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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 23, 1988 414

vs.)

GARY R. GRIMME,) 7-557
87-414

Defendant-Appellant.)

Appeal from the Iowa District Court for Dubuque County (8008-86 CA), Lawrence H. Fautsch, District Associate Judge.

Defendant appeals his conviction of third-degree theft. **AFFIRMED.**

Dirk J. Hamel of Norman, Gilloon & Wright, Dubuque, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann L. Beneke, Assistant Attorney General, for plaintiff-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Defendant, Gary Grimme, appeals his conviction of third-degree theft. Grimme was first found guilty of fifth-degree theft by the jury and then was found guilty of being a habitual offender, thereby enhancing his conviction to one of third-degree theft. In regard to the fifth-degree theft trial, Grimme asserts the trial court erred by denying his motion for a mistrial following two violations by the State's witnesses of a pretrial motion in limine. He also contends there was insufficient evidence to support the jury's verdict. In regard to the habitual offender proceeding, Grimme asserts the trial court erred by refusing to instruct the jury that previous theft convictions may not be counted for habitual offender purposes unless the defendant was informed of the potential habitual offender consequences of pleading guilty to those charges. He also contends the sentence imposed is violative of the constitutional prohibition against cruel and unusual punishment. We affirm.

On October 14, 1986, Grimme was confronted by two grocery store employees in the store parking lot and accused of possessing stolen merchandise. He denied the allegation, but produced from his clothing a package of meat bearing the store logo and for which he did not have a receipt. He stated they could call the police if they wanted but that he did not have time to remain. He thereupon left, leaving the package of meat with the store's employees. Thereafter, Grimme was accused and convicted of third-degree theft and this appeal followed.

I. **Motion for Mistrial.** A pretrial motion in limine, sustained by the trial court, prohibited the State from introducing hearsay evidence that one of the store's employees saw Grimme putting two packages of meat inside his pants. Both of the State's witnesses, however, in answers which could not be anticipated from the questions asked, referred to this hearsay evidence.

On both occasions, Grimme's trial counsel objected and moved for a mistrial. The trial court sustained both objections, but denied both motions for mistrial and instead immediately instructed the jury to disregard the hearsay evidence. Grimme asserts the court erred by denying his motions for mistrial.

Our review of this issue is governed by the following:

> Trial court has broad discretion in ruling on motions for mistrial. Generally, trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice. A defendant who asserts these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of trial court.

State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986) (citations omitted).

Grimme contends abuse of discretion is shown by the fact there were two violations and the jury deliberated for a very short time. He does not, however, provide any evidence supporting a causal connection between the violations and the brief jury deliberation. He merely asserts the State's evidence of theft was weak, absent the prohibited hearsay evidence.

We are not persuaded the State's case was as weak as Grimme contends. After being accused of theft by the store's assistant manager, Grimme pulled the package of meat out from under his clothing. The meat bore the store logo and Grimme did not have a receipt for its purchase. Grimme thereupon gave the meat to the store's employees and left before the police arrived. Although all of this evidence is circumstantial, it supports the inference that Grimme had stolen the meat.

We conclude Grimme has not demonstrated the trial court abused its discretion by denying his motions for mistrial.

II. Sufficiency of Evidence. Grimme asserts there was insufficient evidence to support the jury's verdict as to theft. Arguably, we have already rejected this claim in our discussion above. In any event, Grimme failed to

raise this issue at trial and has, therefore, waived it. See Shill v. Careage Corp., 353 N.W.2d 416, 421 (Iowa 1984).

III. Jury Instructions. Grimme asserts the trial court erred by refusing to instruct the jury that a defendant must have been informed of the possible habitual offender consequences of pleading guilty to earlier theft charges for those convictions to be counted now for habitual offender purposes. The court instructed the jury that the defendant must have merely been represented by counsel at the time of those convictions.

State v. Cooper, 343 N.W.2d 485 (Iowa 1984), holds that an enhanced conviction, as here, cannot be based upon prior convictions which were obtained without benefit of counsel. Id. at 486. Grimme apparently reads an effective assistance of counsel element into this requirement of past counsel. We cannot agree with this interpretation. We are not persuaded our supreme court intended the requirement of past counsel to be used to raise issues that should have been resolved in the earlier proceedings. We uphold the trial court's instruction on this issue.

IV. Sentence. Grimme asserts the sentence imposed (a maximum of two years' incarceration to be served consecutively to a prior sentence) violates the eighth amendment's prohibition against cruel and unusual punishment. He contends the habitual offender statute as applied to him does not satisfy the proportionality analysis enunciated in Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).

As an initial matter, we doubt Solem applies to this case. Cf. State v. Nims, 357 N.W.2d 608, 610 (Iowa 1984) (questionable whether Solem applied to mandatory life prison sentence for first-degree kidnapping). If it doesn't, the length of a felon's sentence is "purely a matter of legislative prerogative."

Id. (quoting Rummel v. Estelle, 445 U.S. 263, 274, 100 S. Ct. 1133, 1139, 63 L. Ed. 2d 382, 391 (1980)).

Assuming Solem does apply, Grimme's claim is still without merit. Under the Solem proportionality analysis, we consider three factors: (1) the gravity of the offense and harshness of the penalty; (2) the treatment of others in this jurisdiction who commit crimes of equal or greater severity; and (3) the treatment of persons in other jurisdictions who commit the same crime. Nims, 357 N.W.2d at 610. In considering the first two factors, we grant substantial deference to the legislature's determinations of the types and limits of punishments for crimes. Solem, 463 U.S. at 290, 103 S. Ct. at 3009, 77 L. Ed. 2d at 649.

In his brief, Grimme provides a partial list of crimes in this state for which the punishment is comparable to that meted out here. He contends these crimes are so much more serious than the theft of an eight dollar package of meat that his sentence was clearly excessive. We are not persuaded, however, the sale of hard core pornography, see Iowa Code section 728.4, or preventing apprehension, see Iowa Code section 719.3, for example, are significantly more serious than a third conviction for theft (in fact, this was Grimme's fourth conviction). Nor is our habitual offender statute unique, as demonstrated in the State's brief by the list of similar recidivist statutes in other jurisdictions.

We conclude, therefore, the sentence the trial court imposed upon Grimme did not constitute cruel and unusual punishment.

AFFIRMED.