IN THE COURT OF APPEALS OF IOWA

No. 3-293 / 12-0812
Filed June 12, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSE JUAN CHACON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

A defendant contends the district court abused its discretion in overruling his motion to sever the two counts contained within a trial information. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas H. Miller, Assistant Attorney General, John P. Sarcone, County Attorney, and Robert Diblasi, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITHESWARAN, J.

Jose Chacon was apprehended in connection with an altercation in a Des Moines parking lot. The State charged Chacon with second-degree robbery as well as first-degree harassment of a police officer. Chacon moved to sever the two counts on the ground that there was a danger the jury would improperly consider evidence from one offense in determining whether he committed the other offense. The district court overruled the motion, and the charges were prosecuted in one trial. A jury found Chacon guilty of both crimes, and the court imposed sentence.

On appeal, Chacon contends the district court abused its discretion in overruling the motion to sever. *See State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007) (setting forth the standard of review). He relies on Iowa Rule of Criminal Procedure 2.6(1), which states in pertinent part:

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

He contends "[t]he charges involving the robbery and the harassment of a police officer do not arise out of the same transaction or occurrence" and "were not based upon a common scheme or plan."

Multiple offenses arise out of the same transaction or occurrence "where the facts of each charge can be explained adequately only by drawing upon the facts of the other charge." *State v. Bair*, 362 N.W.2d 509, 512 (Iowa 1985)

(quotation marks and citation omitted).[1] The test focuses on three ways crimes are linked together: time, place, and the circumstances. *Id.* In the alternative, multiple offenses constitute part of "a common scheme or plan" when they are "products of a single or continuing motive." *Elston*, 735 N.W.2d at 198 (quotation marks and citation omitted).

The record reveals that Ed Olaby had just parked in a lot of a retail establishment when Chacon pulled up close to the passenger side of his vehicle. Both men got out and exchanged words, after which Chacon stripped Olaby of his gold necklace and hit him in the face. Olaby did not meekly stand by. He attempted to engage Chacon in a fight, but his knee buckled, and he landed on the ground with Chacon on top of him. Chacon proceeded to take Olaby's wallet from his pocket; Olaby's passenger retrieved it. Eventually, a store employee broke up the fight. As Chacon started to walk away, Olaby grabbed the keys from Chacon's car to prevent him from leaving. Chacon fled on foot.

A police sergeant dispatched to the scene found Chacon and tried to apprehend him. Chacon ran. Another officer located Chacon and had him placed in her car. During the drive back to the scene of the altercation, Chacon told the officer, "God judges all and will kill all that do wrong." He also said he acted as God and the officer needed to watch her back "because he would come to [her] when [she] least expected it." Later, he leaned towards the officer's name tag, read her name out loud three or four times, and told her to watch it because she was going to get it. The officer viewed these statements as threats.

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[1] *Bair* was decided under a former version of the rule, which did not contain the "common scheme or plan" language. *See State v. Lam*, 391 N.W.2d 245, 249 (Iowa 1986).

At the parking lot where the fight occurred, Olaby's passenger identified Chacon as the person involved in the altercation with Olaby.

Based on these essentially undisputed facts, we agree with Chacon that rule 2.6(1)'s "common scheme or plan" alternative for consolidation of offenses is inapplicable because there is scant evidence of "a single or continuing motive" connecting the robbery and harassment offenses. *See Elston*, 735 N.W.2d at 198–99 (finding a "common scheme or plan" connecting indecent contact and sexual exploitation charges in Elston's "desire to satisfy sexual desires through the victimization of children"); *Lam*, 391 N.W.2d at 250 (finding a common scheme or plan" connecting two counts of second-degree burglary in Lam's plan to burglarize apartments during normal working hours to obtain small portable objects for money).

This leaves us with the "same transaction or occurrence" alternative of rule 2.6(1). It is apparent the events precipitating the charges were close in time and place. *See Bair*, 362 N.W.2d at 512. The focus is on the circumstances surrounding the crimes. *See id.* Chacon argues severance was appropriate because "[t]he two charges could be tried separately with completely different facts." While his argument is facially appealing, *Bair* did not adopt such a stringent standard. That opinion allows consolidation if the "facts of each charge [cannot] be explained adequately" without drawing upon the facts of the other charge. *Id.* (quotation marks and citation omitted). That is the case here; the circumstances leading up to Chacon's apprehension were important in explaining

his subsequent threats towards the officer. We conclude the robbery and harassment charges arose from the same transaction or occurrence.[2]

Our analysis cannot end here because, even if this hurdle is cleared, the district court has discretion to sever the counts for good cause. Iowa R. Crim. P. 2.6(1); *see also Elston*, 735 N.W.2d at 199. Here, the district court exercised its discretion to deny severance. To show that the court abused its discretion, Chacon must establish "prejudice resulting from joinder outweighed the State's interest in judicial economy." *Elston*, 735 N.W.2d at 199.

Chacon attempts to meet this burden by arguing the court's failure to sever the charges "allowed the prosecution to use [his] statements to [the officer] as propensity evidence in an attempt to show [he] committed the robbery." He cites to a portion of the prosecutor's closing argument in support of this assertion. On our review of the argument, we are convinced the prosecutor did not improperly use the harassment charge to bolster the robbery count; he summarized the evidence supporting the robbery charge, including Chacon's flight from the scene, then proceeded to the evidence supporting the harassment charge. We discern no prejudice in the prosecutor's "failure to compartmentalize the . . . counts." *State v*. *Geier*, 484 N.W.2d 167, 173 (Iowa 1992).

Our finding of no prejudice is bolstered by the district court's instruction admonishing the jury, "If you find the defendant guilty or not guilty on either of the

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[2] Chacon also argues that, under Iowa Rule of Evidence 5.404(b), the evidence of harassment would not be admissible to prove the robbery offense. In *Lam*, the Iowa Supreme Court addressed the distinction between that evidentiary rule and rule 2.6. 391 N.W.2d at 250. The court stated, "This evidentiary rule deals with what evidence is properly admissible to prove the crime charged. The joinder of offenses rule deals with the more basic question of what crimes can be charged and tried in a single proceeding."

counts, you are not to conclude the defendant is guilty or not guilty on the other. You must determine whether the defendant is guilty or not guilty separately on each count." We presume the jury followed this instruction. *See State v*. *Owens*, 635 N.W.2d 478, 483 (Iowa 2001).

We conclude the district court did not abuse its discretion in overruling Chacon's motion to sever the two counts. We affirm Chacon's judgment and sentence for second-degree robbery and first-degree harassment.

AFFIRMED.