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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-307 / 89-790

STATE OF IOWA,

Appellee,

vs.

ROBERT WADE,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan and Peter Van Metre, Judges.

The defendant appeals his conviction, following a jury trial, for possession of cocaine with intent to deliver. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and Brian K. Sissel, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; James M. Metcalf, County Attorney; and D. Raymond Walton, Assistant County Attorney; for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

Defendant Robert Wade appeals his conviction after a jury trial on the charge of possession of cocaine with intent to deliver in violation of Iowa Code § 204.401(1)(a). We affirm.

Waterloo police stopped Wade November 3, 1988, after having observed Wade allegedly speeding after leaving a tavern parking lot. A police officer paced his car with Wade's for a couple of blocks and determined that Wade was pulling away from the police car which was traveling 45 miles per hour in a 35 mile per hour zone. Wade apparently admitted to the police officer that he had been caught; he said, "I was sure going fast."

The police officer detected alcohol on Wade's breath and requested Wade perform field sobriety tests. Wade failed these tests, and the police officer arrested Wade for operating his vehicle while under the influence.

A second police officer called to assist in the arrest then searched Wade's person. The officer discovered in Wade's jacket a plastic bag containing a substance later determined to be cocaine. During processing at the police station, police officers found in Wade's trouser pocket over $1,500 in cash. (Wade, who has a fourth-grade education, was unemployed and received $360 per month in social security benefits.) Police officers also conducted an inventory search of Wade's car and discovered a .25 caliber pistol.

The State introduced the fruits of the searches--the cocaine, the money, and the gun--into evidence at Wade's trial. Wade challenges the trial court's denial of a motion to suppress this evidence. He argues that the evidence was obtained as a result of an illegal search which taints the evidence. The search was illegal, he contends, because it followed an illegal stop.

The State also introduced into evidence a videotape of the defendant's booking. First, Wade argues that the tape was not included in minutes of testimony and should not have been admitted. Second, he argues that the tape was either irrelevant or more prejudicial than probative. Third, he argues that the State failed to show that he had knowingly, intelligently, and voluntarily waived his Miranda rights during the videotaping.

Defendant also contends that there was insufficient evidence to support a conviction for possession of cocaine with intent to deliver. He argues that the trial court erred in failing to grant his motion for a directed verdict. Defendant also contends that the trial court did not state adequate and proper reasons for the indeterminate ten-year prison sentence imposed.

1.

The fourth amendment requires reasonable cause to stop a vehicle for investigatory purposes. Terry v. Ohio, 392 U.S. 1, 21 (1968). When a stop is challenged on the basis that reasonable cause did not exist, the State must show

that the stopping officer had "specific and articulable cause to support a reasonable belief that criminal activity may have occurred." State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982) (quoting State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980)). Reasonable cause exists when an officer observes unusual conduct leading the officer to conclude that criminal activity may be afoot. State v. Donnell, 239 N.W.2d 575, 577 (Iowa 1976). The officer is bound by the true reason or reasons for making the stop; the officer may not rely on reasons that he or she could have had but did not actually have. Aschenbrenner, 289 N.W.2d at 619. The constitutionality of the stop is judged by balancing the degree of the intrusion against its promotion of legitimate governmental interests. State v. Hilleshiem, 291 N.W.2d 314, 317 (Iowa 1980).

We are satisfied that the police here had a "specific and articulable cause to support a reasonable belief" that defendant was illegally exceeding the speed limit. The evidence seems to show that defendant was pulling away from the patrol car and that the patrol car was traveling at 45 miles per hour. Defendant's arguments challenging the accuracy of this are meritless. As the State points out, this was not a prosecution for speeding, and it was not required to demonstrate beyond a reasonable doubt that defendant was speeding. The subsequent arrest and searches of defendant's person and vehicle were conducted after a legal stop. The trial court did not err, therefore, in

overruling defendant's motion to suppress evidence obtained as a result of this legal stop.

2.

After defendant was arrested, he was transported to the police station, where he was booked on various charges, including the charge for which he was convicted and now appeals. During that booking, under standard procedure, the police videotaped defendant. The tape shows a search of defendant's person and the discovery of a large amount of money. The police then subjected defendant to a comprehensive questioning including his name, address, telephone number, marital status, education, occupation, date of birth, etc. The tape also shows Wade's upper body during a strip search. Under circumstances we describe in greater detail below, the State introduced the videotape into evidence and played the tape for the jury. Defendant argues that the trial court should have granted his motion for a mistrial and raises three different grounds in support of his argument.

Trial courts have considerable discretion in passing on mistrial motions, State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973), and we reverse only upon a showing that that discretion was abused. State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976). The trial court is in a better position to decide whether prejudice could only be avoided by granting a new trial. See State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986); State v. Bishop, 387 N.W.2d 554, 561 (Iowa

1986). Defendant must show the ruling was clearly unreasonable or was premised on untenable grounds. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985); State v. Trudo, 253 N.W.2d 101, 106 (Iowa), cert. denied, 454 U.S. 903 (1977). We now turn to the individual grounds defendant asserts in support of a mistrial.

a. Defendant asserts he was entitled to a mistrial because the videotape was not included in the minutes of testimony. Iowa Rule of Criminal Procedure 5(3) requires the State to "file the minutes of evidence of the witnesses," including "a full and fair statement of the witness' expected testimony," when it files an information. Cf. Iowa R. Crim. P. 4(6) (similar requirement for indictment). These rules are designed to apprise a criminal defendant "fully and fairly" of the testimony expected at trial. State v. Musso, 398 N.W.2d 866, 868 (Iowa 1987) (quoting State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983)). "When minutes fail to adequately do so to defendant's prejudice a reversal will follow" Id. (citing State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979)). "But when the challenged minutes, though incomplete, put defendant 'on notice of the necessity of further investigation of the witness' probable testimony,' reversal need not follow admission of matters they do not disclose." Id. (quoting Lord, 341 N.W.2d at 743; other citations omitted).

The record shows that the prosecution did not request a copy of the booking tape until well after the trial began; thus, it appears that the State either had no knowledge of the existence of the tape or had not originally intended to introduce it into evidence, until defendant brought out its existence through examination of several witnesses. On the basis of its contentions that it had not expected to introduce the tape, the State argues, citing State v. Epps, 313 N.W.2d 553, 557-58 (Iowa 1981), the tape could be admitted even though it was not included in the minutes. We are not prepared to go quite so far. Nevertheless, we do believe Epps controls here. We find, as did the Epps court, that the minutes contained in essence the evidence eventually elicited at trial. Id. at 557. (At worst, the tape might have been duplicative and prejudicial, but these objections were never made.) We hold there was no abuse of discretion in admitting the videotape under these circumstances, and defendant was not entitled to a mistrial.

b. Defendant asserts he was entitled to a mistrial because the videotape was either irrelevant or prejudicial. The Iowa Rules of Evidence, which are applicable to criminal proceedings, Iowa R. Crim. P. 20, state, in part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely

objection or motion to strike appears of record, stating the specific ground of objection . . . ." Iowa R. Evid. 103(a)(1). Objections ordinarily must be made "at the earliest opportunity after the ground for objection becomes apparent." State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984); accord State v. Winquist, 247 N.W.2d 256, 259 (Iowa 1976); State v. Ivory, 247 N.W.2d 198, 203 (Iowa 1976); State v. Pelelo, 247 N.W.2d 221, 225 (Iowa 1976). Thus, to raise error on appeal, an appellant must have presented an objection to the trial court and have obtained a ruling. Pelelo, 247 N.W.2d at 226. Failure to do so is fatal to issues raised for the first time on appeal because we will not address issues not presented and passed upon by the trial court. Suckow v. Neowa FS, Inc., 445 N.W.2d 776, 780 (Iowa 1989); Winquist, 247 N.W.2d at 259 (when objection specifies only untenable ground for reversal, "it cannot support reversal on a tenable ground which might have been specified but was not").

Defendant raises the relevancy, see Iowa R. Evid. 402 (excluding irrelevant evidence), and the prejudicial effect, see Iowa R. Evid. 403, of the videotape admitted into evidence. We note that defendant had three opportunities to make objections to the videotape. On two occasions he did not raise the questions of relevancy or prejudicial effect and on showing the videotape he made no objection at all. Having failed to raise these questions before the trial court and having failed to obtain a ruling

for our review, defendant is deemed to have waived any objection on these grounds. We will not address these issues. Winquist, 247 N.W.2d at 259

c. Defendant asserts he was entitled to a mistrial because the videotape was admitted without a proper showing that he had knowingly, intelligently, and voluntarily waived his rights. The fifth amendment prohibits only the compelled disclosure of incriminating testimonial communication. See Fisher v. United States, 425 U.S. 391, 401 (1976); State v. Mannion, 414 N.W.2d 119, 121-122 (Iowa 1987). Such things as identification exemplars, which generally are nontestimonial, are not protected by the fifth amendment. E.g., State v. Johnson, 261 Iowa 661, 668-69, 155 N.W.2d 512, 517 (1968) (fingerprints); State v. Epperson, 264 N.W.2d 753, 755-56 (Iowa), cert. denied, 439 U.S. 913 (1978) (blood sample); State v. Sefcheck, 261 Iowa 1159, 1170-71, 157 N.W.2d 128, 135 (1968) (handwriting sample). Similarly, showing a videotape of a defendant to the jury may not violate the fifth amendment if it is physical, i.e., nontestimonial, Mannion, 414 N.W.2d at 121 (citing Schmerber v. California, 384 U.S. 757, 760-61 (1966)), or if it is not improperly compelled. Id.

Defendant argues that under Miranda v. Arizona, 384 U.S. 436 (1966), and Edwards v. Arizona, 451 U.S. 477 (1981), he was entitled to a mistrial. He complains that a videotape depicting the booking procedures following his arrest violated his fifth and fourteenth amendment rights

as interpreted in Miranda and Edwards. There is evidence in the record that defendant was warned of his rights before the videotape was made. Defendant points out that the validity of a Miranda waiver depends "upon the particular facts and circumstances surrounding that case, including background, experience, and conduct of the accused." Edwards, 451 U.S. at 482. We note that this defendant has extensive experience with the criminal justice system in his background. We will, however, further examine the issue as though defendant did not knowingly, intelligently, and voluntarily waive his rights of self-incrimination.

We find that the tape was physical, rather than testimonial, evidence. Moreover, we find that the contents of the videotape were not improperly compelled. For the most part, the taped inquiries resulted in identification exemplars normally attendant to an arrest. See Mannion, 414 N.W.2d at 121-22. As the Iowa Supreme Court has indicated, when an officer may testify as to observations contained in a videotape, the videotape may also be admissible. Id. at 121. Even if the videotape is communicative evidence, there will be no violation of the fifth amendment if the evidence received on tape was properly compelled. Id. (relying on South Dakota v. Neville, 459 U.S. 553 (1983)). We hold that defendant was not entitled to a mistrial because the evidence taken during the videotaped booking was nontestimonial in nature

and, therefore, did not rise to the level at which the State was required to show that the defendant had knowingly, intelligently, and voluntarily waived his rights of self-incrimination as to the contents of the videotape.

3.

Our standard of review for a challenge against the sufficiency of evidence to convict is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

At trial, the defense presented testimony of Wade's nephew, Kelvin Scott. Scott claimed that he had borrowed Wade's car and that he had purchased the cocaine in question. Scott also testified that he had put the cocaine in the jacket and left it in the car. Scott did come to the scene of the arrest, and he alleges that he attempted to retrieve his drugs before the police found them. Wade apparently was under conservatorship, and his conservator

also testified that Wade had received a large interest payment and a loan. Others testified that there was no physical evidence linking Wade to the drugs, that he was not wearing a jacket earlier that day, and that no tests had been performed on him to determine whether he had drugs in his system.

Defendant argues that this evidence entitled him to a directed verdict. The State argues that the evidence against Wade is substantial. It notes that the cocaine was found on the defendant and that he was carrying a large sum of money. It also showed that this convicted felon had a firearm in his car. It introduced testimony to the effect that drug dealers are often found with a large amount of money. The State also introduced testimony tending to show that it was a cool day and that it would be unlikely for defendant to have been out without a jacket.

We conclude that, taking all legitimate inferences and viewing the evidence in the light most favorable to the State, there is substantial evidence to support the jury verdict. As the State points out, circumstantial evidence is as probative and convincing as direct evidence. State v. Schrier, 300 N.W.2d 305, 308 (Iowa 1981). Moreover, the State is not required to present evidence to rebut every conceivable theory conflicting with defendant's guilt. It need only present sufficient evidence upon which a rational jury could conclude beyond a reasonable doubt that defendant was guilty. Jackson v. Virginia, 443 U.S. 307, 317 (1979).

4.

A recitation of reasons for sentencing by the trial court is made generally so that a reviewing court may determine whether the sentence was an abuse of discretion. State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979). We will not find an abuse of discretion unless the sentence was clearly unreasonable or was based on wholly untenable grounds. State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982). A denial of probation will not be an abuse of discretion if the probation will neither promote the rehabilitation of the defendant nor protect the community. State v. Ramierez, 400 N.W.2d 586, 590 (Iowa 1987); State v. Beyer, 258 N.W.2d 353, 359 (Iowa 1977).

This represents Robert Wade's twenty-second conviction in the State of Iowa. The trial court cited the seriousness of the offense and his record as significant factors in his sentence of imprisonment. His prospects for rehabilitation are important and relevant considerations. State v. Wright, 340 N.W.2d 590, 594 (Iowa 1983); State v. Fink, 320 N.W.2d 632, 634 (Iowa App. 1982). Defendant has been on probation three times and incarcerated once. We find no unreasonable or untenable grounds for the sentence of incarceration. We hold that the trial court did not abuse its discretion in sentencing.

AFFIRMED.