IN THE COURT OF APPEALS OF IOWA

No. 0-080 / 09-0308
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

IAN MATTHEW THOMPSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Ian Thompson appeals his conviction for assault causing serious injury. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

In the late night hours of Friday, January 25, 2008, Ian Thompson punched Justin Nisser causing fractures to Nisser's jaw. As a result, Thompson was charged with assault causing serious injury in violation of Iowa Code section 708.2(4) (2007). The case proceeded to a jury trial where Thompson claimed he acted in self-defense. The jury returned a guilty verdict on the offense charged.

Thompson appeals, contending: (1) the trial court erred in giving the jury its "punishment" instruction; (2) the trial court erred in admitting evidence of Thompson's prior bad acts, including prior misdemeanor convictions for disorderly conduct and assault; and (3) his counsel was ineffective for failing to object to a jury instruction on alternative courses of action for self-defense.

The "punishment" instruction informed the jury as follows:

> The duty of the jury is to determine if the defendant is guilty or not guilty.
>
> In the event of a guilty verdict, you have nothing to do with punishment.
>
> Criminal offenses may be punished by fines or community service; by supervised or unsupervised probation; by placement in a residential, correctional or violator facility; or by confinement in a county jail or prison; depending on the circumstances of the case. Accordingly, you may neither speculate on what any punishment in this case might be nor let it influence your verdict.

Thompson objected to this instruction during the instruction conference. Among other things, he pointed out that it was "inaccurate." If Thompson were convicted, he faced incarceration, not any of the other sentences listed in the instruction. Thompson had been charged with assault causing a serious injury, a forcible felony. *See* Iowa Code §§ 708.2(4), 702.11. Thus, Thompson was not eligible for any sentence other than incarceration. *See id*. § 907.3.

The supreme court transferred this appeal to us, but recommended we hold it pending its review of the same instruction in another case. Recently, the supreme court decided that case. *State v. Hanes*, ___ N.W.2d ___, 2010 WL 4539192 (Iowa 2010). Based on *Hanes*, we now reverse and remand to the district court.

In *Hanes*, the supreme court found that the "punishment" instruction "wades into a topic about which the 'jury had no concern.'" *Id*. at ____ (quoting *State v. Purcell*, 195 Iowa 272, 274, 191 N.W.2d 849, 850 (1923)). Also, raising the same concern that Thompson voices here, the supreme court added:

> Based on the language of the penalty instruction, the jury may have incorrectly believed the district court always has discretion to sentence a defendant to any of the listed options. So, although the jury may not have speculated as to which of the listed options would ultimately be used in this case, the jury may have been prompted by this information to minimize the importance and gravity of their verdict, thinking the defendant might not be imprisoned.

Id. at ___.

Therefore, as the supreme court ordered in *Hanes*, we must reverse and remand this case for a new trial.

Because the issue is likely to arise on retrial, we now turn to Thompson's claim that the district court erred in admitting his prior incidents of disorderly conduct and assault that had resulted in misdemeanor convictions.

During the State's case-in-chief, the district court indicated that it was inclined to admit evidence of these incidents if Thompson argued self-defense. In the court's view at that point, the evidence was admissible under Iowa Rule of

Evidence 5.404(*b*) "to show that [Thompson's] intent was not to protect himself but to injure Mr. Nisser."

Later, Thompson took the stand, and testified on direct examination that when the police tried to contact him following Nisser's report he avoided them because he was "scared." He also testified that, when questioned by police, he did not recall the encounter with Nisser because he did not think a "small one-punch exchange" would lead to a "police investigation."[1] Thompson added that he did not initially tell the police Nisser had hit him first because, again, he was "scared."

Following this testimony, the court ruled that the State could cross-examine Thompson about his prior convictions for disorderly conduct and assault, and the circumstances that led to them. In explaining its ruling on admissibility, the district court commented that the State is "entitled to show that [Thompson's claim of being scared is] a fabrication, that he's not scared of police at all, he's had numerous contacts with them, and has no reason to be scared of them." Thus, instead of finding the incidents admissible under rule 5.404(*b*) to rebut a claim of self-defense, the district court found them admissible to contradict allegedly false statements made by Thompson during his testimony. During its cross-examination of Thompson, the State put into evidence details of the incidents, including the criminal complaints and Thompson's subsequent

[1] Officer Marc Rath testified that Nisser gave him a formal statement on February 3, at which point he tried to track down Thompson. Thompson missed an appointment and failed to return numerous calls so finally Officer Rath went to Thompson's apartment on February 20. At that time, Officer Rath questioned Thompson in detail about the incident and Thompson repeatedly claimed no recollection whatsoever of the matter. Of course, since he claimed not to remember the incident, Thompson did not tell Officer Rath he had acted in self-defense.

guilty pleas. Thompson conceded under the State's questioning that his prior assault conviction arose from a situation, like the present, where he claimed to have thrown only one punch, in self-defense.[2]

On appeal, Thompson contends the district court committed error because the prior incidents were inadmissible under either Iowa Rule of Evidence 5.404 or Rule 5.609. In contrast, the State insists that the district court properly allowed the State to engage in "impeachment by contradiction," a separate ground for admissibility.[3]

Impeachment by contradiction, i.e., offering extrinsic evidence to show that the defendant's testimony was false, can be appropriate, although it is subject to Rule 5.403 balancing. *See, e.g., United States v. Kincaid-Chauncey*, 559 F.3d 923, 932-33 (9th Cir. 2009); *United States v. Gilmore*, 553 F.3d 266, 271 (3rd Cir. 2009); *United States v. Cerno*, 529 F.3d 926, 934 (10th Cir. 2008); *see also* 1 Kenneth S. Brown et al., *McCormick on Evidence* § 45 at 216 (6th ed. 2006) (noting that the Federal Rules "do[] not expressly mention specific contradiction as a permissible method of impeachment" but that federal courts are correct in continuing to permit resort to this technique). Impeachment by contradiction has also been recognized in Iowa. *See State v. Roth*, 403 N.W.2d

[2] As noted above, Thompson did claim he had acted in self-defense and the jury was instructed on self-defense. The district court also gave a limiting instruction that Thompson's other wrongful acts could "only be used to show intent."

[3] In its appellate briefing, the State only argues in passing that the prior bad acts were admissible under Rule 5.404(*b*) to rebut Thompson's claim of self-defense, the original theory under which the district court had planned to admit them. Under this theory, the balance may weigh against admission of the prior assault, depending on the underlying facts and whether that event lends any probative information to the issue of the identity of the aggressor in this case. We do not decide that question here. In any event, we believe this theory would not justify admission of the prior disorderly conduct.

762, 767 (Iowa 1987); 7 Laurie Kratky Dore, Iowa Practice Series: Evidence § 5.607:4, at 510 (2010) ("Contradiction of a witness by eliciting material and non-collateral facts contrary to the witness' testimony is an approved method of attacking credibility."). We do not read *State v. Parker*, 747 N.W.2d 196 (Iowa 2008), where the State did not argue this theory of admissibility, *id.* at 209, as undermining this longstanding authority.

To the extent Thompson testified he did not "recall" the encounter with Nisser when questioned by police because he did not "think" a single punch thrown by him would lead to a police investigation, we believe it was fair game for the State to show that just a few months before, he had been involved in a somewhat similar incident where he claimed to have thrown only one punch, had been charged with assault, and ultimately pled guilty. Here the extrinsic evidence *strongly* contradicted Thompson's testimony. This was solid "impeachment by contradiction."[4] In short, balancing the probative value of the evidence against the danger of unfair prejudice, we find the probative value of the evidence to show that Thompson's claimed lack of recollection when interviewed by the police on February 20 was untrue outweighed any unfair prejudice. Also, the proof of the prior incident was clear: Thompson had pled guilty. Thus, under a 5.403 balancing, *see, e.g., State v. Reynolds*, 765 N.W.2d

[4] As Thompson was forced to admit when cross-examined about the earlier assault:

> Q. So you do know that one punch leads to a police investigation; don't you? A. I guess it depends on the situation.

283, 290 (Iowa 2009), we do not believe it would be an abuse of discretion to admit evidence of the incident and the guilty plea.[5]

But we do not share the district's court broader view that one who merely testifies he or she was "scared" of the police opens the door to the admission of all prior contacts with the police, including arrests, investigations, and convictions. In fact, one might argue that someone with a recent criminal history who had committed yet another crime would have good reason to be "scared" of the police. Hence, in our view, the district court's rationale for admissibility went somewhat too far.

We have decided not to address Thompson's remaining appellate argument because it may not arise on retrial. *See State v. Lawler*, 571 N.W.2d 486, 491 (Iowa 1997) (declining to address certain issues raised for this reason).

REVERSED AND REMANDED.

[5] Although the State is not necessarily stuck with Thompson's description of the incident and may be able to use otherwise admissible extrinsic evidence (such as the guilty plea), the criminal complaint that was introduced here is a form of hearsay.