim, who obviously

give divergent accounts of what occurred. When the prior-bad-acts evidence is included and the jury is not properly instructed on how it may be considered, we conclude the defendant was prejudiced.

IV. Conclusion

The district court abused its discretion in modifying uniform criminal jury instruction number 200.34 to the extent that it allowed the jury to consider the prior-bad-acts evidence improperly. The blanket determination that the prior-bad-acts evidence was admissible failed to apply the considerations of our evidentiary rules 5.404(b) and 5.403. The court abused its discretion in not considering each separate prior incident. We conclude the errors were prejudicial to the appellant. Consequently, we reverse his conviction of assault causing bodily injury and remand.

REVERSED AND REMANDED.