

IN THE COURT OF APPEALS OF IOWA

No. 8-967 / 07-0664
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DON CHRISTOPHER WHITE JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Defendant appeals following his convictions for first-degree murder and
intimidation with a dangerous weapon. **REVERSED AND REMANDED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, William E. Davis, County Attorney, and Amy K. Devine,
Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Doyle, JJ.

DOYLE, J.

Don White Jr. appeals following his convictions for first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (2005) and intimidation with a dangerous weapon in violation of section 708.6(1). He contends the district court erred in: (1) denying his motions for judgment of acquittal, (2) allowing admission, over objection, of evidence of another unrelated shooting, (3) failing to grant various challenges for cause during jury selection, and (4) failing to properly instruct the jury. Upon our review, we reverse the judgment of the district court and remand the case for a new trial.

I. Background Facts and Proceedings.

At about 5:00 p.m. on August 19, 2006, Mark Helton observed White playing dice at the house of Ron Millbrook in Rock Island, Illinois. Helton was there to drop off his girlfriend's minivan, which Helton had agreed to loan to Millbrook. Eight or nine people were at the Millbrook house, including Millbrook and Rasheem Bogan.

Beginning at about 6:00 p.m., White participated in a "memorial walk," which was held on the nineteenth of each month to commemorate the April 19 murder of Andrell Hearn. The approximately ninety-minute walk was followed by a gathering and barbeque at the Rock Island residence of Hearn's grandmother. Several people saw White at the walk and later barbeque.

On that evening, a young woman in Davenport, Iowa named Vincelina Howard was at a gathering in the backyard of a house with several other people. A van drove by the Howard home and gunshots were fired; Vincelina was struck

by a bullet. Phillip Potter was driving in the area and called 911. Emergency units were dispatched to the house at about 10:30 p.m. Vincelina was pronounced dead at a Davenport hospital a short time later.

Benjamin Tarnish lived near the Howard home and reported to law enforcement that the occupants of the van were four African-American males. The van was later found abandoned on a Davenport street. A surveillance videotape from a nearby business showed the minivan coming to a stop and four persons running from the van.

This van was later determined to belong to Virginia Schaeffer, Mark Helton's girlfriend. Bullet casings found outside and inside the van were linked to others found at the scene of Howard's shooting. Ron Millbrook's fingerprints were found on the front edge of the sliding door of the van; Don White's left palm print was found on the outside edge of the passenger side rear sliding door; Bogan's right thumb print was found on the window crank on the driver's side door of the van. Guns later found were tied to Millbrook and White.

On October 3, 2006, the State filed a trial information charging White and codefendants Ron Millbrook and Terrell Lobley with murder in the first degree, in violation of Iowa Code sections 707.1 and 707.2, and intimidation with a dangerous weapon, in violation of section 708.6(1). The court severed the trial of Ron Millbrook but ordered that White and Lobley be tried jointly. After the jury was unable to reach a verdict, the court declared a mistrial.

On retrial, the State moved to join White's case with that against Bogan. Both defendants contested the joinder. The State also filed notice of its intent to

offer evidence of prior acts by Don White pursuant to Iowa Rule of Evidence 5.404(b). A hearing was held on the State's motions. The State's offer of proof concerning the rule 5.404(b) acts included three civilian witnesses who testified that on June 14, 2006, White—without apparent provocation—walked up to the car in which these witnesses were sitting, placed a gun to the ribcage of one of the occupants, and pulled the trigger. The gun jammed and did not fire. White went to the side of a building, hit the handgun against a wall to unjam it, and started shooting at one of the individuals, who was now out of the car and running away. At the hearing, three law enforcement officers testified that a live round and four bullet casings were found at this June 14, 2006 Rock Island shooting scene, which could be linked to casings left at the August 19, 2006 Davenport shooting scene, and that all these rounds were fired from the same weapon, a Colt .45 handgun recovered during an unrelated search. The State argued that the evidence of prior acts was necessary to connect defendant Don White with the weapon, and thus, the August 19, 2006 Davenport shooting. The district court ruled that the prior acts evidence would be allowed and that joinder would not result in prejudice to either defendant.

After jury selection, White again objected to the prior acts evidence. Both defendants offered to stipulate that on June 14, 2006, White did possess the Colt .45 handgun that matched casings found at the scene of the Davenport shooting. The State would not join the stipulation, and the district court refused to reconsider its earlier rulings.

At trial, Jennifer Estrada, Carrie Hamilton, Teneshia Horne, and Carlton Nixon all testified in detail about Don White's placing a gun to Nixon's side and pulling the trigger, the gun jamming, and his shooting at them on June 14, 2006. Sergeant Matthew Edwards testified about collecting numerous shell casings on June 14, 2006, from the area surrounding the shooting scene. Linda Yborra, a forensic scientist with the Illinois State Police Morton Forensic Science Laboratory, testified the shell casings recovered from the Howard house shooting scene and the shell casings recovered from the Rock Island shooting scene were fired from the same gun, a Colt Commander semi-automatic pistol. In this appeal, White asserts the trial court abused its discretion in admitting the prior bad acts evidence.

II. Prior Bad Acts Evidence.

We review district court rulings admitting evidence of other bad acts for an abuse of discretion. *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997). Generally evidence of one crime cannot be used to prove another crime occurred; however, if the evidence of crimes, wrongs, or bad acts is relevant to issues other than the defendant's propensity to commit a crime, it may be admissible. *State v. White*, 668 N.W.2d 850, 853-54 (Iowa 2003); *see also* Iowa R. Evid. 5.404(b). The evidence may be admissible as proof of motive, opportunity, or identity. *White*, 668 N.W.2d at 854. "Courts employ a two-step analysis to determine whether the bad-acts evidence is admissible." *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). First, the court must determine if the evidence is relevant to a legitimate factual issue in dispute. *Id.* If it is, then the

court must decide if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.* If it does, the court must exclude the evidence. *Id.*

As set forth above, the evidence in question consisted of testimony that during the course of another crime, White pulled out a gun and placed it to the ribcage of an individual. When the gun would not fire, he ran off, hit the gun on the side of a building to unjam it, and then fired several rounds at several individuals. No one was hit. Ballistics testing of the cartridges recovered at the scene of that Rock Island shooting showed that the cartridges had been fired from the same Colt .45 that fired several rounds at the Howard shooting in Davenport. The gun was found at a Rock Island residence on October 18, 2006, almost two months after the Howard shooting. The State argues the evidence, taken with other evidence that White, Bogan, Millbrook, and Lobley were together on the night Howard was shot, strongly linked White to the shooting, and was thus probative on the issue of identity and opportunity.

On appeal, White does not argue the evidence was not relevant, only that it was unfairly prejudicial. We must then employ the second step of the analysis to determine whether the trial court abused its discretion in deciding that the probative value of the evidence was not substantially outweighed by its inherently prejudicial effect. *Id.* at 25. Evidence is unfairly prejudicial if it,

[a]ppeals 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 the jury to base its decision on something other than the established propositions in the case.

White, 668 N.W.2d at 854 (citations omitted).

We first examine “the actual need for the . . . evidence in . . . light of the issues and the other evidence available.” *State v. Taylor*, 689 N.W.2d 116, 129 (Iowa 2004) (quoting *State v. Wade*, 467 N.W.2d 283, 284 (Iowa 1991)). The State argues that the need for the evidence was very high in light of the fact that no eyewitness to the shooting could identify the shooters. The State’s case against White rested on placing him in the van used at the drive-by shooting. The State attempted to do so by showing White was with Millbrook, Bogan, and Lobley shortly before the shooting, that ballistics evidence tied White’s codefendants to shell casings and bullets found at the scene and tied them to the van used, and by evidence that White’s palm print was found on the outside of the van used in the shooting. The State points out that the only other evidence available to tie White to the shooting was the evidence that White had previously fired one of the guns which had been fired at the Howard shooting. That evidence had not been available at White’s first trial which ended with a hung jury. Thus, the State argues it had “a very great need” for the evidence of White’s participation in the Rock Island shooting. We do not question the State’s need, but regardless of how great the need, it cannot be satisfied by the introduction of unfairly prejudicial evidence which overrides White’s fundamental right to a fair trial.

The State argues the danger of unfair prejudice to White was low, and in any event, any potential unfair prejudice was eliminated through the court’s cautionary instruction prior to the testimony and limiting instruction upon submission of the case to the jury. We disagree.

Prior to the testimony of the witnesses who testified about the prior shooting, the court gave the jury the following cautionary instruction:

Ladies and gentlemen, starting with this witness, evidence is going to be presented concerning other wrongful acts alleged to have been committed by Defendant Don White Jr. Defendant White is not on trial today in this trial for those other acts. Evidence of other crimes, wrongs or acts is not admissible to show 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 identity. You are cautioned that you may not use evidence Defendant White may have committed the other wrongful acts as proof he committed the acts that he is charged with in this trial.

The court also gave a limiting instruction upon submission of the case to the jury:

Evidence was presented concerning other wrongful acts alleged to have been committed by Defendant, Don White, Jr. Defendant White is not on trial for those acts.

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. The evidence may, however, be admissible for other purposes, such as proof of identity.

You are cautioned that you may not use evidence Defendant White may have committed the other wrongful acts as proof he committed the crimes he is charged with in the present case.

After reviewing the evidence in question and its prejudicial effect, we “do not believe this is the kind of prejudice which can be erased by a limiting instruction. It did not involve a brief, inadvertent reference to prior criminal activity, promptly stricken from the record” *State v. Belieu*, 288 N.W.2d 895, 901 (Iowa 1980). The evidence was not introduced inadvertently. It was marched in like an army with banners, and trumpets blaring, escorted and emphasized by the attorney for the State. It involved extensive and repeated references to other acts which remained part of the record because of purported relevancy of White’s identity and involvement. See *id.* The testimony of five witnesses (forty-five pages of

transcript) went into graphic and great detail describing the events that occurred during the prior shooting. We find that the evidence, as presented at trial, was such that its prejudicial effect against White could not reasonably be cured by cautionary or limiting instructions. *See id.*

When jurors hear that a defendant, on earlier occasions, has committed essentially the same bad acts for which the defendant is on trial, “the information unquestionably has a powerful and prejudicial impact.” *United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994). And regardless of the stated purpose of such evidence, “the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered”—to convict the defendant because he or she is a bad person. *Id.*; *see also United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (suggesting that “[t]o tell a jury to ignore the defendant’s prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities”); *United States v. Burkhart*, 458 F.2d 201, 204 (10th Cir. 1972) (suggesting that “once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality”); *State v. Daly*, 623 N.W.2d 799, 803 (Iowa 2001) (suggesting that admitting evidence of prior conviction for impeachment purposes, which were exactly the same crimes for which defendant was on trial, “could very likely have a substantial effect on a jury, which, although instructed not to do so, could reasonably be expected to misuse the evidence as substantive proof of guilt”); [Abraham P. Ordovery, *Balancing the Presumption of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135, 177 (1989)] (stating empirical studies show that introducing defendant’s criminal record increases likelihood of conviction).

Sullivan, 679 N.W.2d at 30.

In some cases, the prejudicial effect might be mitigated by the overwhelming nature of the State’s evidence against the defendant. *See, e.g., State v. Leutfaimany*, 585 N.W.2d 200, 206 (Iowa 1998) (noting the evidence incriminating defendant “came close to being conclusive”). Here, the State’s

evidence against White is certainly not overwhelming, as evidenced by the first trial that ended with a hung jury. White was entitled to jury consideration “free from the spill-over effect of the other crimes evidence.” *Belieu*, 288 N.W.2d at 902. For the above reasons, we conclude the district court abused its discretion in admitting the evidence of White’s prior acts concerning the Rock Island shooting.

Our conclusion is not to be construed to suggest that none of the evidence was admissible. A limited amount of the evidence in question was admissible. The evidence that just two months earlier White possessed and shot a handgun that other evidence indicates was one of the weapons used in the shooting in this case is highly relevant to the issue of identity, that is, whether White was one of the shooters in this case. Further, evidence limited to the fact that White possessed and shot a handgun involves little or no danger of unfair prejudice to him. However, the additional graphic and disturbing details of the events of June 14, 2006, have little or no relevance to the issue of identity, constitute evidence of bad character and a propensity to commit crimes of violence, encourage a jury to decide a case on a basis other than the facts of the case, and thus have a probative value that is substantially outweighed by the danger of unfair prejudice.

III. Other Arguments.

White claims, among other things, that the trial court erred in not granting the motion for judgment of acquittal during each appropriate stage of each trial. After a thorough review, we find this argument to be without merit. Additionally, in view of our holding, it is not necessary to address White’s other arguments.

IV. Conclusion.

Because we conclude the district court abused its discretion in admitting evidence of White's prior bad acts and such admission was prejudicial, that is, it affected White's substantial rights, we reverse the judgment of the district court and remand the case for a new trial.

REVERSED AND REMANDED.