

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 29 1982

CLERK SUPREME COURT

STATE OF IOWA,

)

166

Plaintiff-Appellee,

)

Filed June 29, 1982

vs.

)

ROBERT DAVIS MORRIS,

)

2-124
65753

Defendant-Appellant.

)

Appeal from Polk District Court - Ray A. Fenton, Judge.

Defendant appeals from his conviction for robbery in the first degree in violation of sections 711.1 and 711.2, The Code, asserting that: (1) he was denied a fair hearing on the voluntariness of his confession when the trial court ruled that the evidence was admissible prior to defense counsel's cross-examination of the probation officer; (2) the confession he gave to his probation officer was not knowingly, voluntarily, and intelligently made and was thus in violation of his Miranda rights; and (3) the evidence was insufficient to support the jury's verdict of guilty. AFFIRMED.

R. Earl Barrett, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, and Johnson, JJ.

DONIELSON, J.

Defendant appeals from his conviction for robbery in the first degree in violation of sections 711.1 and 711.2, The Code, asserting that: (1) he was denied a fair hearing on the voluntariness of his confession when the trial court ruled that the evidence was admissible prior to defense counsel's cross-examination of the probation officer; (2) the confession he gave to his probation officer was not knowingly, voluntarily, and intelligently made and was thus in violation of his Miranda rights; and (3) the evidence was insufficient to support the jury's verdict of guilty. We affirm.

Generally, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. However, when a constitutional issue is presented, the evidence relevant to that issue is reviewed de novo. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

I.

Defendant was arrested during the evening of March 25, 1980, shortly after the report of a robbery at the Country Kitchen restaurant at 2700 Grand Avenue in Des Moines by a masked robber. The pickup in which defendant was riding prior to his arrest matched the description of the robber's escape vehicle. Des Moines police officer Jerry Jones testified at the suppression hearing that he and another officer interviewed the defendant about other robberies in the Des Moines area on March 26, 1980, at 10:00 a.m.; that prior to the interview the defendant was read his Miranda rights; and that the defendant signed a waiver form. This interview lasted approximately twenty minutes.

Defendant's probation officer, Hazel Wesley, and another probation officer visited defendant on March 26, 1980, at 10:30 a.m. Defendant asserts the probation officers' visit was on March 27, 1980, and thus 27 hours had elapsed since his previous Miranda warning and waiver. During this visit defendant made certain inculpatory statements.

During the trial defendant made a motion to suppress the testimony of his probation officer that he had confessed to her at the county jail. The probation officer testified that defendant told her he knew, understood, and waived his Miranda rights but she did not specifically advise him of his rights. Defendant reserved cross-examination of the probation officer until after Officer Jones testified. The trial court then heard Officer Jones testify that defendant had been advised of his Miranda rights after arrest. Based on this testimony, the trial court overruled defendant's motion to suppress prior to defendant's cross-examination of the probation officer. The trial court found the confession was not made in a custodial setting and the waiver of Miranda rights was knowing, voluntary, and intelligent. However, defendant was allowed to cross-examine the probation officer before the trial was resumed.

II.

Defendant asserts he was denied a fair hearing on the voluntariness of his confession because the trial judge issued his ruling before defendant was allowed to cross-examine the probation officer. The state argues that defendant waived any claim of error as to the adequacy of the hearing by not making a timely objection at trial.

Defendant did reserve cross-examination of the probation officer until after testimony of Officer Jones; however, the defendant failed to object in any manner when the trial court made the adverse ruling, which defendant now claims was error, prior to defendant's cross-examination of the probation officer. Furthermore, defendant then proceeded to cross-examine the witness after the ruling without making any objection. Objections should be raised at the earliest time at which the error becomes apparent. State v. Steltzer, 288 N.W.2d 557 (Iowa 1980); State v. Reese, 259 N.W.2d 771, 775 (Iowa 1977). Issues not raised in the trial court may not be raised for the first time on appeal. State v. Jump, 269

N.W.2d 417, 430 (Iowa 1978). We find that defendant has waived this issue by failing to make a timely objection when the alleged error first became apparent. However, even if this issue had been properly preserved, we would find the alleged error harmless, where as here, the trial court did in fact hear defendant's cross-examination outside the presence of the jury and there was an opportunity to object prior to the resuming of the trial.

III.

Defendant next asserts his confession to probation officer Wesley was not given with a voluntary, knowing, and intelligent waiver of his Miranda rights. We disagree.

Defendant was advised of his Miranda rights on March 26, 1980, at approximately 10:00 a.m. by Officer Jones. At this time, defendant was presented with a standard advisement of rights form which was read to defendant. Defendant also read and signed the form. Defendant was subsequently visited by Mrs. Wesley either a few hours later or the next day. During this visit, defendant immediately volunteered information about his activities on March 25. Mrs. Wesley then interrupted defendant and asked if he wanted to be read the Miranda warning and/or would like to waive it. Defendant then responded he understood his rights and would waive them. Under the totality of circumstances, including: defendant's prior Miranda warning given by Officer Jones, the fact that defendant's statements to Mrs. Wesley were unsolicited, and defendant's statement to Mrs. Wesley that he knew and would waive his Miranda rights, we find the defendant's waiver of Miranda rights was voluntary, knowing, and intelligent. The trial court is, therefore, affirmed.

IV.

Defendant's final assertion is that the trial court erred by overruling defendant's motion for a directed verdict because there was not substantial

evidence to identify defendant as the perpetrator of the robbery. We disagree. We view the evidence in the light most favorable to the state and find from the facts set out below there was substantial evidence as could convince a rational trier of fact that the defendant was guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d 337, 339-40 (Iowa 1980).

The state produced two eye witnesses who, while not able to identify specific facial characteristics of defendant due to the mask, were able to make a composite identification due to defendant's height, weight, and clothing. Defendant's allegations do go to the credibility of the eye witnesses, but this is a matter for the jury to determine and did not entitle the defendant to receive a directed verdict. See State v. Agee, 257 Iowa 1345, 1348, 136 N.W.2d 419, 420 (1965).

Circumstantial and direct evidence are equally probative. Iowa R. App. P. 14(f)(16); State v. O'Connell, 275 N.W.2d 197, 205 (Iowa 1979). Circumstantial evidence also links defendant with the crime. Following a high speed chase, defendant was arrested as he fled from a pickup which matched the description of the robber's getaway vehicle. The robber's mask was found along the escape route in a brushy area near the restaurant. Defendant's face was scratched and slightly bleeding. A jury could reasonably infer he was scratched in the brushy area as he fled the restaurant.

Based upon these facts, we affirm the trial court's denial of defendant's motion for a directed verdict.

AFFIRMED.