

IN THE COURT OF APPEALS OF IOWA

No. 8-653 / 07-0660
Filed December 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RASHEEM DAMONTE BOGAN,
Defendant-Appellant.

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

Defendant appeals from judgment entered upon his conviction of first-
degree murder. **REVERSED AND REMANDED.**

Brian Farrell, Cedar Rapids, 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 Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Rasheem Bogan appeals from judgment entered upon his conviction of first-degree murder. He contends, among other things, the trial court erred in allowing his trial to be joined with that of a codefendant. We agree.

I. Background Facts and Proceedings.

In August 2006 Rasheem Bogan was fourteen years old, a special education student at Thurgood Marshall Learning Center, and living with his father. At about 5 p.m. on August 19, 2006, Mark Helton observed Bogan 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 Donald White.

Beginning at about 6 p.m. on August 19, Bogan 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 Bogan at the walk and later barbeque.

At about 11 p.m. or 12 a.m. that night, Bogan was picked up outside of Millbrook's house and given a ride to a Rock Island motel by Timothy Smith. Smith rented a room for Bogan, using Bogan's money.

On the evening of August 19, 2006, in Davenport, Iowa, a young woman 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;

Howard 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. Howard 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. Fingerprints of Ron Millbrook 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, but not to Bogan.

On August 23, 2006, Davenport police officer Mark Dinneweth interviewed Bogan at Thurgood Marshall Learning Center. Detective Dinneweth asked Bogan if he was aware of the Howard shooting. Bogan denied knowing any specifics, but stated that Stevie West called Bogan's brother, Terrell Loble, and accused Loble and Bogan of being the shooters. When asked about his whereabouts on the evening of August 19, Bogan stated he went on the Ahearn memorial walk and then to the barbeque. Bogan then said he and his brother Loble went to Ron Millbrook's house where they stayed from about 9:30 p.m. to

12:30 a.m. He stated he then got a ride from his uncle, Tim Smith, to the American Motor Inn.

On August 31, 2006, a delinquency proceeding was commenced against Bogan alleging he had committed the offenses of murder in the first degree and willful injury. On December 4, 2006, the juvenile court waived jurisdiction over Bogan. Bogan was charged with murder in the first degree and intimidation with a dangerous weapon.

The State moved to join Bogan's case with that against Don White. 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. White went to the side of a building, hit the handgun against a wall and again started shooting at one of the individuals, who was now out of the car and running away. Law enforcement then 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 associate defendant Don White with the August 19, 2006 shooting and the weapon.

Bogan resisted joinder, arguing that the prior acts evidence related to White would be unfairly prejudicial. 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, Bogan 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 Howard 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, then presented testimony connecting the shell casings to those involved in the Howard shooting and to Don White. In this appeal, Bogan asserts the trial court abused its discretion in joining his trial with that of White.

II. Applicable Law and Standard of Review.

At issue here is Iowa Rule of Criminal Procedure 2.71, which provides:

Two or more defendants who are alleged to have participated in the same transaction or occurrence or series of transactions or occurrences from which the offense or offenses charged arose may be tried jointly whether the defendants are charged in one or more complaints. . . . *Complaints or defendants shall not be jointly tried as to a party if the court finds, in its discretion, that prejudice would result to the party.*

(Emphasis added.)

Rule 2.71 vests discretion with the district court to determine whether defendants should be tried jointly or separately. *State v. Belieu*, 288 N.W.2d 895, 900 (Iowa 1980). We review a district court's decision to consolidate or sever trials for an abuse of discretion. *Id.* To establish an abuse of discretion, a defendant must show sufficient prejudice to constitute denial of a fair trial. *Id.* To the extent Bogan claims a constitutional violation, our review of the evidence is de novo. *State v. Jefferson*, 574 N.W.2d 268, 271 (Iowa 1997).

III. Discussion.

The trials of codefendants should be severed in two circumstances: (1) the trial is so complex and the evidence so voluminous the jury will be confused and cannot compartmentalize the evidence; or (2) the evidence admitted by or against one defendant is so prejudicial to a codefendant, the fact-finder is likely to improperly use it against the codefendant. *State v. Williams*, 574 N.W.2d 293, 300 (Iowa 1998). Bogan raises the second ground here, claiming evidence of White's prior bad acts was so prejudicial the jury likely improperly used it against him.

In *Belieu*, the court noted that "[p]rejudice can also be avoided if the other crimes evidence would have been admissible in the State's case against the defendant." *Belieu*, 288 N.W.2d at 900. Bogan asserts the evidence of White's prior bad acts was not relevant to the charges against Bogan and would not have been admissible at trial had the defendants been tried separately. The State argues that the evidence would have been relevant and probative on the issue of identity even if the defendants had been tried separately. We find the offered

testimony has no relevance with respect to Bogan's identity. Moreover, even if we assume that some evidence tying the bullet casings found at the Howard shooting scene to the gun used by White in another shooting would be minimally relevant, the extensive testimony about the June 16 shooting would most certainly have been declared unduly prejudicial and cumulative in a case against Bogan tried alone.

"The rule excluding evidence of other crimes of a defendant is based on the fundamental principle that '[a] defendant must be convicted only if it is proved he committed the offense charged and not because he is a bad man.'" *Id.* at 901 (quoting *State v. Wright*, 203 N.W.2d 247, 250 (Iowa 1972)). As was the case in *Belieu*, the evidence of White's prior bad acts when applied to Bogan "tended only to establish defendant's bad character"—that Bogan kept company with persons who cavalierly used weapons. *Id.*

The State argues that the prejudice was minimized by limiting instructions offered at trial.

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 for those other acts. Evidence of other crimes, wrongs or acts is not admissible to show the character of the 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.

We first note that nothing in the instruction cautions the jury about how it could use the evidence with respect to Bogan. More importantly, however, we "do not believe this is the kind of prejudice which can be erased by a limiting instruction."

Id. “It did not involve a brief, inadvertent reference to prior criminal activity, promptly stricken from the record.” *Id.* Rather, it involved extensive and repeated references to other acts which remained part of the record because of purported relevancy to the codefendant’s identity and involvement. *See id.* We find that the evidence as presented, especially in light of the absence of a strong limiting instruction, was such “that its prejudicial effect against this defendant could not reasonably be cured by a limiting instruction.” *Id.*

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 Bogan is certainly not overwhelming. Bogan was entitled to jury consideration “free from the spill-over effect of the other crimes evidence.” *Belieu*, 288 N.W.2d at 902.

We conclude Bogan was entitled to a separate trial. In light of this conclusion, we need not address the remainder of Bogan’s claims. We therefore reverse and remand for a new trial.

REVERSED AND REMANDED.