FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

347

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL JOHN KOBYLINSKI,

Defendant-Appellant.

Filed January 29, 1986

5-591
85-202

Appeal from the Iowa District Court for Polk County - Ray Hanrahan, Judge.

Defendant appeals his conviction of theft in the second degree. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; and Kirk McCormick, Assistant Polk County Attorney, for plaintiff-appellee.

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

Defendant Michael John Kobylinski was charged with theft in the second degree for stealing a 1976 Ford pickup truck. Sam Lehman, a truck driver, testified that on September 3, 1984, he drove his route to Chicago. When he returned to Des Moines on September 5, 1984, his pickup truck was missing. Lehman asked Kobylinski's girlfriend if she had seen his truck. She reported that she had not seen the truck or Kobylinski. At that point, Lehman reported the theft to the police.

Lehman testified that he met Kobylinski at a tavern on Saturday night, September 1, 1984. During the evening, Lehman, Kobylinski, and Kobylinski's girlfriend walked to Lehman's apartment building. At Lehman's request, Kobylinski drove Lehman's pickup truck to the house of one of Kobylinski's friends. Lehman wanted Kobylinski to drive so that he wouldn't risk getting another DWI since his license was already suspended. After leaving the friend's house, Kobylinski drove the pickup truck to the Travelodge where Kobylinski was staying. Lehman was with Kobylinski at that time. The two men left the truck at the motel and drove a car to a tavern. Later on, they left the tavern separately. Lehman retrieved his truck from the Travelodge the next day and parked it in front of his apartment building. He did not leave the keys in the truck, but the doors were unlocked. Lehman denied that he had given Kobylinski permission to use the truck.

During his testimony, Lehman stated that when he discovered the truck was missing, he suspected Kobylinski because he knew Kobylinski had previously been in jail. The trial court ordered this testimony stricken from the record and directed the jury to disregard the testimony. The trial court overruled the defendant's motion for a mistrial on this ground.

Officer Meeker testified that Lehman reported the theft on September 5, 1984. On September 6, Officer Meeker observed Lehman's truck parked across the street from the restaurant where he was dining. He watched the truck, and about an hour later he observed a man he identified as Kobylinski approach the truck, open the hood for 30 seconds to a minute, close it, and drive off. When Officer Meeker stopped the truck, Kobylinski told him that "Sam" had given him permission to drive it. Wiring under the hood indicated that the truck had been hot wired. Officer Meeker, then, arrested Kobylinski.

Kobylinski's defense was that he had been using the truck with Lehman's permission. Kobylinski did not testify on his own behalf. The jury found Kobylinski guilty of second-degree theft.

Kobylinski appeals his conviction. He contends that the trial court erred by denying his motion for a mistrial. He also contends the trial court erred by declining to give a specific instruction on his theory of defense. Kobylinski further challenges an instruction which deals with the common law inference of guilt from unexplained possession of recently-stolen property. Kobylinski contends that the use of the phrase "unexplained possession" in the instruction violated his right to remain silent at trial and impermissibly shifted the burden of proof to the defense on the issue of justification for his possession of the property.

Instruction on Defense. Kobylinski contends that the trial court should have given his proffered theory-of-defense instruction. His requested instruction reads as follows:

> DEFENDANT'S REQUESTED INSTRUCTION NO. 1
>
> The State must prove the defendant did not believe he had permission to have possession of the motor vehicle in question.
>
> Permission to take control of the vehicle may be express or implied.

> Express permission is actual permission.
>
> Implied consent or permission are circumstances when viewed from the standpoint of the defendant may give rise to the defendant believing that he had permission to take the vehicle.
>
> If you find that the State has failed to prove beyond a reasonable doubt that the defendant in his mind, did not have permission to take the vehicle, then you must find the defendant not guilty.

The trial court denied Kobylinski's request finding that no evidence was in the record supporting this defense.

"The obligation of the court to instruct is well settled. Even without a request, the court must instruct on all material issues so that the jury understands the matters which they are to decide." State v. Van Rees, 246 N.W.2d 339, 343 (Iowa 1976). "The court has the duty to instruct the jury on the law applicable to the facts disclosed by the evidence, and must so instruct if there is evidence admitted which supports some involved issue." State v. McConnell, 178 N.W.2d 386, 389 (Iowa 1970). "Error in instructing the jury is presumed prejudicial unless the contrary appears beyond a reasonable doubt from a review of the whole case." State v. Davis, 228 N.W.2d 67, 73 (Iowa 1975).

While the Iowa courts have not specifically addressed the issue of a defendant's entitlement to a theory-of-defense instruction, the Iowa Supreme Court indicated a possible entitlement to such an instruction in Conner v. State, 362 N.W.2d 449, 453 (Iowa 1985), wherein it stated, "A proper theory of defense instruction is one which sets forth a set of facts which would preclude a finding of guilt." The Eighth Circuit Court of Appeals has often required such an instruction as stated in United States v. Brake, 596 F.2d 337, 339 (8th Cir. 1979):

> There is no question that a defendant in a criminal case is entitled to have the jury know what he contends, and that ordinarily he is entitled to a "theory of defense" or a "position" instruction if he makes a timely request for such an instruction, if the request is supported by evidence, and if it sets out a correct declaration of law. United States v. Hill, 589 F.2d 1344 (8th Cir. 1979); United

States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978); United States v. Nance, 502 F.2d 615 (8th Cir. 1974), cert. denied, 420 U.S. 926, 95 S. Ct. 1123, 43 L. Ed. 2d 396 (1975). 351

However, if the instructions given by the trial court adequately and accurately cover the substance of the defendant's requested instruction, the defendant is not entitled to a particularly-worded instruction. Id; see also State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1968) (trial courts may use their own words in framing jury instructions).

In the case at bar, Kobylinski's counsel made a timely request for the theory-of-defense instruction. However, there was not sufficient evidence in the record to support this request. Lehman testified that he had consented to Kobylinski driving the truck while Lehman accompanied him on September 1, four days prior to the alleged theft. That evening Lehman and Kobylinski spent several hours drinking in various locations. During cross-examination, Lehman admitted that he supposed it was possible that they had a discussion about Mike having to move some furniture for someone the next weekend but he did not recall such a conversation. This evidence does not indicate that Lehman gave Kobylinski express or implied permission to take his truck on September 3-5.

We conclude that there is not sufficient evidence in this case to require an instruction on Kobylinski's theory of defense. Furthermore, the instructions given by the trial court allowed the jury to consider any evidence regarding Kobylinski's belief in implied consent when determining whether Kobylinski intended to permanently deprive Lehman of possession.

Motion for Mistrial. Kobylinski contends that the trial court abused its discretion in denying his motion for mistrial. During Lehman's cross-examination by defense counsel the following exchange occurred:

> Q. The first thing that came to your mind was that it might have been towed or impounded or, for some reason, taken by the police, is that correct? A. Well, I don't really remember thinking that, that it had--because there would have been no reason, because— It might have went through my mind, but, you know, it's paid for, and there wouldn't have been no repossession, or thing like that.
>
> Q. And the next thing in your mind was to go to Judy, Mike's girl friend, to see if Mike had the truck? A. Yeah, because he told me he had been in jail before, and I—

At this point defense counsel voiced an objection and moved for a mistrial because the witness's volunteered information was grossly prejudicial to Kobylinski. The trial court sustained the objection, the answer was stricken from the record, and the jury was admonished to disregard the answer. The court denied the motion for mistrial on this ground.

The trial court has considerable discretion in deciding whether or not to grant a mistrial. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). "Defendant is entitled to a new trial only where it is manifest that the prejudicial effect remained with the jury." State v. Burrell, 255 N.W.2d 119, 122 (Iowa 1977). The general rule is that improper testimony "is not unduly prejudicial if the court admonishes the jury." Id. "Only in those exceptional cases in which the prejudicial effect of such a comment cannot be eliminated will an admonition of the court be found insufficient. State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982).

In this case the trial court was in a better position than we to gauge the effect of Lehman's volunteered response on the jury. Lehman's reference to Kobylinski's prior incarceration was brief, inadvertent, did not detail specific prior criminal activity by Kobylinski, and was promptly stricken from the record.

Kobylinski has not persuaded us that Lehman's answer was prejudicial nor caused the jury to disregard the court's instruction. Accordingly, we find that the trial court did not abuse its discretion in denying the motion for mistrial.

"Unexplained Possession" Instruction. Kobylinski next challenges an instruction which provides in part as follows:

> If you find the State has proved by the evidence beyond a reasonable doubt each of the following facts, then you may but are not required to, infer that the defendant stole it:
>
> 1. That the property claimed by the State to have been stolen was stolen.
> 2. The defendant had unexplained possession of the property.
> 3. The possession of the property was recent.

Kobylinski argues that the use of the term "unexplained possession" was in effect a comment on Kobylinski's failure to testify and thus violative of his fifth amendment right to remain silent. Kobylinski also asserts that the instruction shifted the burden of proof on an essential element of the crime by implying that Kobylinski must explain possession of the property.

We are reluctant to disapprove Uniform Jury Instructions. State v. Jeffries, 313 N.W.2d 508, 509 (Iowa 1981); State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978). When considering the propriety of instructions, we review them as a set and not in isolation. Jeffries, 313 N.W.2d at 509.

In this case the challenged instruction closely follows the Iowa State Bar Association's Uniform Jury Instruction Number 1429. Furthermore, the jury was instructed per Kobylinski's request that no inference of guilt or innocence should be drawn from Kobylinski's failure to testify on his own behalf. The jury was also instructed that the State had the burden to prove each element of the crime charged beyond a reasonable doubt.

We believe the challenged instruction correctly states the law, did not shift the burden of proof to the defendant, or violate his fifth amendment rights. Therefore, we find no reversible error.

AFFIRMED.