FILED
DEC 26 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 26, 1984

vs.) 560

JAMES L. MORRISON,) 4-402
83-930

Defendant-Appellant.)

Appeal from the Iowa District Court for Polk County - I. Joel Pasternak, Judge.

Defendant appeals his conviction of theft in the third degree in violation of sections 714.1(4) and 714.2(3), Iowa Code (1981). REVERSED AND REMANDED FOR NEW TRIAL.

Charles Harrington, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Sherie Barnett, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Defendant, James Morrison, appeals his convcition of theft in the third degree in violation of sections 714.4(14) and 714.2(3), Iowa Code (1981). He asserts: (1) that the court erred in permitting, over his relevancy objection, testimony of his attempt to sell stereo components two days after selling the stolen cassette tape deck that he was charged with stealing; (2) that the jury instruction concerning his privilege against self-incrimination permitted the jury to raise an inference from his failure to take the witness stand; (3) that communications between the bailiff and the jurors coerced a verdict and deprived him of a fair trial; (4) that acceptance of the verdict without his counsel or him being allowed to be present violated his right to be present pursuant to Iowa R. Crim. P. 25(1) and denied him his right to poll the jury pursuant to Iowa R. Crim. P. 21(5); and (5) that the court's failure to state reasons for the sentence imposed requires resentencing. We reverse and remand for a new trial.

Morrison was charged with theft in the third degree in violation of sections 714.1(4) (theft by exercising control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen) and 714.2(3) (property having a value exceeding one hundred dollars but not exceeding five hundred dollars), Iowa Code (1981). He was specifically charged with exercising control over a cassette deck that was stolen when he knew, or had reasonable cause to believe, that such property was stolen. Morrison pleaded not guilty, but offered no evidence in his defense.

Dan Slattery testified that the cassette deck described in the trial information, together with other stereo components, had been taken from the apartment where he lived. The evidence further showed that at some short time later Morrison sold the cassette deck to a pawn shop operated by Michael King. The cassette deck was later sold by King to another individual.

I. Morrison's first assignment claims that the trial court erred in permitting King, the pawn shop operator, to testify about Morrison's attempt to sell additional stereo components to King a day or two following his sale of the cassette deck. Although the additional components matched a general description of property stolen from Slattery, there was no evidence to identify them as the stolen components.

Morrison made a motion in limine to exclude King's testimony about the effort to sell the additional components. The motion alleged that the testimony would be irrelevant and prejudicial to Morrison.

In ruling on the motion, the court held that the challenged testimony was admissible on the question of defendant's knowledge that the cassette deck was stolen. Under the court's rulings, Slattery testified that all of his stereo equipment was missing. He related that the items missing were: a Pioneer receiver, Pioneer turn table, two Kenwood speakers, two Bose speakers and a Sony cassette deck. He was also able to identify the Sony cassette deck which had been sold to King by Morrison (which was produced as an exhibit at trial) as the Sony cassette deck that had been stolen.

King testified that Morrison sold the cassette deck, the description of which was set forth in the trial information, and a pair of Bose speakers, on December 30, 1982, for $225. He then testified that the following day Morrison brought to his pawn shop a Pioneer receiver-amplifier and a Pioneer turntable. Morrison urges that the testimony by King concerning Morrison's attempt to sell additional components to King the next day was irrelevant, and that the allowance of it was prejudicial error.

Relevancy of evidence has been defined in Iowa, effective July 1, 1983, by the newly-adopted Iowa Rules of Evidence. Rule 401 of those rules defines "Relevant evidence" as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

This case was tried prior to the effective date of those rules, but the definition of relevant evidence was the same before the Iowa Rules of Evidence were adopted. Thompson v. Bohlken, 312 N.W.2d 501, 509 (Iowa 1981); Carson v. Mulnix, 263 N.W.2d 701, 706 (Iowa 1978). Accordingly, the relevancy of the testimony of Mr. King must be tested against the definition as stated by the newly-adopted rule. We do not pass on whether the new rules apply to this issue, since in either event the definition is the same.

The trial court held that King's evidence concerning the subsequent attempt by defendant to sell additional components was admissible on the issue of Morrison's knowledge that the Sony cassette deck, the control over which was the only basis for the charge against Morrison, was stolen. Knowledge that the cassette deck was stolen was an element of the crime charged, and was therefore "a fact that is of consequence to the determination of the action." Iowa R. Evid. 401. Thus, the relevancy of the challenged testimony depends upon whether the attempted sale of additional stereo components has the tendency to make more probable or less probable the existence of Morrison's knowledge that the Sony cassette deck was stolen. See id. We conclude the challenged testimony does not have such a tendency, and that it is therefore irrelevant.

Possession, by itself, of an item does not show whether the possessor knows if the item has been stolen. Conclusions about the possessor's knowledge can be reached only through use of inferences. In this case, two separate but related methods of raising an inference of knowledge from the fact of possession could be advanced. First, knowledge may be inferred from proof of other crimes of a similar nature. State v. Leto, 305 N.W.2d 482, 490 (Iowa 1981). Second, possession of recently stolen property permits the jury to infer the property was received

with guilty knowledge. State v. Post, 286 N.W.2d 195, 203 (Iowa 1979). However, these inferences arise only after certain prerequisites are met. The prerequisites were not met in this case, so the inferences could not be made. Admission of the challenged testimony was therefore error.

Before evidence of prior crimes is admissible to raise an inference, the State must present "clear proof" that the defendant was involved in the other crimes. Leto, 305 N.W.2d at 490. In this case, there was no "clear proof" that Morrison was involved in other crimes. There was not even proof of any kind that the Pioneer turntable and receiver he was trying to sell had been stolen. All the State could show was that the two items matched a general description of stolen property. Yet, thousands of people in Iowa own similar stereo components. Because the State did not present the required "clear proof," the challenged testimony could not be admitted under the "other crimes" theory.

Raising the inference of knowledge from possession of recently stolen goods is also only permissible when a proper foundation exists. That foundational requirement is met when the State shows the property in possession was in fact stolen. See Post, 286 N.W.2d at 203. The State did not, and could not, show that the Pioneer components were stolen. Thus, the inference could not arise. The challenged testimony should have been excluded.

II. Morrison raises the issue that the instruction referring to his failure to testify permits the jury to consider that fact in determining his guilt or innocence.

Morrison offered no evidence in the case, and did not take the witness stand in his defense. The trial court gave the following instruction:

> In this case the defendant has elected not to take the witness stand. The defendant is not required to testify on his own behalf and no inference should be drawn as to his guilt or innocence from the fact that he elected to proceed in this manner. The burden of proof remains upon the State to prove the guilt of the defendant beyond a reasonable doubt as set forth in these instructions. (Emphasis added.)

Morrison claims that the phrase ". . . and no inference should be drawn as to his guilt or innocence . . . ," and particularly the use of the word "should," might improperly cause the jurors to believe that they could draw an inference from the defendant's silence. The court correctly observed that the wording of that instruction was that of the uniform instruction. Uniform Jury Instruction (Criminal) No. 238.

An instruction which tells the jury no inference can be drawn from defendant's failure to testify, which is given absent a request by defendant, is error. State v. Kimball, 176 N.W.2d 864, 869 (Iowa 1970). This rule was laid down as a result of the Iowa court's recognition that an instruction such as the cited uniform instruction "is a comment on defendant's failure to testify even though it is supposedly for defendant's benefit and is designed to keep the jury from speculating on the reasons for his failure to take the stand and drawing improper inferences therefrom." The court went on to state:

> Because of the divergent opinions in this sensitive area and as the giving of even a cautionary instruction favorable to defendant may violate the spirit of Griffin v. State of California, [380 U.S. 609, 85 S.Ct. 1229, 14 L. Ed. 106 (1964)] we believe it is advisable for us to take a definitive position on this issue. We now hold that such instruction should not be given in any future trial unless it is requested by defendant, and that it will be considered error if it is given, absent such request, in any trial started after the date this opinion is filed.

Kimball, 176 N.W.2d at 869.

In this case, the cautionary instruction was included by the court in the preliminary draft of instructions submitted to counsel. There is no record of any request being made by Morrison that such instruction be given. The only record made concerning the instruction was Morrison's objection to the wording of the proposed instruction. He did not request that the instruction be given in the form submitted by the court. In fact, he objected to instruction in the form proposed. Counsel for defendant stated:

> MS. ODELL: I would make an objection then the wording of the uniform instruction is not consistent with the constitutional rule no inference can or may be drawn. This implies to the jury there is in their discretion an inference that may or may not be drawn, that they can or can't. You shouldn't but it's not error if you do is what this implies, and I think constitutionally it's absolutely forbidden.

The court overruled the objection and the instruction was given in the form objected to by Morrison.

The objection to the form of the instruction raises the same concerns expressed in Kimball, 176 N.W.2d at 869. In view of the recognized sensitivity of the subject of such an instruction, the language of the uniform instruction is, at best, unfortunate. We cannot say with assurance that the jury would positively understand that the phrase—"and no inference should be drawn as to his guilt or innocence . . ."—meant that the jury could not infer something from Morrison's failure to take the stand. Morrison suggested the phrase should read: "and no inference can be drawn . . . ." The trial court took refuge in the fact that the instruction as proposed was the uniform instruction, and said, "Remember no inference should be drawn. That's the wording of the uniform instruction."

We hold that the wording suggested by defendant is more in accordance with the rule laid down by Griffin, and hold that the uniform instruction should be amended accordingly. We hold that the giving of Instruction 12 in this record was error. Further, upon a retrial of this cause, sufficient record should be made on the issue of defendant's request for such an instruction or the lack of such request. See Kimball, 176 N.W.2d at 869.

III. Morrison next claims that a communication between the bailiff and the jury constituted a verdict-urging communication and deprived defendant of a fair trial.

The jury in this case deliberated for approximately one and one-half hours. They were then separated and sent home for the night with instructions to return at 9:00 a.m. the next day to continue deliberations. At approximately 10:14 a.m.

the next day, the jury gave the bailiff a note which the bailiff recalled said: "We are at an impasse. We have one descending [sic] vote. What now?" The bailiff took the note to the bailiff of Judge Anania (who had been designated to supervise the jury in Judge Pasternak's absence) for instructions, and ultimately received an instruction to tell the jury that it was to continue working until 4:00 p.m. He relayed the information to the jury, adding the statement, "You know, if you get a verdict, you won't be here until four o'clock." A short time later, the jury notified the bailiff that it had a verdict.

Rule 18(5)(g) Iowa Rules of Criminal Procedure provides:

> After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required may be given, in the discretion of the trial court .... Provided, that the procedures described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

Rule 18(5)(h) also provides:

> On final submission, the jury shall retire for deliberation, and be kept together in charge of an officer until they agree on a verdict or are discharged by the court, unless the court permits the jurors to separate temporarily overnight, on weekends or holidays, or in emergencies. The officer in charge must be sworn to not suffer any communication to be made to them during their deliberations, nor to make any himself or herself, except to ask them if they have agreed on a verdict, unless by order of court; nor to communicate to any person the state of their deliberations or the verdict agreed upon before it is rendered.

Arrangements had been made for the bailiff to consult with Judge Anania, when the jury reached a verdict. The judge sent oral instructions through his bailiff to the bailiff supervising the jury. These instructions were relayed by that bailiff. The jury was not brought before the court for its instructions, nor did the court submit a written message to the jury.

Iowa Rule of Criminal Procedure 18(5)(g) gives the court discretion in granting or refusing a jury request for information, but that rule makes the

presence of defendant and counsel at all procedures mandatory unless waived. State v. Griffin, 323 N.W.2d 198, 200 (Iowa 1982). However, matters that deal only with jury management, and not questions of law, may be decided by the trial court without the presence of defendant or counsel. Id. The Iowa Supreme Court has stated a number of times:

> It would be far better for trial courts to conduct all matters involving jury inquiry in the presence of the defendant and counsel, whether additional instructions are given or not. There is good reason for this practice. It provides an adequate record on appeal; it allows counsel an opportunity to argue for or against the giving of additional information to the jury; and it gives the parties, both the defendant and the State, notice of the jury's request which otherwise might go undisclosed.

Id. at 201 (citations omitted).

Despite the better practice of having defendant and counsel present, we must conclude that the communication sent by the judge to the jury resulted in harmless error. See State v. Williams, 341 N.W.2d 748, 751-52 (Iowa 1983) (communication that was not improper, but was merely innocuous, held to be harmless beyond a reasonable doubt). The judge's communication was not verdict-urging, but simply jury management.

We cannot reach such a conclusion, however, about the bailiff's added statement. It is not possible to find that the comments made by the bailiff were nonprejudicial to defendant's case. To make such a determination, "The ultimate test is whether the [comment] improperly coerced or helped coerce a verdict or merely initiated a new train of real deliberation which terminated the disagreement." State v. Campbell, 294 N.W.2d 803, 808 (Iowa 1980).

It is probable that the bailiff's comment in this case could only have the effect of informing the jury that a deadlock would not get them released before four o'clock p.m. and that if they wanted to get away sooner, the one holdout (assuming the "one descending vote" meant there was one holdout) would have to give up and make it a unanimous verdict. It is unlikely that the bailiff's comment

opened up a "new train of real deliberation," since a verdict was reached ten to twenty minutes after the comment.

It is of concern to us that the handling of the jury deliberations in this case fails to acknowledge the importance of this case to both the State of Iowa and to the defendant. Of equal, if not greater importance, is that such conduct of jury trials, and such apparent disregard for the rules may contribute to a lessening of public confidence in the system. As was stated in the case of Daniels v. Bloomquist:

> It has been said the deliberation of the jury is a final and crucial stage of any trial. In order that the institution of jury trials be preserved and its usefulness continued, its deliberations and pronouncements must be kept pure, and untainted, not only from all improper influences, but from the appearance thereof. It is often said that the jury trial is one of the bulwarks of our liberty, but it will remain so only as long as public confidence in the institution prevails.
>
> Whether injury or injustice has resulted to the litigants by reason of the conduct is not our primary concern. Rather, our concern is with the implication that attaches to the administration of justice under these circumstances. Confidence in our judicial system is imperiled if such conduct is countenanced in jury trials. Conduct which if proved would give rise to doubt and disrespect, or the mere appearance of such conduct as will not meet with the approval of public opinion, must be severely condemned. It is only through the granting of a new trial in situations like this, as well as vigilant efforts by the officers of the court to prevent such occurrences, that public confidence in the jury system may be preserved.

258 Iowa 301, 306-07, 138 N.W.2d 868, 871-72 (1965) (citations omitted). If one of the jurors in this case has the opinion that the fate of the defendant was decided by the need to be released before four o'clock p.m., damage has been done to the system. It is the obligation of the trial judge to make sure the jury's deliberations are carried out under the rules. In this case, that duty was totally abdicated by the trial judge and resulted in error being committed by the bailiff. We cannot find that the error was harmless.

IV. Morrison's last claim relates to the failure to have Morrison or counsel, either for the State of Iowa or for Morrison, present at the reporting of the verdict. Morrison suggests that such procedure violates rule 25(1) of the Iowa Rules of Criminal Procedure. We agree. That rule provides:

> 1. In felony cases the defendant shall be present at the arraignment and plea, unless a written arraignment form as provided in R.Cr.P.8(1) is filed, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. In other cases the defendant may appear by counsel.

Neither counsel for the State, counsel for Morrison, or Morrison himself were present at the reporting of the verdict. The report was made to a judge whose only contact with the case was the taking of the verdict. The record shows that the jury was not polled at the request of one of the parties, as prescribed by rule 21(5), Iowa Rule of Criminal Procedure. The trial court's findings to the contrary are not supported by the record. No party was present to request such a polling. The right to poll the jury is an important right. State v. Callahan, 55 Iowa 364, 365, 7 N.W. 603 (1880).

The State concedes that if prejudice is presumed from the fact of defendant's absence at the reporting of the verdict, a new trial is required because the State cannot demonstrate that the error was harmless. Morrison is entitled to a new trial on this issue.

V. Because we hold that Morrison is entitled to a new trial, we do not comment upon the remaining issue raised by him and conceded by the State on the issue of his sentencing.

REVERSED AND REMANDED FOR NEW TRIAL.