IN THE COURT OF APPEALS OF IOWA

No. 0-598 / 99-1429
Filed December 13, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANNY RAY LONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Keith Burgett, Judge.

Long appeals from his convictions for two counts of first-degree robbery. **AFFIRMED.**

Delbert D. Rowse, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher Wilson, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Hecht, JJ.

HUITINK, J.

Danny Long appeals from his conviction of two counts of robbery in the first degree.

I. Background Facts and Proceedings.

Danny Long, Shawn Saul, and David Vance were jointly charged with the armed robbery of three Council Bluffs businesses on December 11 and 18, 1998. Although a joint trial was originally scheduled, the State's case against each was severed for separate trials.

Under the State's theory, each robbery involved a single shotgun wielding man wearing a ski mask. The State's case against Long was in part premised on testimony by Jeffery Haines, B.J. Smith, and Sherry Heath, witnesses who could link Long to the gun, ski masks, and automobile used in the robberies. In addition, police obtained Saul's confession to the December 18 robbery. Saul's confession also implicated Long and Vance in the two December 11 robberies. The State's case also included incriminating statements Long made to Rebecca Brightbill admitting involvement in the December 11 robberies.

Haines, Smith, and Brightbill recanted their original statements to investigators. As a result, the State, over Long's hearsay objection, sought and received a pretrial ruling admitting the transcripts and tape recordings of Smith's and Haine's original statements.

The district court's decision to separately try Long resulted in Long's motion to sever each charge against him for separate trial. His lawyer argued:

> Just one last comment. Again, when—when the strategy was with all defendants together we—we agreed that there was a common

> scheme with somebody. The problem now that I see with defendants being severed is my client's alleged participation is different on each count. So if I'm not going with all the defendants to show, yeah, there was a common scheme but it was them and here's the evidence regarding my client and my defense, then it isn't as effective and I think the cases should be severed. I should be able to present my defense as to my client's participation or alleged participation in each charge separately without having the prejudice of, well, maybe they think he was more involved in one and not involved in the others, et cetera. Then I gain that advantage in fairness to my client by having them severed. I think it's prejudicial at this point and there's no common scheme regarding my client. Maybe the common scheme of the robbers or somebody involved in these—this threesome but that's it.

The district court denied Long's motion, stating:

> [T]wo of these crimes are committed as alleged in the file on December the 11th and the other one a very short time later. A – Having heard the evidence that was presented from the other trial [Vance's] convinces me that there was a short period of time when a common scheme occurred that could have easily been interpreted as one common event. But I'm not going to sever these cases. They're all going to trial today.

At trial Long's attorney made the following objections to the admission of transcripts and tape recordings of Haine's and Smith's original statements to investigators:

> MR. HEITHOFF: Your Honor, I object to this and the tape that's going to be offered here real soon. I'll make this again at that time but it has to do with that hearing that we've already had and – and I object that he is in effect impeaching his own witness, meaning Jeff Haines. It's also – I wasn't present at this taped statement so I had no right of confrontation for my client and this is clearly hearsay and it's apparently being offered under residual hearsay. That requires trustworthiness and reliability of the statement. Jeff Haines just said that he lied to the police to protect his own self and I don't think there's reliability of that statement so I object for all those reasons.
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> * * *
>
> I have a number of objections as we've already discussed. This is in fact impeaching his own witness, BJ Smith, through some other

> statement which is clearly contrary to Turraseck (phonetic). Also it doesn't qualify under the residual hearsay rule because it has no reliability to the statement. Also, Your Honor, I wasn't present at this statement so I had no confrontational rights against this witness. And that deprives my client of the right of confrontation so I object for all those reasons.

Long made the following objection to the admission of an investigator's testimony concerning Brightbill's pretrial statement concerning Long's admissions:

> Q. Were you [the investigator] ever able to get her [Brightbill] to tell you anything about Danny Long and his involvement in these robberies? A. Yes.
>
> Q. What – what was she – what did she eventually tell you?
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> MR. HEITHOFF: Your Honor, at this point though I would like to make that objection regarding the hearsay. It doesn't meet the exception of the residual hearsay as we've already previously discussed. I'm also objecting on the grounds that I was not present during this conversation to cross-examine this witness so my client would be deprived of the right of confrontation regarding this statement.

Sherry Heath's testimony that David Vance told her not to use her car because it was used in the robbery was also received over Long's hearsay objection. The jury returned guilty verdicts on two of the three robbery counts charged. Long's posttrial motions in arrest of judgment, for judgment of acquittal, and motion for new trial were denied.

On appeal Long contends the court erred in denying his motion to sever the charges, admitting the taped interviews of certain witnesses, and admitting evidence discovered because of Saul's allegedly coerced admission. He also claims his trial counsel was ineffective for failing to seek suppression of Saul's confession and any evidence obtained as a result of that confession. Finally, he maintains the prosecutor was guilty of misconduct due to statements made in his closing arguments.

II. Severance.

We review the trial court's refusal to sever charges on an abuse of discretion standard. *State v. Delaney*, 526 N.W.2d 170, 174 (Iowa App. 1994).

Long asserts that the district court erred in denying his motion to sever the charges brought against him because those charges did not "arise out of the same transaction or occurrence." While this may be true, this does not necessarily give rise to the conclusion that the charges should be tried separately. Iowa Rule of Criminal Procedure 6(1) provides as follows:

> Multiple Offenses. Two or more public offenses which arose from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

The district court based its denial of Long's motion, not on a finding that the crimes arose from the same transaction or occurrence, but on a finding that the crimes involved a common scheme or plan. A common scheme or plan by its very definition presupposes that it involves a series of separate transactions or acts. *State v. Smith*, 576 N.W.2d 634, 636 (Iowa App. 1998). The test applied in making this determination is the requirement that all offenses charged must be products of a single or continuing motive. *Id.* Factors relevant to this inquiry include intent, modus operandi, and the temporal and geographic proximity of the crimes. *State v. Oetken,* 613 N.W.2d 679, 688 (Iowa 2000).

We cannot find, based on our review of the record, that the district court abused its discretion in finding a common scheme or plan. Long was linked with three robberies of businesses where a lone clerk worked and had access to the

cash register, all committed within a few days of each other by a person wielding a sawed-off shot gun and wearing a mask. In other words, the charges against Long were the same type of crimes, committed in close temporal proximity, and executed in the same fashion. Similar evidence has been deemed sufficient to establish a common scheme or plan with a continuing motive. *See Oetken,* 613 N.W.2d at 688-89 (finding that two burglaries committed on two consecutive days using similar methods of operation was sufficient to evidence a common scheme or plan). We affirm on this issue.

III. Evidentiary Issues.

Long raises a categorical constitutional challenge to the admission of all pretrial statements and trial testimony of the State's witnesses. Our review is accordingly de novo. *State v. Ryan*, 501 N.W.2d 516, 517 (Iowa 1993).

Long argues:

> The basic rule of law controlling the outcome of this case can be found in *Bruton v. United States*, 391 US 123, 20 Led2d 476, 88 S.Ct. 1620 and *Lilly v. Virginia*, 119 S.Ct. 1887. *Bruton* has been a rule of long standing existence. *Lilly* was issued in June 1999. Trial in this matter did not commence until August 10, 1999. *Lilly* was the law at the time of trial herein. The Trial Court erred by consistently applying the wrong rules of law in this matter.
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> All witnesses in question could have well been charged as accomplices – accessories either before of [sic] after the fact. There are clear subtle indications all through the testimony of these witnesses that they were aware that they could also have been charged if they did not co-operate [sic] and testify against the Appellant.
>
> . . .

We disagree. The *Bruton* rule Long invokes holds that a "nontestifying codefendant's confession incriminating the other defendant is barred by the confrontation clause from admission into evidence at their joint trial." *State v.*

Puffinbarger, 540 N.W.2d 452, 457 (Iowa App. 1995). Saul did not testify at trial, nor was his confession implicating Long admitted at trial. Moreover, none of the remaining witnesses were charged or tried as a codefendant. The *Bruton* rule simply is not implicated here and provides no grounds for reversing Long's conviction.

The only arguable exception is Sharon Heath's testimony concerning David Vance's statements incriminating Long. She testified:

> Q. (BY MR. WILSON) Did Mr. Vance ever tell you that he did not want you to use your own automobile? A. Yes, he did.
> Q. And why did he say he didn't want you to use your own automobile? A. He did not want me to use my automobile because he told me that him and Danny Long went and committed some robberies in my car and he did not want me to get pulled over by the police.
> MR. HEITHOFF: Your Honor, I am trying to object. This is the hearsay I'm talking about. You've just authorized him to go into something and she went way beyond that on purpose.

The district court overruled Long's objection. We find it sufficient to note the inadequacy of counsel's objections to preserve anything other than a hearsay issue for appeal. *See State v. Taylor*, 310 N.W.2d 174, 177 (Iowa 1981) (Objecting party must lodge specific objection so court is not left to speculate whether evidence is subject to unspecified infirmity.). We therefore decline to address whether *Bruton* or *Lilly* were implicated by Heath's testimony.

Lastly, we note Long's random mention without elaboration of other evidentiary rulings is insufficient to raise any of those issues for appeal. *See* Iowa R. App. P. 14(a)(3). We according affirm on this issue.

IV. Ineffective Assistance of Counsel.

Long contends counsel was duty-bound to seek suppression of Saul's allegedly involuntary confession and all other evidence and testimony obtained as a result thereof. He argues:

> All the States [sic] witnesses and evidence were found and the State's case was built on Shawn Saul's involuntary confession. Had it not been for the involuntary confession of Shawn Saul, there may have been no prosecution possible or at least the complexion of trial would have been significantly different. The rules announced in Burton [sic] and Lilly are also applicable here. Appellant's presecution [sic] was had on the "Fruits of the Poisonous Tree" of violation of the rule of law cited and his judgement of conviction should be reversed.

Long's argument presumes his standing to assert Saul's Fifth-Amendment rights. In *Couch v. United States*, the United States Supreme Court Court held:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence, but not from its production." *Johnson v. United States*, 228 U.S. 457, 458, 33 S. Ct. 572, 57 L. Ed. 919 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself:" it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from *him*." *Holt v. United States*, 218 U.S. 245, 252-253, 31 S. Ct. 2, 6, 54 L. Ed. 1021 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice.

409 U.S. 322, 328, 93 S. Ct. 611, 616, 34 L. Ed. 2d 548, 554 (1973). Our supreme court reached the same conclusion in *State v. Graham*, 291 N.W.2d 345, 349 (Iowa 1980). Because Long had no standing to assert Saul's Fifth-Amendment rights, counsel had no duty to seek suppression of Saul's statement

or other evidence obtained as a result. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) (Counsel has no duty to file a meritless motion.).

We, for the reasons cited earlier, reject Long's claim that counsel was ineffective for failing to raise a *Bruton* or *Lilly* issue concerning testimony of all the State's witnesses including Vance. We affirm on this issue.

V. Prosecutorial Misconduct.

Long next urges us to reverse the trial court decision based on misconduct of the prosecutor. Specifically, Long alleges that he was deprived of a fair and impartial trial because the prosecutor stated to the jury that, in his opinion, the shoes Shawn Saul wore to the deposition were the same shoes seen on the robber in one of the robberies. Long argues that such statement of a personal belief not stated as reasonable inferences from the record are impermissible because they are a form of unsworn testimony. *See State v. Williams*, 334 N.W.2d 742, 745 (Iowa 1983).

We must reject this complaint because defendant failed to preserve error. Our supreme court has stated:

> Defendant had the duty to object at the time of argument to offensive or improper remarks made by the county attorney in his closing arguments, and unless such objection was made he waived his right to complain of such offensive or improper remarks in a motion for new trial or on appeal here.

State v. Love, 302 N.W.2d 115, 121 (Iowa 1981) (quoting *State v. Whitfield*, 212 N.W.2d 402, 406 (Iowa 1973)). Long made no objection to the prosecutor's statement at the time it was made. We also affirm on this issue.

Even if we were to conclude otherwise, Long was unable to sustain his burden of showing prejudice. Prosecutorial misconduct only warrants a new trial when it is so prejudicial as to deprive the defendant of a fair trial. *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa App. 1997). Long cannot satisfy his burden because there is substantial evidence in the record supporting his guilt.

The judgment of the district court is affirmed in its entirety.

AFFIRMED.