IN THE COURT OF APPEALS OF IOWA

No. 9-240 / 98-0239
Filed July 23, 1999

STATE OF IOWA,

Appellee,

vs.

JAMES LEO FREUND,

Appellant.

FILED
JUL 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Shelby County, Keith E. Burgett, Judge.

James Freund appeals his conviction for fourth-degree theft. **JUDGMENT AFFIRMED; REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Jeffrey L. Larson, County Attorney, and Susan Larson-Christensen, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

VOGEL, J.

James Freund appeals his conviction for fourth-degree theft. We affirm his conviction, but remand for resentencing.

Background facts. On March 26, 1997, Exclusive Healthcare Inc., a Mutual of Omaha Company, issued a check to Freund in the amount of $129 to reimburse him for overpayments made under his insurance plan. In April of 1997, Freund cashed this check and a duplicate of the check at the Hy-Vee grocery store in Harlan, Iowa. The manager of the Hy-Vee reported Freund to police after the duplicate check was returned and Freund failed to return payment to the store.

Following an investigation, Freund was charged with fourth-degree theft. Trial was held in December of 1997. At the close of the State's evidence, Freund moved for a judgment of acquittal. The trial court denied the motion and Freund proceeded to put on a defense. The jury returned a verdict of guilty, and Freund now appeals.

I. Hearsay testimony. Freund asserts the trial court erred in overruling his objections to hearsay. Freund further asserts that his counsel was ineffective for failing to object to all instances of hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). Hearsay is generally inadmissible unless it falls within one of the enumerated exceptions set forth in the rules. *See* Iowa R. Evid. 802 & 803. If hearsay is admitted, prejudice to the non-offering party is presumed unless

the contrary is established. *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996). The admission of hearsay evidence is reviewed for corrections of errors at law. *See State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). In those instances where Freund claims his counsel failed to object to hearsay, our review is de novo. *See State v. Keesey*, 519 N.W.2d 836, 837-38 (Iowa App. 1994) (court reviews de novo claims of ineffective assistance of counsel).

The State called three witnesses at trial, Tim Sullivan, manager of the Hy-Vee where Freund cashed the checks, James Archer, the investigating police officer, and James Dale, an investigator from Mutual of Omaha. At trial Freund objected to testimony from Archer, which recited statements made by Dale, Sullivan and other Hy-Vee employees. Among other things, Archer's testimony identified the duplicate check and allowed its introduction into evidence, and identified that Freund was the individual who cashed the check. We disagree with the State's argument that this hearsay was admissible for the purpose of explaining Archer's subsequent conduct and investigation. Generally, an investigating officer may explain his actions by testifying as to what information he had and its source regarding the crime and the criminal. *State v. Reynolds*, 250 N.W.2d 434, 440 (Iowa 1977) (citation omitted). However, the scope of this evidence is limited and should not go beyond the point of explaining why certain responsive actions were taken by an officer. *See State v. Doughty*, 359 N.W.2d 439, 442 (Iowa 1984); *see also State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa App. 1997). Archer's testimony clearly went beyond a mere explanation

of the course of his investigation. However, we do find that the admission of this, and other,[1] hearsay did not prejudice Freund.

At trial, Freund identified both the original check and the duplicate. He readily admitted that he cashed both checks, but denied knowing that the second check was a duplicate and denied making the duplicate. He testified that he thought he was due additional funds from Mutual of Omaha, and believed the second check to be valid. The following exchange took place during Freund's direct examination:

> COUNSEL: Okay. Now you've heard the testimony here today that you received a duplicate check which is marked as Exhibit Number 2.
>
> * * *
>
> And I will hand you that Exhibit Number 2. Do you recognize that?
>
> FREUND: Yeah.
>
> COUNSEL: Is that your signature on the back?
>
> FREUND: Yes.
>
> COUNSEL: Is this something that you took to Hy-Vee for money?
>
> FREUND: Correct, yes.
>
> COUNSEL: Did you take it to Hy-Vee at the same time that you took this check that's shown as Exhibit Number 1?
>
> FREUND: No.
>
> COUNSEL: Do you see on this check that it says void if background not blue, void if background not blue?

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[1] Freund also claims his trial counsel was ineffective for failing to object to the foundational deficiencies for the State's exhibits 1 and 2, the original check and the duplicate.

FREUND: Yes.

COUNSEL: Did you see it at the time that you took it in to Hy-Vee?

FREUND: No.

COUNSEL: Did you know that it was not a good check?

FREUND: No.

COUNSEL: Did you know that it was a copy of a check?

FREUND: No.

COUNSEL: Did anyone at Hy-Vee question you about whether or not it was a good check or not?

FREUND: No.

* * *

COUNSEL: Were you trying to get money from Hy-Vee on a -- a copied check that would not be good when it went through the bank system?

FREUND: No.

COUNSEL: Did you tell Jim Archer that?

FREUND: Yes.

COUNSEL: What did you tell him?

FREUND: Well, I told him I thought it was a good check and, well -- the day that I was there I said, well, I'd give him cash for it just to get the -- get it over with. I didn't know it wasn't a good check.

COUNSEL: Uh-huh. Would they take the money then?

FREUND: No.

Freund's own testimony made much of the admitted hearsay cumulative. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (admitted hearsay which is merely cumulative is not prejudicial). More importantly, Freund's defense did not hinge upon the jury's rejection of any of the hearsay testimony. The crucial issue for the jury to decide was whether Freund knew that the second check was a duplicate when he cashed it. The admitted hearsay was not relevant to that question.

II. Sullivan's testimony. Freund also claims his counsel was ineffective in failing to object to Sullivan's testimony on the grounds that he was not listed as a witness in the trial information. We agree that an objection to Sullivan's testimony on these grounds would have properly been granted. *See* Iowa R. Crim. P. 5(3). However, as with the hearsay testimony, Freund's own testimony and admissions made Sullivan's testimony cumulative. We conclude Freund suffered no prejudice.

III. Jury instructions. Freund next claims his counsel was ineffective in failing to request jury instructions on the defenses of claim of right[2] and ignorance or mistake of fact.[3] Two of the relevant instructions given to the jury stated as follows:

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[2]Iowa Uniform Jury Instruction 1400.19 (1988) provides:

> A person who [takes] [disposes of] [uses] [acquires] property is not guilty of Theft if [he] [she] reasonably believes [he] [she] has a right, privilege, or permission to do so, or if [he] [she] does in fact have such right, privilege or permission.

[3] Iowa Uniform Jury Instruction 200.39 (1988) provides:

> The defendant claims that at the time of the [act] [omission] in question, [he] [she] was [ignorant of (element of crime to which ignorance is directed)] [acting under a mistake of fact as to (element of crime to which mistake of fact is directed)]. When an [act is committed] [omission is made]

Instruction No 14

The State must prove all of the following elements of Theft in the Fourth Degree:
1. Defendant did deliver or give a check to Hy-Vee in the amount of $129.00.
2. The check was drawn on a bank.
3. The defendant received money in exchange for the check.
4. *The defendant knew at the time he gave the check to Hy-Vee it would not be paid by the bank because it was a duplicate check.*

If the State has proved all the elements, the defendant is guilty. If the State has failed to prove any one of the elements, the defendant is not guilty.

Instruction No. 16

For the defendant to have knowledge of something means he had a conscious awareness the check presented to Hy-Vee was a photocopy or duplicate of an original check which would not be paid by the bank.

(Emphasis added.)

Although either a claim of right and ignorance or mistake of fact instruction could have been properly submitted to the jury, we find Freund suffered no prejudice from the omission. In his defense, Freund testified that he believed he had a legitimate right to the second check and believed it was a valid check. In finding

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because of [ignorance] [mistake of fact], the [ignorance] [mistake of fact] must be because of a good faith reasonable belief by the defendant, acting as a reasonably careful person under similar circumstances.

The defendant must inquire or determine what is true when to do so would be reasonable under the circumstances.

The State has the burden of proving the defendant was not acting under [ignorance] [mistake of fact] as it applies to the question of [element].

(Emphasis in the original.)

Freund guilty, the jury necessarily rejected both a claim of right and ignorance or mistake of fact defenses. As Freund cannot show he suffered any prejudice from counsel's failure to request the instructions, this claim of ineffective assistance must also fail.

IV. Sentencing. Finally, Freund contends the district court erred by failing to make an adequate statement explaining its reasons for his sentence.

A sentencing court is required to state on the record its reasons for selecting a sentencing option. Iowa R. Crim. P. 22 (3)(d); *State v. Mai*, 572 N.W.2d 168, 170 (Iowa App. 1997). The purpose of this rule is to allow the appellate court to determine whether there has been an abuse of discretion. *Mai*, 572 N.W.2d at 170 (citation omitted). It is an abuse of discretion if the court fails to state reasons for the sentence imposed. *See State v. Oliver*, 588 N.W.2d 412, 414 (Iowa 1998). Failure to adequately do so requires us to vacate the sentence and remand the case for resentencing. *Mai*, 572 N.W.2d at 170.

At sentencing, the court heard from Freund and his counsel before pronouncing his sentence. The court gave Freund an opportunity to finish his comments, and the following exchange occurred:

> THE COURT: Well, you are going to jail.
>
> THE DEFENDANT: Well, I figured I was but --
>
> THE COURT: 12 people took almost I think it was an hour to decide that you were guilty.
>
> THE DEFENDANT: Uh-huh.

> THE COURT: It certainly wasn't very long.
>
> THE DEFENDANT: Well --
>
> THE COURT: They heard all of the testimony. They also heard a very competent person who came here from Mutual of Omaha to describe how they identify the checks, how they identify the copies.
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> * * *
>
> THE COURT: I gave you an opportunity to visit about what you believed your position was. But 12 people found you guilty of Fourth Degree theft. That's a year in the county jail and a thousand dollar fine and I'm going to sentence you to a year in the county jail and fine you $150 as well as require when you get out that you must pay your court-appointed attorney fees and be placed on probation for one year following your release from jail. I'm going to suspend all but 45 days and mittimus issues at the present time, immediately.

We find that the record does not contain an adequate statement by the court to explain its reasons for the sentence imposed. We therefore vacate Freund's sentence and remand for resentencing.

V. Conclusion. Having considered all other issues properly before us on appeal, we hereby affirm the conviction of James Freund, but vacate his sentence and remand for resentencing.

JUDGMENT AFFIRMED; REMANDED FOR RESENTENCING.