



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	Filed April 26, 1983
	)	
vs.	)	
	)	
LARRY M. GERING,	)	<u>2-470</u>
	)	66933
Defendant-Appellant.	)	

Appeal from Polk District Court - Van Wifvat, Judge.

Defendant appeals from his conviction, after a jury trial, of first-degree arson as defined in Iowa Code sections 712.1 and 712.2. AFFIRMED.

Scott D. Rosenberg, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

DONIELSON, J.

Defendant appeals from his conviction, after a jury trial, of first-degree arson as defined in Iowa Code sections 712.1 and 712.2. He was originally charged with two counts of arson, but the trial court granted his motion for judgment of acquittal on one of the counts. On appeal, defendant asserts (1) that there was not sufficient evidence to support his conviction; (2) that the second sentence of Iowa Code section 712.1 (exception to definition of arson when owner of property consents) sets forth additional elements of the crime, and the trial court thus should have instructed the jury as to those elements; (3) that the jury was prejudiced by evidence of another crime—the count of which defendant was acquitted—and the trial court thus should have granted defendant's motion for mistrial; (4) that the State failed to disclose pursuant to Iowa Rule of Criminal Procedure 13(2) certain incriminatory statements made by defendant; (5) that the State failed to establish an adequate chain of custody for one of its exhibits, a newspaper saturated with fuel oil; (6) that the trial court should not have permitted one of the State's witnesses to testify about matters not contained in the minutes of testimony; and (7) that certain testimony elicited by the State on cross-examination not only exceeded the scope of direct examination but also was hearsay. We affirm the decision of the trial court.

Defendant has alleged no violation of basic constitutional safeguards in this criminal appeal. Our review, therefore, is on assigned error only. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I.

An apartment building and a rental house owned by defendant, Larry M. Gering, were damaged by fire on February 29, 1980. Defendant was charged with first-degree arson in the apartment building fire and second-degree arson in the house fire.

At trial, the prosecutor called as a witness Tim Dorr, an insurance adjuster. Dorr testified that he had interviewed defendant after the fire because he was handling a claim by defendant's insurance agent. Defense counsel objected that this testimony was not contained in the minutes of testimony. (The minutes indicated that Dorr was an insurance adjuster and would testify (1) about an interview he had had with defendant in which defendant told him he was behind in his payments for the two rental properties, and (2) about "other matters pertaining to the crime.") The trial court overruled the objection.

The prosecutor also called as a witness Joleta Ripley, a friend of defendant's. On redirect examination, the prosecutor asked Ripley if she had spoken with defendant after she contacted the authorities. When she replied that she had, the prosecutor requested that defense counsel approach the bench. At this time defendant was informed that the State intended to introduce testimony concerning incriminating statements made by defendant. Defense counsel objected that the prosecutor had not disclosed to him pursuant to Iowa Rule of Criminal Procedure 13(2) any incriminating statements made by defendant to Ripley. (The prosecutor's answer to defense counsel's pretrial motion to produce did not list any statements to Ripley.) A hearing was held outside the presence of the jury. The prosecutor argued that he had given defense counsel all the information described in the answer, and that he had told defense counsel about defendant's ongoing relationship with Ripley. He also argued that prior to cross examination of Ripley by the defense, during which questions were asked concerning Ripley's ongoing relationship with defendant, he had not intended to introduce this information.

The trial court overruled the objection but allowed defense counsel to examine Ripley outside the presence of the jury. Defense counsel then renewed his objection, and the prosecutor further explained that he had given defense

counsel only limited information about the conversations between defendant and Ripley because he had suspected defendant of the crime of tampering with a witness, and he had felt no duty to disclose an ongoing crime. The trial court again overruled the objection. Ripley then testified in the presence of the jury that defendant had asked her to change her testimony at trial.

The prosecutor offered into evidence Exhibit 5, a newspaper saturated with fuel oil. William Devine, a fire investigator, testified that on the night of the fires he had found a newspaper smelling of fuel oil in a closet near the place where the apartment house fire had started. Devine identified Exhibit 5 as the newspaper he had found. He also testified that the newspaper was later placed in a covered coffee can in the trunk of his car and that from there it had been taken to the crime laboratory. Defense counsel objected to the admission of the exhibit, asserting that the prosecutor had failed to establish an adequate chain of custody. The trial court overruled the objection, and Exhibit 5 was admitted.

At the conclusion of the prosecutor's case, defense counsel moved for a judgment of acquittal. The trial court sustained the motion as to the second-degree arson count by overruled it as to the first-degree arson count. Defense counsel then moved for a mistrial, asserting that the jury had been prejudiced by evidence of another crime--the second-degree arson count. The trial court denied the motion, but counsel agreed that the jury would be instructed to consider only the evidence relevant to the first-degree arson count.

Defense counsel called as a witness Ronald Wheeler, an assistant county attorney who had spoken with Joleta Ripley after the fires. Wheeler testified on direct examination that Ripley had told him where defendant had bought the fuel oil he used to start the fires. On cross-examination, the prosecutor sought to ask Wheeler about other matters discussed in his conversation with Ripley. Defense counsel objected that the testimony was hearsay and went beyond the scope of

direct examination. The trial court overruled the objection, and Wheeler testified that Ripley told him that defendant had set the fires by going up a fire escape and that he had set them in order to collect on insurance.

Defense counsel asked the court to include in its jury instructions on the elements of first-degree arson, two additional elements: that an insurer had been fraudulently exposed to risk, and that the life or property of a person other than defendant had been endangered. In support of his request, defense counsel cited Iowa Code section 712.1. The trial court refused to so instruct the jury.

II.

Section 712.1 of the Iowa Code defines the offense of arson as follows:

Causing a fire or explosion, or placing any burning or combustible material, or any incendiary or explosive device or material, in or near any property with the intent to destroy or damage such property, or with the knowledge that such property will probably be destroyed or damaged, is arson, whether or not any such property is actually destroyed or damaged. Provided, that where a person who owns said property which the defendant intends to destroy or damage, or which he or she knowingly endangers, consented to the defendant's acts, and where no insurer has been exposed fraudulently to any risk, and where the act was done in such a way as not to unreasonably endanger the life or property of any other person the act shall not be arson. (emphasis added).

Defendant argues that this section, read as a whole, provides that when the property destroyed belongs to the defendant, the State must prove that an insurer has been exposed fraudulently to risk and that the life or property of another person was unreasonably endangered. He argues that the statute establishes these points as necessary elements of the offense in such a situation, and that since the State did not prove that any insurer had been exposed fraudulently to risk, it failed to establish a necessary element of arson.

Defendant's argument is premised upon an unsupportable construction and interpretation of Iowa Code section 712.1. The basic elements constituting arson are set out in the first clause of the section. As to these elements, the State has

the burden of proving each and every one beyond a reasonable doubt in order to establish occurrence of the crime. In reviewing the language of the second clause, however, it is clear that the legislature intended its provisions to constitute an affirmative defense rather than additional elements of the offense. See State v. TeBockhorst, 305 N.W.2d 705, 707 (Iowa 1981). See also Yeager and Carlson, Iowa Practice: Criminal Law and Procedure sections 272 and 273 at 71 and 72 (1979).

Thus, where a defendant against whom all of the elements of arson have been established can prove (1) that he either owns the property, or burned it with the owner's consent, (2) that no insurer has been exposed fraudulently to risk, AND (3) that no unreasonable danger to the life or property of any other person was posed, he has raised a specific statutory defense. To maintain the defense, defendant must assert each and every element of the defense. Conversely, in order to overcome this defense, the State need merely disprove any one of its elements. The State bears no burden until defendant demonstrates that the defense applies. See State v. Delay, 320 N.W.2d 831, 834 (Iowa 1982).

Defendant did not assert this affirmative defense. The State, therefore, was under no obligation to refute any of its elements. It was not required to offer any evidence to establish that an insurer had been exposed fraudulently to risk, and the court did not err in refusing to instruct the jury to the contrary. We hold that the court properly instructed the jury as to each and every element of arson. Upon review of the record, we are also satisfied that the evidence presented by the State was sufficient to uphold a verdict of guilty on the charge of arson in the first degree.

III.

Defendant argues that the trial court erred in not granting his motion for a mistrial after the jury heard evidence concerning the second count of arson, which was dismissed on defendant's motion on the grounds of insufficiency of the

evidence. He asserts that because the jury might have considered evidence relating solely to the second count despite the court's admonition, he was denied a fair trial. We do not agree.

As a general rule, evidence establishing the commission of an offense other than that for which defendant is charged is inadmissible. State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978). This does not mean, however, that when two separate but related offenses are charged in a single trial information, a directed verdict on one charge necessitates a mistrial on the grounds of prejudice as to the other charge. Indeed, it is our opinion that the weight of authority does not support the application of this evidentiary rule in any case where two crimes are charged in a single information. Even if we were to hold to the contrary, however, defendant cannot prevail here. In cases where the rule applies, defendant must first establish that he has suffered prejudice as a result of the jury hearing evidence of the separate crimes. This he has not done.

To begin with, in the case at bar it is not clear that the jury could not have properly considered evidence relating to the dismissed charge. We have recognized exceptions to the stated rule, under which evidence of other crimes allegedly committed by the accused may be admitted. Such evidence may be admitted to establish:

(1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other, (5) identity of the person charged with the commission of the crime. (emphasis added).

State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979). Two counts of arson, committed at the same time, and under the same circumstances would appear to fit within the fourth enumerated exception.

More to the point, though, is that even if the jury could not have considered the evidence, the court's instruction that the jury disregard it is presumed to be

sufficient to protect defendant. A curative instruction is sufficient to avoid prejudice except in "extreme instances where the prejudicial effect would probably remain to influence the verdict despite its exclusion." State v. Coffee, 182 N.W.2d 390, 392 (Iowa 1970). We find no evidence of any manifest prejudicial effect resulting from the jury hearing evidence pertaining to the second count of arson charged in the information. We therefore hold that the trial court did not err in denying defendant's motion for a mistrial.

IV.

Defendant seeks reversal on the grounds that the State failed to disclose, prior to trial, the substance of certain incriminatory statements allegedly made by him to Joleta Ripley. Defendant argues that once he filed his pretrial motion for discovery, disclosure was made compulsory under Iowa R. Crim. P. 13(2) and 13(5).

Rule 13(2)(a)(1), which is really the section at issue here, requires the State, upon defendant's motion, to divulge the substance of any oral statements made by defendant which the State intends to use at trial. The rule imposes no obligation to disclose the substance of any statement which the State does not intend to use. Rule 13(5) provides that if the State subsequently decides to use these statements, it is under a continuing duty to inform defendant and allow discovery.

In the present case, the State argues that until related matters were elicited on cross examination by defendant, it had no intention of using the statements at issue. Every trial lawyer tries a slightly different case; however, we observe that it is normal practice for the State to formulate a rather definite trial plan well in advance of trial, and we are not convinced that defendant's cross examination was so unexpected that it would have caused the State to alter its tactics.

Alternatively, the State argues that it was not obligated to disclose the substance of the statements at issue, because they were evidence of the on-going crime of tampering with a witness. This does not relieve the State of its obligation under rule 13(2), however.

The trial court is given considerable discretion in enforcing the discovery rules. State v. Leto, 305 N.W.2d 482, 489 (Iowa 1981). In the exercise of its discretion, the court may properly consider the reasons for the State's failure to provide timely discovery. State v. Thompkins, 318 N.W.2d 194, 198 (Iowa 1982). In the present case, the State did not make disclosure because it suspected that there was an on-going crime of tampering with a witness. This is information which the court could properly consider in determining what sanctions, if any, to apply.

In reviewing the exercise of the trial court's discretion, we will not find an abuse of discretion unless defendant demonstrates prejudice. He has not done so here. A review of the record indicates that defendant was given the opportunity to examine the witness outside the presence of the jury prior to the time the testimony was admitted. Had he desired more time to prepare a defense, he could have moved for a continuance. He did not, and he does not cite as error the trial court's failure to order one sua sponte. In light of this, he has failed to show that he was in any way prejudiced by the fact that his examination of the witness concerning the statements at issue took place during the trial rather than pretrial. We therefore hold that the trial court did not err in failing to impose the most severe sanction—exclusion of the testimony—under these circumstances.

V.

Defendant argues that the State failed to establish a continuous chain of custody for one of its exhibits, a newspaper saturated with fuel oil. An exception to the general rule requiring a continuous chain of custody, however, applies when the exhibit is not easily altered. The State need not show a chain of continuous custody as a foundation for the admissibility of evidence which is not easily susceptible to undetected alteration. State v. Moses, 320 N.W.2d 581, 585 (Iowa 1982).

Admission of evidence over a chain of custody objection is a matter within the sound discretion of the trial court. State v. Gibb, 303 N.W.2d 673, 681 (Iowa 1981). Reversal is warranted only upon a clear showing of abuse of discretion.

Trial judge determines the sufficiency of physical evidence identification in light of the article's nature, circumstances surrounding its custody and the likelihood of intermeddlers tampering with it. A more elaborate foundation is required to identify evidence that is easily substituted, such as marijuana, than is necessary to identify physical evidence with unusual characteristics, such as money, a gun, clothing and a body, or matches and glasses. State v. Ash, 244 N.W.2d 812, 816 (Iowa 1976); State v. Lunsford, supra, 204 N.W.2d at 616-617. Unless trial judge's decision to admit evidence over a chain-of-custody objection constitutes a clear abuse of discretion, it will not be overturned. Lunsford, supra, 204 N.W.2d at 617.

State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978).

The disputed exhibit in the case at bar was a newspaper soaked in fuel oil. The fire investigator testified that he found the paper near the origin of the fire on the night of the fire, that he sealed it in a coffee can and locked it in the trunk of his car. He further stated that he was the only one who was permitted access to the trunk, and that, to his knowledge, nobody had gotten into the trunk. He finally testified that the exhibit introduced at trial was the same paper he had taken from the scene of the fire, and that it did not appear to have been altered.

Based upon the testimony of the fire investigator, it is our opinion that possibility of substitution or alteration of this exhibit was slight. The State has met its required showing that it is "reasonably probable [that] tampering, substitution or alteration did not occur." State v. Gibb, at 681. We therefore hold that the trial court did not err in admitting the exhibit over defendant's chain of custody objection.

VI.

Defendant next argues that the trial court erred in permitting one of the State's witnesses to testify beyond the scope of the minutes. The requirements

for the minutes of testimony are enumerated in Iowa R. Crim. P. 5(3). That rule stipulates that the minutes must provide a "full and fair statement of the witness's expected testimony." This does not mean that every detail of the expected testimony must be set out at length, however. The minutes need merely be sufficient to advise defendant of the nature and scope of testimony evidence to be used against him. State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). The purpose of the minutes is to prevent defendant from being prejudiced by surprise testimony at trial. Absent such prejudice, we will not grant relief. See State v. Buford, 308 N.W.2d 31, 34 (Iowa 1981).

We are of the opinion that the minutes of testimony were sufficient to advise defendant of the scope and substance of the insurance adjuster's testimony. However, even if the minutes were inadequate, defendant has not made any claim that he was surprised by the testimony. Absent surprise, defendant cannot have been prejudiced by the alleged inadequacies of the minutes.

VII.

Finally, we consider defendant's claims that the State's cross examination of assistant county attorney Ronald Wheeler went beyond the scope of direct examination, and that the testimony was hearsay. We find no merit in either claim. It is the accepted rule in this jurisdiction that when a part of a conversation is shown on direct examination, the rest of the conversation may be inquired into on cross-examination. Iowa Code section 622.19; State v. Ebelsheiser, 43 N.W.2d 706, 709 (Iowa 1950). As to the hearsay objection,

The rule in Iowa is that when one party introduces inadmissible evidence, with or without objection, the trial court has discretion to allow the adversary to offer otherwise inadmissible evidence on the same subject when it is fairly responsive.

State v. Pepples, 250 N.W.2d 390, 394 (Iowa 1977).

AFFIRMED.

All judges concur except Schlegel, J., who dissents.

SCHLEGEL, J. (dissenting)

I dissent from division IV of the majority opinion because I believe the prosecutor violated the rules of criminal procedure by failing to disclose certain incriminatory statements made by defendant.

The criminal rules could not make the State's duty any more clear. Iowa R. Crim. P. 13(2)(a)(1) provides in part:

Upon pretrial motion of a defendant the court shall order the attorney for the state to permit the defendant to inspect and copy or photograph: . . . the substance of any oral statement made by the defendant which the state intends to offer in evidence at the trial.

Iowa R. Crim. P. 13(5) imposes on the State a continuing duty to disclose such information:

If, subsequent to compliance with an order issued pursuant to this rule, either party discovers additional evidence, or decides to use evidence which is additional to that originally intended for use, and such additional evidence is subject to discovery under this rule, the party shall promptly file written notice of the existence of the additional evidence to allow the other party to make an appropriate motion for additional discovery. (emphasis added)

In this case, the State was required to file notice of its intent to use defendant's statements when it was determined that such evidence would be used. I do not believe that the trial court should be excused from its failure to adhere to the unambiguous requirements of Rule 13 merely by invoking the ambiguous "abuse of discretion" standard.

In oral arguments before this court, the State contended, in effect, that the failure to reveal such statements could not surprise or prejudice the defendant since he made the statements himself. Such an argument arrogantly supposes that the only purpose of Rule 13 is to avoid surprise, and that defendants are not prejudiced by learning, too late to obtain evidence explaining such statements in a proper case, that the State has concluded such statements will be used to assist

some formerly unrevealed theory of the case. We must, of course, reject this argument.

I believe defendant in this case was prejudiced by the State's failure to adhere to its duty of disclosure under Iowa R. Crim. P. 13(2)(a)(1) and 13(5). I would reverse and remand for a new trial.