FILED
JAN 23 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-539 / 94-343

STATE OF IOWA,

Appellee,

vs.

LAWRENCE K. BURGIN a/k/a **LARRY BURGIN,**

Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III, Judge.

Lawrence Burgin appeals his conviction, following a jury trial, of first-degree burglary in violation of Iowa Code sections 713.1 and 713.2 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Mary Tabor, Assistant Attorney General, Richard Crowl, County Attorney, and Chris Wilson, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Cady, JJ.

DONIELSON, C.J.

The defendant appeals from his conviction for burglary in the first degree. We have reviewed the parties' arguments, the record and the applicable law, and affirm the defendant's conviction.

I. MOTION FOR MISTRIAL

The defendant contends the trial court abused its discretion in failing to grant a mistrial after the State's rebuttal witness testified in violation of a motion in limine and Iowa R. Evid. 404(b). A district court is granted considerable discretion in deciding whether to grant a mistrial. State v. Callender, 444 N.W.2d 768, 770 (Iowa App. 1989). "The court is found to have abused its discretion only when defendant shows prejudice which prevents him from having a fair trial." Id.

During her testimony the rebuttal witness was asked if she knew Steve Bryan and if he was a friend of the defendant. The witness responded, "Yes. They were in prison together." When asked about the manner in which police had arrived to arrest the defendant, the witness said, "They came and knocked on the door and they asked if Larry Burgin was there. I said no. He said, 'Well, we have a warrant for his arrest.' And he was on escape."

The defendant concedes the jury was aware of his previous felony conviction for robbery. However, he argues but for the rebuttal witness's testimony the jury would not

have known if he was actually imprisoned for that offense (as opposed to receiving probation), and he was unfairly prejudiced by the reference to his escape from detention.

The trial court is in the best position to observe the matters complained of and ascertain their effect, if any, on the jury. See State v. Brotherton, 384 N.W.2d 375, 381 (Iowa 1986). Testimony indicating the defendant had been imprisoned was consistent with the jury's knowledge of his prior conviction. The testimony regarding the defendant's escape was unsolicited by the prosecution and isolated in nature. The trial judge found the comment to be inadvertent, nearly inaudible and without prejudicial effect. We concur and find no abuse of discretion in the trial court's denial of the defendant's request for a mistrial.

II. HEARSAY EVIDENCE

The defendant challenges allegedly hearsay evidence proffered by the State's rebuttal witness. The defendant had testified he believed Steve Bryan was residing with the victim (Judy) and he went to the victim's house for the purpose of visiting Mr. Bryan, not to burglarize it. In rebuttal, the State offered the following testimony:

> Q. Did Larry know where Steve Bryan was living at the time?
>
> ....
>
> A. When we came to town they first met Steve, Steve had told Larry that him and Judy had broken up and that he was not living with Judy anymore, that they were not boyfriend and girlfriend anymore.

> Q. Larry knew... A. He didn't know the exact place where he lived, but he knew that they were broken up. He knew they were no longer together.

The defendant objected to the testimony as hearsay and his objection was sustained. The jury was admonished to disregard the testimony. The defendant subsequently used this purported hearsay evidence as a basis for moving for a mistrial. His mistrial request was denied.

"It is only part of the definition of hearsay to say it is a statement, other than one made by a declarant while testifying at trial or hearing." State v. Frazer, 267 N.W.2d 34, 37 (Iowa 1978). "In order to constitute hearsay such a statement must also be offered in evidence to prove the truth of the matter asserted therein." Id. The above-quoted testimony was not offered to prove the truth of whether Steve Bryan and Judy were no longer living together. It was offered to establish what the defendant knew at the time he went to Judy's home in the early morning hours of April 16, 1993, and it was not inadmissible hearsay. Even if it did constitute hearsay, the trial court gave a sufficient cautionary instruction to mitigate any prejudice arising from it. See Brotherton, 384 N.W.2d at 381 (admonition to jury to disregard inadmissible testimony is generally sufficient to cure any prejudice).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant argues his counsel was ineffective in not objecting to the prejudicial impact of the defendant's mugshot admitted as part of a photographic lineup shown to the victim. Issues of ineffective assistance of counsel are generally reserved for postconviction proceedings. See State v. Bass, 385 N.W.2d 243, 245 (Iowa 1986). However, we will address such issues on direct appeal when the record is sufficient for appellate review.

At issue is Exhibit 1, a photographic lineup used by the police to enable the victim to identify the individual who entered her home on April 16, 1993. Exhibit 1 consists of a manila file folder into which six billfold-size squares have been cut. The squares are numbered one through six and in each square is a head-shot photograph of a man. The exhibit appears to have been carefully designed to conceal any distinct markings which would reveal the photographs were mug shots or otherwise police photographs.

The defendant argues introduction of this exhibit was unnecessary as he did not deny his presence in the victim's home. However, it was not until the defendant chose to take the stand and testify on his own behalf that the State knew for certain the defendant would take this position. During its case-in-chief it was entirely appropriate for the State to use the testimony of the victim and the police to establish the defendant's identity. Introduction of exhibit 1 confirmed the consistency of the victim's

identification of the defendant before and during trial. Exhibit 1 was properly admissible at trial and the defendant's counsel had no duty to object to the exhibit. The defendant's claim of ineffective assistance of counsel is denied.

AFFIRMED.