

FILED

MAR 31 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed March 31, 1980

vs.

)

BLAIR EDWARD JONES,

)

352

Defendant-Appellant.

)

62841

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Defendant appeals conviction of first degree robbery in violation of section 711.2, supplement to the Code 1977. Affirmed.

Douglas V. Coonrad of Patterson Law Firm, Waterloo, for defendant-appellant.

Thomas E. Miller, Attorney General of Iowa, Douglas F. Staskal, Assistant Attorney General, and David H. Correll, Black Hawk County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant appeals conviction of first degree robbery in violation of section 711.2, supplement to the Code 1977. For reversal, defendant contends: Trial court erred in overruling his motion for a mistrial because of prejudicial statements by three witnesses; trial court erred in allowing police officer to testify to what defendant's alleged accomplice said upon arrest; and trial court erred in not suppressing results of search of defendant's car. We affirm.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

On May 24, 1978, defendant and John Manning were charged by information with robbery in the first degree, in violation of section 711.2, supplement to the Code 1977, of a Waterloo gas station on May 19, 1978. Defendant was tried on September 5, 1978, and the jury returned a verdict of guilty. The trial court sentenced defendant to imprisonment for a term not to exceed twenty-five years, with a mandatory minimum five-year term.

II.

Initially, defendant contends the trial court erred in overruling his three motions for a mistrial. Trial courts have considerable discretion in ruling on motions for mistrial; they are in a better position than we to gauge the effect on the jury of the matter in question. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977); State v. Cage, 218 N.W.2d 582, 586 (Iowa 1974); see State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978). We intervene only where this discretion is abused. Abuse of discretion is shown only when it is demonstrated such discretion was exercised on untenable or unreasonable grounds. Trudo, 253 N.W.2d at 106; State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976); State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976). Our inquiry here focuses on whether the trial court abused its discretion by determining the jury was not prejudiced by exposure to certain evidence.

Defendant first complains of an allegedly prejudicial remark occurring in the testimony of police officer Mark Shoars, when he stated he was attempting to locate on the day of the robbery "the vehicle used in the incident" while referring to defendant's

automobile. Defense counsel objected on the ground there was no evidence to prove defendant's automobile was used in the robbery and moved for a mistrial because the witness' statement invaded the province of the jury. Initially, the trial court overruled the defense motion. After hearing defendant's argument outside the presence of the jury, however, the trial court sustained the objection, ordered the question and answer be stricken, and admonished the jury to disregard the answer, but overruled defendant's motion for a mistrial. The trial court then allowed the State to ask another question, but required any reference to the automobile be in terms of "the reported vehicle" or "vehicle fitting a certain description."

Prompt withdrawal of improper testimony by the trial court with an admonition to the jury to disregard the elicited testimony "leaves no ground for complaint except in extreme instances where it is manifest its prejudicial effect remained and influenced the verdict despite its exclusion." State v. Johnson, 183 N.W.2d 194, 198 (Iowa 1971). Here, the trial court's exclusion of the evidence and admonishment to the jury erased any prejudicial effect the evidence may have had, particularly in light of the evidence introduced prior to it and that the officer never testified defendant's vehicle was used in the robbery or defendant owned or operated the vehicle used in the robbery. Id.

Next, defendant contends the trial court erred in overruling his motion for a mistrial after State's witness, John Manning, allegedly impeached a defense witness. In response to State's question of whether he knew why James Karr did not want to give him a ride to pick up the gun used in the robbery, Manning stated: "I think he was already in some trouble on papers or something and he didn't want —." Here, defense counsel objected on the ground the statement impeached defendant's witness, James Karr. The trial court sustained the objection, ordered the answer to be stricken from the record, and admonished the jury to disregard the answer, but overruled defendant's motion for a mistrial. The trial court did not abuse its discretion in so ruling. Cage, 218 N.W.2d at 586. Moreover, similar testimony was later introduced by defendant himself, rendering harmless any prejudicial effect. Trudo, 253 N.W.2d at 107-08; State v. Leonard, 243 N.W.2d 887, 891 (Iowa 1976).

Defendant also challenges a question asked of the defendant by State's attorney, concerning the presence of a knife in defendant's toolbox. The trial court sustained defendant's objection, ordered the question be stricken from the record, and admonished the jury to disregard it, but again denied defendant's motion for a mistrial. Defendant argues the prejudice arising from this question could not be eliminated by striking the question. We are unpersuaded and find no abuse of discretion here. See Johnson, 183 N.W.2d at 198.

III.

Defendant contends the trial court erred in allowing Detective Sergeant Stephen Dwyer to testify regarding his conversation with John Manning. State's attorney asked Dwyer what Manning told him about how he had gotten to the scene of the robbery. Defense counsel objected on hearsay and relevancy grounds. The trial court overruled the objection and allowed Dwyer to answer: "he [Manning] stated he was dropped off at the intersection of Mulberry and Lane Street by Blair Jones." Dwyer was also allowed to answer over defendant's objection the question: "Did he tell you where he got the shotgun from that he used in the robbery?" Dwyer's answer was "[Manning] stated he got the shotgun from Blair Jones." Defendant contends these questions and answers serve no other purpose but to implicate him and they are inadmissible hearsay. The State concedes the statements are inadmissible hearsay, but contends the error was harmless to defendant since the same evidence came in during subsequent testimony. See State v. Johnson, 272 N.W.2d 480, 482-83 (Iowa 1978); Trudo, 253 N.W.2d at 107; State v. Jurgenson, 225 N.W.2d 310, 311-12 (Iowa 1975).

Admission of hearsay evidence is presumed to be prejudicial error unless the contrary is shown. State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). The presence of substantially the same evidence in the record does not overcome this presumption unless it is extremely trustworthy. Id. In Horn the supreme court concluded that testimony coming from a witness involved in the crime whose testimony resulted from a bargain with the county attorney was not sufficiently trustworthy to make the objectionable hearsay harmless. Id. at 724-25. Distinguishing this case from Horn is the trial court's finding that Manning's testimony did not result from any bargain with the county

attorney; this finding is supported by substantial evidence in the record. Moreover, with respect to the hearsay statement as to where defendant dropped off Manning, defendant himself testified to this. Admission of evidence is not prejudicial when the defendant testifies to the same facts. Trudo, 253 N.W.2d at 108. Defendant's objections to Manning's testimony were insufficient to preserve error. Neither Iowa R. Crim. P. 20(3) nor section 782.5, The Code 1977, are evidence excluding rules, but rather require corroboration of accomplice testimony to support a conviction. We conclude Manning's and defendant's independent testimony is sufficiently trustworthy to make harmless the admission of the objectionable hearsay.

IV.

Defendant contends the trial court exhibited bias against defendant in its conduct before the jury and assumed a prosecutorial role during the trial. The primary basis of defendant's claim is the trial court's numerous adverse rulings. He also raises instances where the trial judge exhibited an alleged antagonistic attitude toward defense counsel, gave testimony, questioned witnesses, and put into evidence exhibits not offered by the State. After carefully reviewing each incident, we find no evidence of any bias by the trial court. See State v. Smith, 282 N.W.2d 138, 142 (Iowa 1979). Having failed to establish the prejudice of any alleged error, defendant's claim of cumulative prejudicial effect is meritless. State v. Pierce, 287 N.W.2d 570, 575 (Iowa 1980).

The mere number of adverse rulings can be of no consequence since they are a function of defense objections and application of law. Unless the ruling is erroneous, no reversible error arises even though defense counsel raises many objections that are all overruled. Finding otherwise would invite parties to raise numerous frivolous objections in an attempt to create the appearance of bias. Here, most of the rulings defendant relies on to show bias are not even challenged by him as erroneous. Those that defendant contends are erroneous are raised elsewhere in his brief; we have examined and found them to be correct. We find the trial judge's conduct to be fair and demonstrated concern for defendant's rights. State v. Jensen, 245 Iowa 1363, 1368-69, 66 N.W.2d 480, 483 (1954).

V.

Lastly, defendant contends results of the search of his automobile pursuant to a search warrant are inadmissible because the automobile had already been searched by the police prior to obtaining the warrant. Further, no chain of custody was established to demonstrate the automobile was secure from the time it was taken into police custody to the time it was searched pursuant to the search warrant. In the warrant search of defendant's automobile, police officers found a green metal box that contained a knife and shotgun shells along with some tools. These items and a photograph of the box located in the automobile were admitted into evidence over defendant's objections. The fighting issue is whether this evidence was discovered in a search pursuant to a valid search warrant after the automobile remained in the continuous custody of the police.

In a hearing on defendant's motion to suppress these items, defendant sought to prove police officers searched defendant's automobile prior to obtaining a search warrant and a continuous chain of the automobile's custody had not been shown. While two defense witnesses testified they saw police officers search defendant's automobile upon its seizure, there were substantial discrepancies in their testimony. The police officers involved testified they did not search the automobile. Defendant further contends the specificity of the search warrant application tends to show the police officers searched the automobile before obtaining the search warrant. The trial court, however, found defendant failed to establish the occurrence of a search prior to the one done pursuant to the search warrant. Under these facts, we hold the trial court did not abuse its discretion in so finding. Defendant's argument depends largely on the credibility of his two witnesses; we find no reason for reversing the trial court's assessment on this point. See Northwestern National Insurance Co. v. Raid Quarries Corp., 249 N.W.2d 640, 642 (Iowa 1977).

On the chain of custody issue, defendant introduced testimony creating some doubt as to the continuity and control of the police custody of defendant's automobile, particularly as to where the automobile was parked in the police lot. State must show circumstances making it reasonably probable that tampering, substitution, or alteration of evidence did not occur. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978); State v.

Branch, 222 N.W.2d 423, 426 (Iowa 1974). Considering the facts the automobile was locked when taken into custody and the police lot was under twenty-four hour television surveillance, we hold the trial court did not abuse its discretion in finding tampering or substitution had not occurred. State v. Lunsford, 204 N.W.2d 613, 617-18 (Iowa 1973); see State v. Orozco, No. 62554, slip op. at 5-6 (Iowa, filed March 19, 1980).

We affirm the trial court's judgment.

AFFIRMED.