

FILED

MAR 22 1979

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Appellee,

)

Filed March 22, 1979

vs.

)

WALLACE MADDEN,

)

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61678

Appellant.

)

Appeal from Linn District Court - Robert Osmundson, Judge.

Defendant appeals his conviction of robbery with aggravation pursuant to § 711.1 and § 711.2, The Code 1977, alleging errors in the failure to hold a preliminary examination, in the denial of his motion for a continuance, in the overruling of his motion in limine, in the failure to admit certain impeachment testimony concerning a witness for the prosecution, in the lack of impartiality evidenced by the trial judge, and in the denial of his motion for mistrial based on defendant's appearance in the area of the jury while handcuffed. - AFFIRMED.

Philip B. Mears, Iowa City, for Appellant.

Thomas J. Miller, Attorney General of Iowa, J. Susan Allender, Assistant Attorney General and Eugene Kopecky, Linn County Attorney, for Appellee.

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

SNELL, J.

Defendant appeals his conviction of robbery with aggravation pursuant to § 711.1 and § 711.2, The Code 1977. We affirm.

I. Defendant initially maintains that it was error to overrule his motion to set aside the information or to provide a preliminary examination, claiming his constitutional right to judicial determination of probable cause was violated. Gerstein v. Pugh, 420 U.S. 103, 114, 95 S. Ct. 854, 863, 43 L.Ed. 54, 65 (1975). Defendant was arrested on August 21, 1977 and arraigned on August 22, 1977. A preliminary hearing was scheduled for August 30 but was not held even though defendant had not waived the hearing. On August 31, a county attorney's information was filed.

Charging a defendant by means of county attorney's information satisfies Gerstein and renders a preliminary examination unnecessary. State v. Henderson, 268 N.W.2d 173, 176 rehearing denied, 272 N.W.2d 492 (Iowa 1978). Furthermore, "although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." Gerstein, 420 U.S. at 118, 95 S. Ct. at 865, 43 L.Ed. at 68; Henderson, 268 N.W.2d at 176; State v. Lass, 228 N.W.2d 758, 763 (Iowa 1975). Defendant's contention that State v. Lass should not apply here is without merit. Defendant's conviction cannot be reversed on this particular ground.

II. Defendant next asserts that the trial court's denial of his motion for a continuance denied him the effective assistance of counsel.

Granting of a motion for continuance rests largely in the sound discretion of the trial court. State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978). A reviewing court will interfere with the trial court's ruling only where there has been a clear abuse of judicial discretion and injustice thereby done to the defendant. Id. A higher standard of review is not required, as defendant suggests. Inherent in any motion for a continuance is the assertion that defense counsel's assistance will be rendered ineffective unless provided more time to prepare for trial. See State v. Youngbear, 229 N.W.2d 728, 734 (Iowa 1975); cert. denied 423 U.S. 1018, 96 S. Ct. 455, 46 L.Ed.2d 390 (1975); Orcutt v. State, 173 N.W.2d 66, 69 (Iowa 1969).

We further find that in this case defendant was not denied effective assistance of counsel and the trial court did not abuse its discretion in overruling the motion for a continuance. Defendant was advised by able counsel who was given a reasonable opportunity to prepare for trial. Orcutt, 173 N.W.2d at 69. Also, defendant, in his motion, failed to adequately show what particular facts he hoped to prove and that these facts could be proved only by those witnesses he sought. Iowa R. Civ. P. 183(b)(3). Denial of the motion was proper.

III. Defendant also claims that the trial judge's ruling on his motion in limine improperly inhibited the exercise of his right to take the stand in his own defense.

Ordinarily the granting or rejection of a motion in limine, while possibly error, is not reversible error. State v. Langley, 265 N.W.2d 718, 720 (Iowa 1978); State v. Jacoby, 260 N.W.2d 828, 834 (Iowa 1977); State v. Garrett, 183 N.W.2d 652, 655 (Iowa 1971). This motion is not a ruling on the evidence, Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974), although it may have the effect of precluding the introduction of evidence at trial. Id. It is only when the material cited as objectionable in the motion is offered into evidence that error, if any, occurs. Garrett, 183 N.W.2d at 655.

Here, the material objected to was never offered at trial. Because rulings on motions in limine are not final and, thus, not reviewable, and because the material was never offered or objected to at trial, it might be said that defendant presents nothing for review. Langley, 265 N.W.2d at 721. But defendant raises a different point, saying the denial of his motion prevented his exercise of the right to take the stand in his own defense. While defendant is not precluded procedurally from raising this issue, we find the point to be without merit. The decision to take or not to take the stand is a tactical one. Defendant could have taken the stand and further objected to the State's impeachment questions. If the court ruled at trial in the same manner as it did at the hearing on the motion, then defendant would be in a position to challenge the ruling on appeal. The fact that defendant chose not to do this cannot justify a reversal by this court.

IV. Defendant claims that the trial court, on four different occasions, improperly restricted his constitutional right to impeach prosecution witness Brenda Stroud. The extent of cross-examination is largely within the discretion of

the trial court and the court's ruling will be disturbed only upon a showing of abuse of discretion, and then only if it appears prejudice resulted. Avery v. Harms Implement Co., 270 N.W.2d 646, 649 (Iowa 1978); State v. Cornell, 266 N.W.2d 15, 21 (Iowa 1978). While the scope of cross-examination is discretionary, the right to do so is absolute and essential to a fair trial. Avery, 270 N.W.2d at 650.

On one occasion, the witness testified that a pending revocation of a parole proceeding against her was to be dropped in exchange for her testimony. Defense counsel inquired as to her sentence for the crimes she had committed. The trial court sustained the State's objection to the testimony as incompetent, irrelevant, and immaterial. Defendant maintains the information was proper to show the witness's motivation for testifying.

A defendant should be permitted wide latitude in seeking to show the bias of a witness in testifying. State v. Armento, 256 N.W.2d 228, 229 (Iowa 1977). Here such bias was sufficiently shown by revealing that Stroud had been convicted of two felonies, that she was on probation, and that she was testifying in exchange for continued probation. While it may have been improper for the trial court to sustain the objection here, it was not reversible error. See Id. at 229-30.

Defendant claims he should have been allowed to question the witness concerning her past drug use in order to attack the credibility of her statement that she was not using drugs on the night of the crime. The trial court sustained the objection on grounds of irrelevancy. The credibility of a witness may be attacked by showing a defect in his capacity to observe, to remember or recount the matters testified about. State v. Ivory, 247 N.W. 2d 198, 204 (Iowa 1976). Evidence of drug use which would substantially lessen or temporarily impair the ability of the witness to perceive the facts he claims to have observed is provable to attack the witness's credibility. Id. But here the questions which defendant sought to ask were not relevant for proving that the witness was under the influence of drugs on the night of the crime. Id. The objection was properly sustained.

Defendant further claims that it was error to exclude the testimony of Sue Young, Brenda Stroud's probation officer, concerning Stroud's prostitution activities. Defendant hoped to attack Stroud's credibility with this information as well

as to implicate her in the crime. The trial court did not abuse its discretion in finding such testimony irrelevant to any issue in this case. While the general moral character of a witness may be proven for the purpose of testing his credibility, such proof must be confined to the general reputation of the individual and should not be directed to proof of specific vices or traits of character. State v. Johnson, 219 N.W.2d 690, 695 (Iowa 1974).

Defendant also maintains that Sue Young should have been allowed to testify regarding Stroud's reputation for veracity. The trial court sustained the State's objection to this evidence on the ground that defense counsel had not shown that Young's knowledge of Stroud's reputation was based upon information received from a cross-section of the community. The court's ruling was proper.

Reputation evidence is subject to the same minimum assurance of reliability whether used to prove character or to impeach the credibility of a witness. State v. Sill, 199 N.W.2d 47, 49 (Iowa 1972). The requirement that reputation testimony be based on information garnered from a cross-section of the community is designed to assure reliability. State v. Buckner, 214 N.W.2d 164, 169 (Iowa 1974). While it is not necessary that comments come from a cross-section of an entire city or town, Id., in this case the trial court did not abuse its discretion by ruling in favor of the argument that the people Young had come into contact with constituted a narrow group of individuals primarily involved in the legal system and, as such, this group did not represent a cross-section of the community.

Our findings in this division in no way represent non-recognition of defendant's right to present a defense. But we note the United States Supreme Court's statement that "[i]n the exercise of this right, the accused, as is required of the State, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L.Ed.2d 297, 313 (1973). A defendant cannot be allowed to circumvent valid rules of evidence and procedure by claiming he was not allowed to present a defense.

V. Defendant next asserts that he was denied a fair trial, claiming partiality in favor of the State by the trial court. Defendant bases his claim on one incident where defense counsel requested a witness to read an answer he had given in a

deposition and the trial judge interrupted and stated: "Just a minute, Mr. Kaldem. I don't know exactly what you have in mind. The witness is not going to read his own deposition." In response to the trial judge's comment, defense counsel replied "Okay, your Honor." No further objection to the court's comments were made throughout trial.

We agree with defendant that under State v. Larmond, 244 N.W.2d 233, 236-37 (Iowa 1976), he should not necessarily be barred from raising this issue on appeal. But we further find that this particular comment of the trial judge does not approach even a minimum level of bias or prejudice. See State v. King, 256 N.W.2d 1, 13 (Iowa 1977); contrast case at bar with Larmond, 244 N.W.2d at 235-36. Defendant's contention is without merit.

VI. Defendant finally asserts that his motion for mistrial, based upon the fact that he was exposed to the jury while handcuffed was improperly denied. Defendant was handcuffed and escorted to the courthouse by two police officers. Defendant was still handcuffed when he and the officers left a second floor elevator and took two or three steps into the hallway. People, including members of the jury, were milling about the hallway. After defendant protested, the officers led him back into the elevator and removed the handcuffs.

The record shows that local court rule provides that custodians of a defendant are to use reasonable measures to avoid exposing defendant to the view of the jurors while in handcuffs or other physical restraints. The general rule is that under ordinary circumstances freedom from handcuffs is an important component of a fair and impartial trial. State v. Evans, 169 N.W.2d 200, 210 (Iowa 1969). This rule recognizes that such a constant reminder of the accused's condition may affect a juror's judgment. Estelle v. Williams, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 1693, 48 L.Ed.2d 126, 131, rehearing denied, 426 U.S. 954 (1976).

Here it cannot be shown that members of the jury even saw the defendant while handcuffed. Furthermore, a brief look at the defendant in handcuffs would in no way serve as a constant reminder of his incarcerated state. Also, although handcuffed, defendant was in other respects well-groomed and attired. Defendant was not sufficiently prejudiced to justify a mistrial. The trial court's ruling was proper.

AFFIRMED.

All judges concur, except Oxberger, C. J., who dissents.

OXBERGER, C. J. (dissenting)

I disagree with the majority's conclusion in Division III. After the State rested, defense counsel made a motion in limine seeking to prevent the State from questioning defendant about any prior felony convictions except a 1976 conviction for uttering a forged instrument. On appeal, the State concedes that trial court's ruling on this motion would have required defendant to testify that he had twice been convicted of a felony in the preceding five years. The State also concedes that defendant's 1975 conviction for assault with intent to do great bodily injury does not involve dishonesty, as required by State v. Martin, 217 N.W.2d 536 (Iowa 1974). Under these circumstances, trial court erred when it decided that defendant must include the assault offense in the number of his prior convictions in the past five years. This decision had the effect of a ruling, and further objections were unnecessary. See State v. Miller, 229 N.W.2d 762, 768 (Iowa 1975). As a result of the ruling, defendant decided not to take the stand. The policy of the law should be to encourage a full presentation of competent testimony. Trial court's decision on the motion had the effect of chilling defendant's right to testify because while a jury might tolerate one previous conviction, two or more convictions increase the possibility that defendant could be convicted because of his bad record. I would apply the following statement from State v. Jones, 271 N.W.2d 761, 766 (Iowa 1978) to the instant situation: "Where the issue is fully argued and trial court, apprised of defendant's objection, rules evidence of prior convictions admissible, we are not convinced defendant must abandon all trial tactics to preserve error." Based on trial court's erroneous ruling with its resultant inhibition of defendant's right to testify, I would reverse the conviction and remand for a new trial.