IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

WILLIAM FRANKLIN GAINES, JR.,

Defendant-Appellant.

Filed November 10, 1983

3-329
69121

Appeal from Polk District Court, Ray A. Fenton, Judge.

Defendant appeals from his conviction for burglary in the second degree and assault while participating in a felony in violation of Iowa Code sections 708.3 and 713.3. REVERSED AND REMANDED.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

OXBERGER, C.J.

Defendant appeals from his conviction for burglary in the second degree and assault while participating in a felony in violation of Iowa Code sections 708.3 and 713.3, asserting: (1) that the evidence was insufficient to support the jury's verdict of guilty; (2) that a mistrial should have been granted due to a police officer's testimony that defendant remained silent when asked his name; and (3) that the testimony of two police officers improperly exceeded the scope of the minutes of testimony. The State asserts, inter alia, that any error with regard to the minutes of testimony was harmless. We reverse and remand.

Two police officers responding to a silent burglary alarm at a community center at approximately 10:30 p.m. split up when they arrived at the scene. One of them observed defendant near the building and a struggle commenced, during the course of which defendant was subdued with the aid of the other officer. An outside window had been broken and there was damage to interior doors and windows. A cash box on a game machine had been pried open, and unidentifiable muddy footprints were found inside. Defendant's palmprint and three fingerprints were found on a refrigerator. When first observed, defendant was walking away from the broken window and was carrying either a tire iron or a stick.

Defendant testified, inter alia, that he lived in the area and was walking in the area taking a shortcut home when he was grabbed by a person that he did not immediately realize was a police officer. He testified that he used the community center for recreational purposes and could have left his palm and fingerprints while there earlier in the day. No employee of the center testified and there was no direct evidence concerning its hours of operation or condition earlier in the day and there was no evidence that anything had been stolen during the break-in.

Over objection that it exceeded the scope of the minutes of testimony the two arresting officers were permitted to testify that the center was not open when they arrived. The minutes of testimony detailed their expected testimony concerning their arrival at the scene. The minutes did not state that they would testify that the building was not open but did state that they would testify concerning "other matters pertaining to the crime."

I. Sufficiency of the Evidence

In our review of a motion for directed verdict of acquittal based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State and all of the evidence must be considered. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). If there is any evidence that could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt, the trial court's denial of the motion will withstand a challenge. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980).

The circumstances under which defendant was first apprehended, and the facts disclosed on further investigation were such that a rational trier of fact could have found that defendant was guilty beyond a reasonable doubt of burglary and of assault while attempting to commit a felony.

As such, we find no error in the trial court's denial of the directed verdict on Count I or Count II.

II. Right to Remain Silent

As the direct examination proceeded, the following record was made:

> Q. Did you have occasion to speak to the defendant on that night?
> A. I attempted to ask the defendant his name shortly after I arrived at the Wilkie House, when I was sitting in the jeep; however he didn't answer me at all.

Gaines contends the answer of the officer was impermissible evidence of his exercise of his right to remain silent.

The right of a person to remain *silent* protects an accused from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 1830, 16 L. Ed. 2d 908, 914 (1966). Both federal and state courts have generally held that the privilege offers no protection against compulsion to submit to fingerprinting, photographing, measurements, or to write or speak for identification purposes. Id. at 764, 86 S. Ct. at 1832, 16 L. Ed. 2d at 916. The defendant, Gaines, was asked his name solely for identification purposes. He was not compelled to utter *statements of* a testimonial nature, nor asked to speak his guilt. See United States v. Wade, 388 U.S. 218, 222-23, 87 S. Ct. 1926, 1930, 18 L. Ed. 2d 1149, 1155 (1967). *Therefore*, since the privilege did not attach we cannot agree that his right to remain silent was violated.

Even assuming that there *was error in* its admission, however, we find the error to be harmless beyond a reasonable doubt. See State v. Porter, 283 N.W.2d 351, 353 (Iowa 1979). We have reviewed the transcript and find that the comment was not emphasized nor mentioned again. Therefore, it was not so prejudicial as to require a mistrial. See United States v. Buttorff, 572 F.2d 619, 626 (8th Cir. 1978).

III. Minute of Testimony

Iowa Rule of Criminal Procedure 5(3) provides:

> The prosecuting attorney shall, at the time of filing such information, endorse or cause to be endorsed thereon the names of the witnesses whose evidence the prosecuting attorney expects to introduce and use on the trial of the same, and shall also file with such information the minutes of evidence of such witness which shall consist of a notice in writing stating the name, place of residence and occupation of each witness upon whose expected testimony the information is based, and a full and fair statement of the witness' expected testimony.

Iowa R. Crim. P. 5(3). There are no fixed criteria with which to determine what constitutes a "full and fair statement of the witness' expected testimony." State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). This is decided on a case-by-case basis. Id. at 614. Minutes do not need to detail each circumstance of the testimony, but must be sufficient to alert fully the defendant generally to the source and nature of the evidence against him. Id. at 614. The State agrees that the minutes did not specifically state that the officers would testify that Wilkie House was open. However, the State contends that when the minutes stated that the officers would testify to "other matters pertaining to the crime," this encompassed the officers' observations that Wilkie House was not open to the public. The State cannot insert a "catchall" phrase and expect it to be a panacea for all discrepancies within the minutes.

Since we find the "catchall" phrase inadequate, we now examine the scope of the minutes. The question of whether Wilkie House was open to the public was material on the issue of defendant's alleged burglary. Three alternative offenses are defined in Iowa Code section 713.1. They have two common elements which are requisite intent and absence of authority. State v. Sangster, 299 N.W.2d 661, 662 (Iowa 1980).

> When those elements exist, a person is guilty of burglary who (1) enters an occupied structure or area enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft or criminal mischief, such occupied structure or place not being open to the public, or (2) who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or (3) who breaks an occupied structure or other place, where anything of value is kept. . . .

Id. at 662-63 (quoting in part from Iowa Code § 713.1). The law of the case embodied in Jury Instruction No. 11 stated, inter alia, that the State must prove beyond a reasonable doubt that Wilkie Center was not open to the public. Through this jury instruction, the State submitted to establishing Gaines' guilt under the first alternative, as the State acquiesced in the instruction and lodged no objection.

The minutes of testimony of Officer Robison and Officer Hartman were quite extensive. However, there was no mention made that these officers would testify to whether the building was open to the public. The State had to be well aware of their intent to elicit this testimony from these officers as no employee of Wilkie House was ever called to testify. See State v. Epps, 313 N.W.2d 553, 557-58 (Iowa 1981). Therefore, we find it hard to believe this testimony about whether Wilkie House was open to the public was not "expected testimony" within the meaning of Iowa Rule of Criminal Procedure 5(3). See State v. Lampman, ___ N.W 2d ___(Iowa Ct. App. 1983).

In State v. Olsen, 293 N.W.2d 216 (Iowa 1980), the court held that defendant was entitled to a new trial because of the State's violation of rule 5(3). The State questioned a D.C.I. agent about his training and experience in drug investigations and about methods of packaging and distributing marijuana. The testimony was material on the issue of defendant's possession with intent to deliver. See Iowa Code § 204.401(1)(1977). The minutes indicated that the agent would testify that he processed evidence from defendant's car, which included marijuana which was sent to the crime laboratory and reported to be marijuana. The court found that questioning concerning the packaging and distributing of marijuana was outside the scope of minutes, was material to the charge, and necessitated reversal. We find the same to be true of the case at bar.

In State v. Ristau, ___ N.W.2d ___ (Iowa 1983), the State sought to establish that the victim was not free to leave. The charge was kidnapping. The court said:

> Although the minutes did not detail the conversation complained of, the challenged statement was consistent with the overall nature of her testimony. The defendant cannot claim he was surprised by her testimony that she was not free to leave. The minutes fully and fairly alerted defendant generally to the source and nature of the evidence against him.

The minutes of testimony of Officers Robison and Harmman stated that when they arrived at the Wilkie House at 10:30 p.m. to check out the alarm drop, the defendant was coming out and away from a window on the north side of the building with a tire iron in his left hand down to his side. A fight between the officer and the defendant then occurred. The minutes did not reveal any details relating to the issue of whether the building was open or closed to the public.

We cannot say that evidence of breaking and entering a building and evidence of resisting an arrest sufficiently alert the defendant that evidence on the issue of whether the building is open to the public will be offered.

If we could conclude that criminals only break and enter closed buildings, then we conclude in light of the Ristau criteria that the issue of an open or closed building naturally flows from the fact that the building was broken into. However, criminals can break into open buildings as access to parts of an open building may be more secretive.

The minutes in this case did not provide the basis on which the testimony was being offered. As such, since a timely objection to the question was lodged as going beyond the substance of matters set out in the minutes of testimony, and such question was material to the issue of defendant's charge, then the requirement of rule 5(3) has been violated.

The State subsequently asserts that even if there was an error on the minutes of testimony issue, such error was harmless because on one occasion no objection was made when one of the officers testified that the building was not open. On that occasion, however, the officer's answer when asked if the building was open was as follows: "Not on my side." Such an answer does not render harmless error other such testimony to which objection was made, that the building was not open to the public at all, when the State was required to prove that element beyond a reasonable doubt.

Therefore, we hold that rule 5(3) was violated and that such was not harmless. Defendant Gaines is entitled to a new trial for reasons stated in Division III.

REVERSED AND REMANDED.

All judges concur except Snell, J., who dissents.

SNELL, J. (dissenting)

I respectfully dissent. I do not believe that Rule of Criminal Procedure 5(3) was violated, but if it was, the issue was waived by the failure to object to evidence admitted at trial. The minutes of testimony stated that the officers were dispatched to the scene of the burglary in answer to a burglar alarm at about 10:30 p.m. Officer Robison would testify that: on arriving he checked the alarm drop and then observed defendant coming out and away from a window on the north side of the building carrying a tire iron; defendant was ordered to drop the tire iron; defendant threw the iron in the alley and Officer Robison put his weapon away and at that time defendant attempted to hit Officer Robison with his right fist; Officer Robison struck defendant with his flashlight; defendant tried to get away, but Officer Robison held the flashlight in front of defendant's throat and tried to pull him down from the rear; defendant got out of the hold and made an attempt for the officer's gun; defendant tried to put the muzzle on the officer's chest, attempting to pull the trigger, which cut the officer's finger; defendant and the officer fell on a bank while still struggling for the gun; Officer Robison forced the muzzle of the weapon into the ground; defendant was subdued finally by Officer Robison and another officer; Officer Robison sustained a cut finger, a scraped left hand, broken glasses, and his clothing and gun were muddied while struggling with defendant on the ground.

The minutes showed that Officer Hartman would testify that he saw defendant walking away from a broken window later determined to be the entry and exit point of the burglary. Officer Hartman also would testify that inside the building he observed glass broken out of the kitchen door, two other interior doors that were pried and damaged, and glass broken out of one of them. Altogether, three doors had been pried and damaged and three windows broken.

The minutes showed that Tim Briggs of the Des Moines Police Department would testify that shortly after 10:30 p.m. he examined the building and observed a

broken window that was apparently the exit and entry point. He also observed muddy footprints inside the building.

The purpose of Rule 5(3) is to provide a full and fair statement of the witness's testimony so that defendant is assured a fair trial, and "to assure minutes which would eliminate most claims of foul play and would provide meaningful minutes from which a defense could be prepared." State v. Walker, 281 N.W.2d 612, 613 (Iowa 1979). I believe this criteria was satisfied in this case. Where the minutes of testimony are detailed and lengthy, as they were in this case, and where the minutes signal defendant that the witness would testify about the circumstances involved in a necessary element of the crime, the defendant cannot claim he was surprised by the witness's testimony. Given the circumstances of this crime and the testimony outlined by the minutes, it hardly can be said in this case that defendant was surprised or that he could not reasonably expect the officers to testify that the building was "not open to the public." The reasoning of State v. Walker, recently has been discussed and applied in State v. Ristau, ___ N.W.2d ___ (Iowa 1983). There, the minutes detailed the circumstances surrounding the kidnapping and sexual abuse of the victim by defendant and another man. At trial, the victim was allowed to testify over objection that "one of them said, don't run off." Defendant claimed he was surprised by this testimony which was not explicitly stated in the minutes as expected testimony. In rejecting defendant's claim of reversible error, the supreme court said:

> Although the minutes did not detail the conversation complained of, the challenged statement was consistent with the overall nature of her testimony. The defendant cannot claim he was surprised by her testimony that she was not free to leave. The minutes fully and fairly alerted defendant generally to the source and nature of the evidence against him.

___ N.W.2d at ___.

In the case at bar, the testimony that the building was not open to the public was consistent with the officers' testimony as outlined in the minutes that

defendant was observed at 10:30 p.m. coming out and away from a broken window on the north side of the building carrying a tire iron. By requiring an explicit statement as to this particular testimony, the majority permits a technicality to overpower the reasonableness of the rule's intent.

At trial, Officer Hartman testified without objection that the building was not open on his side. Any technical error regarding the minutes thus was waived. Moreover, the officer's testimony, rather than being overly embracive on whether the building was locked, was an accurate statement of his observations and should be commended. The fact that he couched the answer in a philosophical mien does not lessen its strength.

I would affirm the conviction.