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JUN 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed June 30, 1981

vs.)

DENNIS LAMAR,) 1-8
64006

Defendant-Appellant.)

Appeal from Polk District Court - Louis A. Lavorato, Judge.

Defendant-appellant appeals from a jury conviction of robbery in the first degree in violation of sections 711.1 and 711.2, The Code 1979, asserting that trial court erred in overruling his motions for mistrial and new trial based on a state's witness's improper and prejudicial reference to defendant's prior criminal record. AFFIRMED.

Gerald W. Crawford of Conley, Conley & Crawford, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Merle Wilna Fleming, Assistant Attorney General; and Dan Johnston, Polk County Attorney; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant-appellant, Dennis Lamar, appeals from a jury conviction of robbery in the first degree in violation of sections 711.1 and 711.2, The Code 1979. He asserts that trial court erred in overruling his motions for mistrial and new trial based on a State's witness's improper and prejudicial reference to defendant's prior criminal record. We affirm.

On March 1, 1979, defendant was charged with robbery in the first degree in violation of sections 711.1 and 711.2, The Code 1979. Trial commenced on June 25, 1979, during which the State's witness, Kim Rundall, was asked on cross-examination, "[i]s Dennis Lamar a good friend of yours?" In an immediate response to that question, Mr. Rundall answered, "when we was in Anamosa—." As soon as defense counsel heard the word "Anamosa," counsel interrupted the witness by requesting permission to approach the bench.

During subsequent proceedings in chambers, out of the presence of the jury, counsel made a motion for mistrial asserting that the answer was unresponsive to his question and irrevocably prejudicial to the defendant. Trial court overruled the motion, apparently on the basis that defense counsel had avoided prejudice to his client by his timely interruption of the witness which prevented him from saying "penitentiary" or "reformatory." In addition, trial court considered the question open ended and seemed to concur with the State's position that the question invited the response. Trial court left the decision whether to admonish the jury within defense counsel's discretion but urged that no instruction be given. Trial court opined that the jury may not have been aware of the meaning of the answer since it made no specific reference to the word "penitentiary," and that it would be best not to draw the jury's attention to the statement's meaning.

During jury deliberations the transcript of Mr. Rundall's testimony was read to the jury, out of the presence of counsel, apparently without deletion of the problematic portion. On June 28, 1979, the jury returned a verdict of guilty whereupon defendant filed a motion for new trial alleging that the trial court erred in overruling his motion for mistrial. Attached to this motion were two juror affidavits stating that the jury's first vote was seven to five for acquittal, that the jury noticed the activity of the court and attorneys when the witness Rundall testified "he had been in Anamosa with Dennis Lamar," that there was discussion by the jury of the fact the defendant had been in prison, that when the testimony was read to the jury the mention of Anamosa was made

a second time, and that the jury again discussed defendant's previous imprisonment. Trial court denied this motion and sentenced defendant. This appeal followed.

I. Scope of Review. Our review is on assigned error only. Iowa R. App. P. 4. Trial court has considerable discretion in passing upon motions for mistrial and, unless it clearly appears such discretion has been abused, its ruling must stand. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977), and cases cited therein. "Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds for reasons clearly untenable or to an extent clearly unreasonable." Id.

II. Denial of Motion for Mistrial. Not all errors in a trial require reversal. State v. King, 256 N.W.2d 1, 12 (Iowa 1977). A defendant is entitled to a mistrial only upon a showing that the error has reached such proportion that he or she was denied a fair trial. Id. See also Trudo, 253 N.W.2d at 106; State v. Thompson, 241 Iowa 16, 29, 39 N.W.2d 637, 645 (1949). The controlling question in denying or granting motions for mistrial is whether prejudice is shown. State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976).

III. Evidence of Prior Criminal Conduct. Defendant contends that 1) the testimony in question informed the jury that he was a convicted felon, 2) such evidence of past criminal conduct is generally inadmissible at trial, 3) the fact that the jury heard the testimony denied him a fair trial, and 4) he was consequently entitled to a mistrial and new trial. We disagree. The central issue and indeed the only issue in the present case is whether the trial court, in denying defendant's motion for mistrial, abused the very broad discretion with which it is vested in considering such motions.[1]

Review of the proceedings at the trial of this case clearly dispels defendant's contention that a new trial is required because the words "when we was in Anamosa" were injected into the record. There is no presumed prejudice or legal error in the mere admission of improper evidence of prior criminal conduct. It is axiomatic that witnesses do not commit legal errors—only judges do. We recognize that when no foundation exists for admitting evidence of other crimes under any recognized

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[1] Although defendant purports to assign error from trial court rulings on both his motion for mistrial and a subsequent motion for new trial following the verdict, only one issue, relating to the testimony "when we was in Anamosa" is urged on appeal. This issue was made the subject of both the motion for mistrial and the motion for new trial. Other grounds urged in the motion for new trial are not argued on appeal. As to the issue which is argued on appeal, the reasons herein advanced to sustain the trial court's ruling on the motion for mistrial served equally well to sustain the denial of the motion for new trial as a result of the testimony as to which complaint has been made.

exception, trial court has no discretion to admit such evidence and it is prejudicial error to do so. State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980). However, this rule only has meaning with respect to erroneous trial court rulings on objections to evidence for motions to strike. No rulings of this nature are involved in the present case. It was incumbent upon defendant, faced with an answer deemed to be improper, to move to strike the answer stating proper grounds. Not only was this not done in the present case but, in addition, defendant declined the trial court's offer to admonish the jury to disregard this answer of the witness. Such circumstances are not without legal consequences. As stated in State v. Schurman, 205 N.W.2d 732, 735 (Iowa 1973):

> [A] failure to make a sufficient objection to evidence which is incompetent waives any ground of complaint as to the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes a part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof.

This statement was subsequently approved in State v. Johnson, 223 N.W.2d 226, 228 (Iowa 1974). We applied this rule to circumstances involving a failure to move to strike evidence in State v. Flesher, 286 N.W.2d 218, 221 (Iowa App. 1979), aff'd. 286 N.W.2d 215 (Iowa 1979). Applying these considerations to the present case, we conclude any right to complain about the inadmissible aspect of the testimony deemed by defendant to be prejudicial has been waived.

If we disregard the procedural deficiency in defendant's position and review the trial court's ruling on the motion for mistrial on the basis of the claimed prejudicial effect of the witness's statement "when we was in Anamosa," the record still calls for an affirmance of defendant's conviction. Applying the abuse of discretion standard, we believe it was far from untenable or unreasonable for the trial court to conclude that the effect on the jury of the statement "when we was in Anamosa" was so speculative and inconclusive that it would be a waste of resources to abort the trial at that stage of the proceedings. A considerable amount of judicial resources, juror time, lawyer time, and tax dollars were riding on one side of the equation. A very uncertain potential for prejudice was perched on the other side. The scales were clearly not tipped in favor of granting the motion for mistrial.

Within the concept of a fair trial, the hint of prior incarceration of an accused, has not been deemed to be so overwhelmingly prejudicial. Such evidence is freely admitted in many criminal cases on one theory or another. See State v. Cott, 283 N.W.2d 324 (Iowa 1979). This of course could not be done if it were per se unfair for the

jury to know of such matters. Our system proceeds on the theory that jurors may be trusted to determine an accused's guilt on matters relating to his or her involvement in the crime charged.

Further, we conclude that it is improper to consider the juror affidavits in reviewing the trial court's exercise of discretion at an earlier stage of the proceedings. The propriety of the court's ruling on the motion for mistrial is properly to be determined on what was tenable and reasonable for the court to conclude at the time the ruling was made. It is also the rule that juror affidavits may not be received to show what influenced the jurors in arriving at a verdict. Such affidavits could be properly employed, if at all, if a claim of juror misconduct were involved. See State v. Jackson, 195 N.W.2d 687 (Iowa 1972). No such claim has been made by defendant either in the trial court or on appeal. Moreover, in light of the prior discussion concerning defendant's failure to move to strike the evidence, no such claim would lie. A jury is free to consider any evidence in the case unless it has been stricken or the jury has been admonished not to consider it.

Lastly, although not crucial to the result, we think it is instructive to consider the issue of whether the allegedly prejudicial answer was invited by the question which defendant had posed to the witness. The defendant argues that the question "[i]s Dennis Lamar a good friend of yours?" did not invite the answer referring to an association between the witness and defendant some years before. Although the witness's answer, "when we was in Anamosa," was unresponsive to the question (and at this point the examining attorney was entitled, had he asked, to have the answer stricken), our inquiry should not end at this point.

Had the witness eventually given a responsive answer which described the extent of the witness's friendship or lack thereof with the defendant, this subject may well have been opened to subsequent inquiry by the State. Such inquiry might properly have sought to elicit the circumstances of the acquaintanceship which gave rise to that degree of friendship. Reversal in this event would place this court in the ironic position of overturning defendant's conviction based only upon the premature introduction of evidence which, in any event, would have been forthcoming.

For all of the reasons discussed, we affirm defendant's conviction and sentence.

AFFIRMED.

Carter, J., concurs with this opinion; Oxberger, C.J., specially concurs; Donielson, J., specially concurs; Snell, J., and Johnson, J., dissent.

OXBERGER, C.J. (specially concurring)

I concur specially.

While I agree with the result the majority has reached, given the record in this case, I believe that admissibility of evidence of prior criminal conduct without proper foundation is the gravamen defendant argues it is.

When no foundation exists for admitting evidence of other crimes under any recognized exception, it is prejudicial error for such evidence to be presented to the jury. State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980). Such statements jeopardize defendant's presumption of innocence of the crime presently charged and place him or her in danger of being convicted for being a "bad person," rather than for the commission of a crime by proof beyond a reasonable doubt. Counsel in this case was acutely aware of this danger and formulated his strategy in an attempt to avoid admission of such evidence.

I further believe there was much more than the mere "uncertain potential for prejudice" that the majority believes existed. The strength of the State's case was not so great as to eliminate the prejudicial effect of evidence of defendant's past criminal conduct. Any evidence prejudicial to the defendant may well have tipped the balance against him; and, if such prejudicial evidence was unfairly submitted for the jury's consideration, defendant should be entitled to a new trial upon proper motion.

Lastly, I believe it is instructive to consider whether it would have been proper to consider the juror affidavits stating that they heard the statement a second time, understood it to mean defendant had been in the reformatory at Anamosa, and talked about it during their deliberations. The record discloses that, despite the trial court's assurances to defense counsel that upon reading Mr. Rundall's testimony to the jury (out of the presence of counsel) the objectionable portion of his testimony would be omitted, the jury was exposed to the question and answer a second time. Although a juror may not by affidavit or otherwise state what influenced the jury in reaching its decision, because such facts inhere in the verdict, the rule is well settled that a juror may state what actually took place in the jury room since such matters do not inhere in the verdict. Fritz v. Iowa State Highway Comm'n., 270 N.W.2d 835, 844 (Iowa 1978); State v. Jackson, 195 N.W.2d 687, 690 (Iowa 1972).

While trial court could reasonably have concluded at the time defendant's original motion for mistrial was made that evidence of defendant's prior record was not before the jury, and thus could deny defendant's motion, the posture of this case had changed

at the time defendant made his motion for new trial. Trial court at that time knew the prejudicial evidence had been infused into the record. He also knew the jury had heard it a second time. Once this became apparent to trial court, despite the procedural difficultires detailed by the majority, I believe a motion for new trial should have been sustained. Defendant, however, did not urge this as grounds for his motion for new trial. His failure to give trial court an opportunity to consider this issue precludes our consideration of it on appeal.

DONIELSON, J. (concurring specially)

I concur with the majority opinion but feel that added emphasis should be placed on the question "Is Dennis Lamar a good friend of yours?" I feel strongly that this is an open-ended question. Contrary to the dissent, I can hardly think of a question on cross-examination more likely to result in a far-ranging, meandering or a spontaneous answer by the witness.

This question simply does not invite the witness to make a simple yes or no answer. The question begs either an explanation or qualification of how the witness and defendant became friends, where they became friends, or whether they were indeed "good friends". The defense attorney knew Rundall, a convicted felon, would testify, and knew or should have known that the defendant and the witness had served time together in Anamosa. Thus the potential for a damaging explanation should have been anticipated and the defense has nothing to complain about in light of the open-ended nature of the question.

I likewise vigorously disagree with both the special concurrence and the dissent. First, I do not believe this case falls within the "proof of other crimes" concept at all. I know of no grounds under this theory which would permit evidence of where they served time, i.e., Anamosa, to be admitted. This theory is a very limited one and only certain information is admissible under its exceptions. Where they served time is not admissible under this specific theory in any circumstances in my view.

Cross-examination of a prosecution witness by the defense resulting in the revelation of evidence of where they served time together has no relationship whatsoever with the prosecutorial concept of "proof of other crimes". It is merely illustrative of the old adage of never asking a question on cross-examination unless you know what the answer is going to be and of the general dangers of cross-examination.

Furthermore, "proof of other crimes" isn't involved here for another reason. It simply does not apply in the situation involving cross-examination of a prosecution witness by the defense counsel. It is a written, rigorously controlled exception to the general proposition that evidence of "other crimes" is not admissible at all. The entire concept is directed to the prosecutor in the case in chief or under some circumstances on rebuttal. It has nothing to do with and would obviously not apply to cross-examination and the responses elicited by the defense.

It should be emphasized that in this case the proof of other crimes was introduced

by the defense attorney's cross-examination of a prosecution witness. The dissent cites State v. Johnson, 244 N.W.2d 809 (Iowa 1976), but this again is a case distinguishable from the instant case in that Johnson involved direct examination of the witness by the prosecutor. In the instant case, there is no question that the evidence was not in any way solicited by the prosecution nor used to build the prosecutor's case in chief against the defendant. Thus, no exception need be found to the general rule that evidence showing the commission of crimes other than the one of which defendant is charged is inadmissible. Id. at 811.

It seems unnecessary to require a foundation for admitting evidence of other crimes when that evidence is solicited by the defense attorney's open-ended cross-examination questions. While the trial court was unwilling to declare a mistrial, the trial court was willing to issue an admonition or instruction to protect the defendant from potential prejudice. This is a question of professional judgment and could go either way, but there should be no complaints at this date about the possible prejudicial effects of this evidence on the defendant when the admission of evidence resulted from the defense attorney's exercise of his professional judgment in refusing the court's offer of an admonition at the time of trial and when the evidence entered the record initially due to the manner of cross-examination he elected to pursue in the first place.

SNELL, J. (dissenting)

I respectfully dissent.

Despite the immediate effort by defense counsel to prevent the infusion of inadmissable evidence, irreparable damage to defendant's right to a fair trial had already been done. The words "when we was in Anamosa" instantly provoked the idea that defendant had been in prison. It is not likely that a juror in a criminal case would assume the reference was to the city of Anamosa and involved some innocuous activity.

The damaging reference came from the state's witness on cross examination and could hardly have been anticipated or prevented. The question by defense counsel "Is Dennis Lamar a good friend of yours?" was entirely proper and facially safe. Counsel should not have to so circumscribe his questions as the majority suggests lest he be charged with inviting the poison.

In State v. Johnson, 244 N.W.2d 809 (Iowa 1976) a police officer responded to a question by the county attorney as to whether defendant said anything else about law books by stating: "During the course of the booking process, he advised me he had spend some time up in Anamosa—." The Supreme Court found that these words would clearly convey to the jury that defendant had been incarcerated following conviction of a prior crime. And this irrelevant and prejudicial information was a violation of the general rule that evidence showing the commission of crimes other than the one with which a defendant is charged is inadmissible. Id. at 811. I find no substantive difference between "he had spend some time up in Anamosa" and "when we was in Anamosa."

In Johnson, the Supreme Court held there was no error preserved for review because "defendant made no objection, requested no jury admonition or instruction, and offered no mistrial motion." But in the case at bar the motion for mistrial clearly preserved the issue. An unfavorable ruling on a motion for mistrial provides a definitive erroneous ruling from which to appeal. See State v. Davis, 240 N.W.2d 662, 664 (Iowa 1976).

In the motion for new trial defendant incorporated the affidavit of juror Stuart Buck. Mr. Buck stated "When we had the testimony reread the mention of Anamosa was made a second time. After the rereading of the testimony the jury again discussed Lamar's previous imprisonment." The trial court was thus apprised of the jury's receiving a double dose of inadmissible and prejudicial evidence.

Concern is expressed by the majority, that a mistrial would sacrifice judicial resources, jurors time, lawyer time and tax dollars. It is also true that "a successful motion for mistrial would have prevented the additional time and money in trial court and on appeal." Id. at 663-64.

Although these matters are important, no stack of them on the scales of justice outweighs defendant's right to a fair trial.

The admissibility of this evidence rests in the trial court's discretion. "But we have not hesitated to reverse where the jury was permitted to consider evidence plainly irrelevant and prejudicial." See State v. Harper, 222 N.W.2d 450, 452 (Iowa 1974); see also State v. Vickroy, 205 N.W.2d 748, 750-51 (Iowa 1973) (trial court's discretion is not without limitations); State v. Wright, 203 N.W.2d 247, 251 (Iowa 1972) (an appeals court will interfere when a trial court has abused its discretion).

The motions for mistrial and for new trial should have been sustained.

Johnson, J., joins this dissent.