IN THE COURT OF APPEALS OF IOWA

No. 3-169 / 92-271

FILED
AUG 06 1993
CLERK SUPREME COURT
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STATE OF IOWA,

Appellee,

vs.

ANTHONY J. SCHOOLEY,

Appellant.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Schooley appeals from his conviction, following a jury trial, of robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, John Sarcone, County Attorney, and James Ramey, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J. 000900

The defendant was convicted of the offense of robbery in the first degree contrary to Iowa Code sections 711.1 and 711.2, and he appeals from the judgment and sentence imposed upon a jury verdict of guilty.

We affirm.

On September 12, 1991, at approximately 2:30 in the afternoon, a Coastal Mart store in Des Moines was robbed of some $70 to $80 by a man displaying a revolver in the waistband of his trousers.

The store clerk immediately called the police after the robber left the premises. The clerk described the robber as being a white male in his late 20s and approximately 5 feet 10 inches in height and weighing approximately 150 pounds. The robber was further described as having a beard and long dark hair. The robber was wearing black sweat pants and a shirt with a car design printed upon it.

Shortly after the robbery, the clerk viewed a photographic array provided by the police of a group of persons with physical descriptions similar to the description of the robber. After looking over these pictures, the clerk identified the defendant as the robber.

With this information, Officer Reynolds went to the residence of the defendant to visit with him about the armed robbery. The defendant was wearing clothing that matched the clothing described as being worn by the robber.

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The defendant during this period was also charged with another and similar offense, and, as a consequence, trials were bifurcated because of the prejudice to the defendant were he to be tried in one trial with two comparable offenses. Part and parcel of that ruling, and implicit in it, was the understanding that there would be no reference made by the State's witnesses to the pendency of the other matter. At trial, however, a police officer testifying for the State on its case in chief stated that the officer thought the defendant was "possibly involved in some armed robberies" and further testified that he had asked defendant where the defendant was "during each one of these incidents." The trial court overruled the motion of the defendant for a mistrial, which motion was made at the time of the utterance and later in a posttrial motion.

The same police officer, testifying for the State on its case in chief, testified that a pistol previously purchased by the defendant from a pawn shop was a revolver. The store clerk had testified a revolver was involved in the robbery and that the clerk knew the difference between a revolver and an automatic or semiautomatic pistol. The officer also testified that he was aware of the difference between the two types of handguns.

It was, however, conclusively shown that the pistol previously purchased by the defendant was a semiautomatic handgun, not a revolver and that the manufacturer of the

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weapon produced only automatic or semiautomatic handguns and not revolvers. The name of the manufacturer was likewise known to the testifying officer as a result of his investigation of the pawn shop record of the sale made to the defendant some weeks prior to the robbery.

Based upon the foregoing, defendant raises two issues on appeal.

The first issue is whether or not he was denied a fair trial by permitting the verdict of guilty to stand in the face of what the defendant calls "perjured testimony" by the officer pertaining to the purchase of a revolver and in view of the uncontroverted evidence that the pistol purchased by him was a semiautomatic handgun, not a revolver as testified to by the officer.

The second issue presented by the defendant on appeal is the failure of the trial court to grant a mistrial after the same officer testified that he was investigating the possible involvement of the defendant in some armed robberies and his testimony that the defendant wanted to explain to the officer where he was during each one of these "incidents."

Since the defendant asserts that his constitutional right to a fair trial was denied, our review of the record is de novo to determine whether or not the court abused its discretion in overruling the motion of the defendant for a new trial.

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Preliminary to a review upon the merits, we note that the defendant did not seek a mistrial when he first discovered the testimony of the State pertaining to the gun which defendant alleges was perjury.

The supreme court has held in a succession of cases that there is a waiver of prosecutorial misconduct if the issue is not raised before submission to the jury. The reasoning of the supreme court is that the defendant should not sit quietly by, although aware of the prosecutorial misconduct, and take his chance with a favorable jury verdict and then thereafter raise the issue if the verdict is adverse to him. Andrews v. Struble, 178 N.W.2d 391 (Iowa 1970); State v. Gibb, 303 N.W.2d 673, 678 (Iowa 1981); State v. Bishop, 387 N.W.2d 554, 564 (Iowa 1986); State v. Radeke, 444 N.W.2d 476 (Iowa 1989). We prefer, however, to address the issue on its merits.

A conviction obtained by the knowing use of perjured testimony is considered basically unfair and should be set aside if there is any reasonable likelihood that such testimony could have affected the outcome of the trial. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976). Our supreme court has set forth five factors in Hamann v. State, 324 N.W.2d 906 (Iowa 1982), which the reviewing court must consider in addressing the claim of constitutional fair trial violations.

Assuming arguendo that the evidence was perjury, i.e., given knowing that it was false by the witness whose

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conduct may be attributed to the prosecutor, we do not find that the testimony affected the outcome of the trial. The officer's testimony was thoroughly repudiated by the use of physical evidence, the testimony of the pawn shop clerk, as well as by the defendant.

Generally when perjured or false testimony is impeached or corrected during trial, defendant may not claim he was denied a fair trial. United States v. Payne, 940 F.2d 286 (8th Cir. 1991). United States v. Bontkowski, 865 F.2d 179 (7th Cir. 1989). In Armento v. Baughman, 290 N.W.2d 11 (Iowa 1980), it was held that the failure of the State to admit, before the jury, that leniency discussions had occurred was improper. However, a witness testified to the negotiations and the supreme court determined that such failure to admit did not create a reasonable doubt when considered with the trial evidence.

The independent evidence of guilt consists of the store clerk identifying the defendant by selecting one photograph out of several hundreds, by a second photographic identification, and by identification in court. The clothing worn by the defendant within several hours after the robbery was strikingly similar to the clothing described by the clerk.

The trial court did not abuse its exercise of discretion in overruling the motion for a new trial.

With respect to the second issue presented by the defendant, we are likewise restricted to a review of the

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record to determine if there was an abuse of discretion by the district court in overruling the motion for mistrial asserted by the defendant. State v. Wade, 467 N.W.2d 283 (Iowa 1991). Abuse of discretion occurs when discretion is exercised for reasons "clearly untenable or to an extent clearly unreasonable." State v. Ruble, 372 N.W.2d 216 (Iowa 1985). Such abuse exists when the defendant shows that such untenable reasons prevented him from having a fair trial. Id. The burden is upon the defendant to sustain his claim that the trial court abused its discretion. State v. Anderson, 448 N.W.2d 32 (Iowa 1989). The trial court observed the reaction of the jury to testimony and generally is in a better position to determine whether or not prejudice occurred. State v. Bishop, 387 N.W.2d 554 (Iowa 1986).

It was apparent to the jury that the defendant was no stranger to the police department, given the existence of his photograph in the police files. The defendant himself elicited testimony that the officers went to locate the file on the defendant. The two references made by the officers and complained of were brief and lacking in detail. Since the trials on the various charges were severed, the jury was alerted only to the fact that the defendant was being tried on one matter and not any other offenses. We conclude that the trial court did not abuse its discretion.

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Consequently we affirm the verdict of the jury and the action of the trial court in rendering judgment and imposing sentence thereon.

AFFIRMED.