FILED
FEB 23 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

381

STATE OF IOWA,	)	Filed February 23, 1983
Plaintiff-Appellee,	)	
vs.	)	2-376 67741
ALVIN RAY BEST,	)	
Defendant-Appellant.	)	

Appeal from Wapello District Court, Phillip R. Collett, Judge.

Defendant appeals from his convictions for theft in the second degree and conspiracy to commit theft in the second degree in violation of Iowa Code sections 714.1, 714.2, 714.3, and 706.1. AFFIRMED.

Alfredo G. Parrish, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Richard L. Richards, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

OXBERGER, C.J.

Defendant appeals from his convictions for theft in the second degree and conspiracy to commit theft in the second degree in violation of Iowa Code sections 714.1, 714.2, 714.3, and 706.1, asserting: (1) that he was denied a fair trial due to juror misconduct; (2) that the evidence was insufficient to support a verdict of guilty on any of the charges against him; and (3) that certain hearsay evidence was improperly admitted under the co-conspirator exception to the hearsay rule when a prima facie case of conspiracy had allegedly not been established. We affirm.

In the course of an investigation by the Division of Criminal Investigation (DCI) at Donna's Place Tavern in Ottumwa, Iowa, Dennis Smith and several DCI agents, in an undercover capacity, met the joint owners, Alvin and Donna Best. The management, bookkeeping, and day-to-day operation of the tavern were handled solely by Donna. To the rear of the tavern were several rooms which were used for storage and in which the Bests were residing.

On or about February 6, 1980, Agent Smith purchased a Pioneer SX 1250 stereo receiver and ten guns from Mrs. Best. About a week later, he returned to the tavern and purchased two pieces of Sony video equipment, a stereo, and a Sony tape recorder from Mrs. Best. Some of these items were introduced into evidence at defendant's trial.

On April 4, 1980, Agent Smith met the defendant to discuss the possible sale of the tavern, and at the same time, the subject of stolen property was discussed.

On or about June 12, 1980, the defendant consented to a search of his tavern and a mobile home owned by the defendant. Numerous items were seized, some of them introduced as evidence at the trial. Best was arrested on that date at Donna's Place.

Other facts will be introduced as discussion of the issues proceeds.

I. Juror Misconduct

Best claims that the foreman of the jury, Max Cline, conducted an unauthorized experiment during jury deliberations, and that this justifies a reversal on the ground of juror misconduct.

A Pioneer SX 1250 stereo receiver was received into evidence during the trial, and it was contended that this was stolen property that had been in Best's possession. Allen Taghon testified that this receiver had been stolen from him. Taghon contended that a scratch on the tuning knob was caused by his fingernail, but when asked by defense counsel on cross-examination to scratch one of the tuning knobs with his fingernail, Taghon was unable to do so. During deliberations, Mr. Cline scratched one of the receiver knobs with his fingernail, and according to one of the other jurors, he passed the knob around the room. Other jurors recalled comments about the knob having been scratched by someone, but denied that they had seen anyone scratch the knob.

It is important to note, however, that Mr. Taghon, in identifying the stereo receiver as his property, also referred to a scratch on the chassis made when he had dropped another object on it. He repeatedly and definitively identified the stereo receiver as the one that had been stolen from him.

When an adequate showing is made that a juror's misconduct was calculated to influence the verdict and that it is reasonably probable that it did so, it is grounds for a new trial.. State v. Cuevas, 288 N.W.2d 525 (Iowa 1980); Harris v. Deere & Co., 263 N.W.2d 727, 730 (Iowa 1978). However, before a new trial will be ordered, there must be clear evidence that the misconduct was prejudicial. Cuevas at 535. Insofar as this experiment is concerned, we find that there is no convincing evidence that the experiment significantly influenced any juror's

decision as to the verdict. There was considerable evidence that any juror could reasonably have employed in arriving at a guilty verdict, and even as regards the particular stereo receiver in question, there is no reason to believe that Mr. Cline's experiment was necessary, taken together with the other evidence on the matter, for any juror to arrive at the conclusion that it had originally belonged to Mr. Taghon and that it was the one that had been stolen from him. We therefore conclude that it is not prejudicial, even if Mr. Cline's actions amounted to misconduct.

Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 586 (Iowa 1973), is distinguishable since in Fischer a juror conducted an experiment and gathered evidence without the knowledge of the parties, gave that information to the jury during their deliberations, and the information given went to a key point in the case. The court concluded that this misconduct "was reasonably calculated to and probably did influence the jury." It was for that reason that the court concluded that the plaintiffs were denied a fair trial and ordered a new trial. In the instant case, we find that the actions of Mr. Cline do not rise to that level of misconduct, that the degree of communication from Cline to the other jurors was relatively inconsequential, that there was other evidence from which the jury could have reached the same conclusion as might have been drawn from Cline's experiment, and that the jury was not influenced by it.

Best complains that a witness named Larry Northup, who was employed at Washington Junior High School in Ottumwa, was an acquaintance of Mr. Cline, the juror. Cline was evidently personally aware of the theft during which video equipment which was admitted into evidence in Best's case was allegedly stolen from Northup's residence. Cline did not inform the court of these facts during voir dire or later during the trial. Best argues that Cline improperly interjected his personal knowledge of the value of the video equipment into the jury deliberations.

We are not aware of any authority which holds that a juror is under an affirmative duty to inform the court of his acquaintanceship with a witness when he has not been interrogated about that matter during voir dire. The remedy for jury partiality, assuming that there was such, is a hearing providing the opportunity to prove that the juror was partial. Best had such an opportunity, and it was determined at that hearing that the juror was not biased, and that the defendant was not deprived of a fair trial. Moreover, "it is well settled that known objections, or those which may be ascertained, are waived if no challenge is made before the jury is sworn." State v. Grove, 171 N.W.2d 519, 520 (Iowa 1969); State v.Cuevas, supra at 534. Prior to trial, defendant had ample opportunity to investigate Mr. Northup, since he was informed of Northup's identity, employment, and the nature of his expected testimony. Appropriate objections could have been raised at voir dire, but were not.

Furthermore, all of the information which Cline allegedly introduced into the jury's deliberations from his own personal knowledge was available to the jury through evidence and testimony adduced at trial. We do not find that Best was prejudiced by any of these matters.

Best also complains that Miss Sulvia Tulley, another juror, did not respond honestly and completely to a general question regarding possible relationships with law enforcement personnel, since she was at the time of trial residing with a person who had at one time been involved in law enforcement.

Miss Tulley, in response to the question, had acknowledged that her brother was involved in law enforcement and was teaching a course on that subject at a community college. Best did not challenge her as partial or biased on the basis of her relationship with her brotner. The individual with whom she was residing, whom she did not mention on voir dire in response to that question, had left law

enforcement work fifteen years prior to the trial. Under the circumstances, we find no evidence of juror misconduct.

II. Hearsay Evidence

Best argues that the trial court committed reversible error in admitting into evidence certain statements made by Best's wife, Donna, to a DCI agent, Dennis Smith, while Smith was operating in an undercover capacity. These conversations consisted essentially of discussions and negotiations concerning allegedly stolen property which Donna was interested in selling to Smith. Best contends that when these statements were admitted into evidence at Best's trial, the State's evidence had not sufficiently established the existence of a conspiracy between Best and his wife. On the ground that the prosecution cannot bootstrap proof of a conspiracy by introduction of an alleged co-conspirator's hearsay declarations, Best argues that the rule making an exception for hearsay statements made in the course of a conspiracy ought not to apply. State v. Lain, 246 N.W.2d 238, 240 (Iowa 1976); State v. Kidd, 239 N.W.2d 860 (Iowa 1976).

We find, however, that there was no bootstrapping here. In Kidd at 864, the supreme court held that "[w]hen there is substantial evidence of a conspiracy, whether the offense charged is conspiracy or not, everything said by any conspirator in furtherance of the common purpose is deemed to have been said in behalf of all parties to the conspiracy." In State v. Blyth, 226 N.W.2d 250, 270 (Iowa 1975), the court held that a prima facie case was sufficient to allow the declarations and conduct of a co-conspirator to be admitted under the co-conspirator exception to the hearsay rule. We find that there was certainly a prima facie case and on any reasonable standard, substantial evidence that Donna and Alvin Best were engaged in a conspiracy, and that this evidence was admitted prior to the admission of the testimony to which Best objects. This evidence

included, among other things, the fact that the stereo receiver had been stolen from Taghon, that soon thereafter, evidence developed that led the authorities to believe that Best had purchased it, that Best told inconsistent stories about the disposition of the stereo, that the stolen stereo was purchased by Smith from Donna Best at the Best's tavern, and that Best had failed to fulfill a promise that he would recover and return the stolen stereo which he said was in the possession of some relative somewhere in Michigan. In addition, after Best's arrest, a search of his living quarters and recreational vehicle led to the seizure of a number of other stolen items which were positively identified by their rightful owners, including a television set, a scanner, underwear which Best admitted had been acquired by shoplifting, and firearms. There was testimony that Best had stated to the undercover agents that his wife did most of the buying and selling of stolen merchandise and that he had urged her to be careful in selecting her suppliers and customers. There was also evidence that Best had provided the undercover agents with the names of other burglars from whom they might acquire merchandise that they were supposedly interested in, and that he had told them that Donna was more intimately acquainted with them than he was.

This clearly is sufficient to establish a prima facie case, so that the co-conspirator exception is applicable under the doctrine enunciated in Kidd, and the argument that the conspiracy case was bootstrapped fails.

III. Sufficiency of the Evidence

Best argues that there was not substantial evidence of a conspiracy to commit theft between Best and his wife. Although he concedes that there was considerable evidence against his wife, he argues that there was not enough evidence to raise a fair inference of guilt concerning his own part in the activities of which he was convicted. State v. Schrier, 300 N.W.2d 305, 308 (Iowa 1981).

We view the evidence in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). The jury's verdict is conclusive if there is "substantial support for the verdict in the record," i.e., "such evidence that could convince a rational trier of fact that defendant is guilty beyond a reasonable doubt." Id. at 338-339.

Applying these criteria to all of the evidence in the record, we conclude that there was substantial evidence supporting Best's conviction.

IV. Control over or Possession of the Stolen Property

In order to be convicted of a violation of section 714.1(4), the defendant must be proved beyond a reasonable doubt to have exercised control over stolen property, knowing or having reason to believe that such property was stolen. Best argues that the property introduced into evidence was not shown to have been under Best's control. "At the time of arrest, a person charged under section 714.1(4) is exercising control over all that property which is in his or her possession. . . ." State v. Post, 286 N.W.2d 195, 202 (Iowa 1979). Best and his wife jointly owned the tavern and the vehicle in which the stolen items were kept. Best granted access to these places to the officers who were investigating the thefts. Best repeatedly stated to investigating officers that he was actively involved in Donna Best's activities in connection with the purchase and sale of stolen items. He admitted advising her as to the care she should exercise in selecting persons with whom she would deal. All of these factors lead us to conclude that there was sufficient evidence to establish that Best was in possession of and exercised control over the items that were introduced into evidence. Moreover, it is clear that he aided and abetted the crimes committed by his co-conspirator, Donna, since he "'assented to or lent countenance or

approval to the criminal act, either by active participation in it or by in some manner encouraging it.'" State v. Galvan, 297 N.W.2d 344, 348 (Iowa 1980); State v. Lott, 255 N.W.2d 105, 108 (Iowa 1977).

Having found no merit in any of Best's claims of error on the part of the trial court, we affirm his conviction.

AFFIRMED.