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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 30, 1983
vs.	)	
WAYNE EDWARD WRIGHT,	)	3-166/68233
Defendant-Appellant.	)	

Appeal from Polk District Court - Richard D. Morr, Judge.

Defendant appeals from his conviction of first-degree robbery, a violation of Iowa Code § 711.1 and 711.2. AFFIRMED.

Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel and Hayden, JJ.

DONIELSON, J.

Wayne Edward Wright appeals from his conviction of first-degree robbery, a violation of Iowa Code §§ 711.1 and 711.2. Defendant Wright contends the trial court erred in (1) overruling his motions for severance, mistrial, and a new trial, and (2) allowing the admission of prejudicial hearsay evidence.

Defendant and Calvin Parris were tried jointly for the robbery of employees of a grocery store. The robbery occurred at Dahl's Food Store at 35th and Ingersoll in Des Moines, Iowa, on July 27, 1981. Witnesses testified that a man wearing sweatpants and a hooded sweatshirt pulled a gun and demanded money from three cashiers at the front of the Dahl's store. Numerous witnesses testified the robber was black; however, further descriptions were difficult because the hooded sweatshirt was tightened closely around the man's face. After having the employees clean out their respective cash registers one at a time and place the money into a plastic shopping bag, the robber fled the store and was last seen running from the parking lot.

Although Defendant Wright was never accused of being the man wearing the hooded sweatshirt and demanding the money from the cashiers, he was seen in the Dahl's store shortly before the crime. The defendant was easily identified because of the cast he wore on his right arm.

A Dahl's customer followed the robber for a short time but lost track of him. However, the customer did witness a maroon Pontiac automobile driving away from the scene. Another witness testified that he was driving in the same area and had seen a man wearing a hooded sweatsuit jogging behind the car directly ahead of him. According to the witness, the jogger suddenly jumped into the trunk of this car, which he described as a burgundy Pontiac. That witness was able to partially identify the license plate as FU325. The license plate was later traced to a dark red Pontiac owned by defendant.

The police, arriving at the defendant's home, discovered $312.00 in a work boot, a grey shopping bag similar to the one used in the robbery, and a grey sweat-suit recovered from the trunk of the defendant's Pontiac.

Calvin Parris, the co-defendant, presented at trial alibi testimony that he was in Davenport during the robbery. However, before presenting this or any other evidence, the co-defendant gave notice that he intended to call two additional witnesses. It is the testimony of these two witnesses, William Parrish and Muhammed Saadiq, that defendant objected to and therefore it is this testimony that this court must concern itself with on appeal. Once it was learned that the co-defendant's newly-found testimony would implicate defendant in the crime, defendant's attorney moved for severance and a mistrial. Although these motions were overruled, the trial court did grant defendant's alternative motion for continuance from Friday morning of trial until the following Monday morning. This continuance provided defendant the opportunity to depose both Mr. Parrish and Mr. Saadiq and allowed for other appropriate investigation.

When trial resumed on Monday morning, the defendant renewed his motions for severance and mistrial on the ground that defendant could not receive a fair trial as a result of the inculpatory evidence to be offered by the co-defendant. The trial court again denied the above motions finding no prejudice to the defendant.

The defendant, in his appellate brief, raises a concern that the trial court did not entertain the motion for severance because it was untimely. Iowa Rule of Criminal Procedure 10(2)(e) requires requests for severance of charges or defendants must be made prior to trial. Upon reviewing the record, we think it clear that the trial court did indeed rule on the merits of the motions and further note that the State did not contest the timeliness of the motion for severance in light of the good cause exception enunciated in Rule 10(3).

I.

The underlying issue presented by the defendant's motions for severance and mistrial is whether the trial court abused its discretion in overruling these motions and allowing the joint trial, which allegedly resulted in prejudice to the defendant. We find no abuse of discretion and rule that the defendant's trial was a fair one.

The relevant rule is Iowa Rule of Criminal Procedure 6(4) which provides:

> a. Multiple defendants. Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or the same transaction or occurance out of which the offense or offenses arose. Such defendants may be charged in one or more counts together or separately, and all the defendants need not be charged in each count.
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> b. Prosecution and judgment. When an indictment charges a defendant with a felony, and the same indictment charges two or more defendants, those defendants jointly charged may be tried jointly, if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties; otherwise the defendants shall be tried separately. When jointly tried, each defendant shall be judged separately on each count.

The above rule clearly places the decision of whether defendants should be tried jointly or separately in the discretion of the trial court. The Iowa Supreme Court decision of State v. Belieu, 288 N.W.2d 895 (Iowa 1980) provides a discussion centered upon Rule 6(4) and the trial court's discretion. "When a trial court denies severance in the exercise of discretion, the ruling will be reversed on appeal only if the defendant demonstrates an abuse of discretion." Id. at 900. For a defendant to establish an abuse of discretion, he must show sufficient prejudice to constitute denial of a fair trial. Id. Mere hostility among co-defendants is insufficient to show abuse of discretion. Id. "Nor does an effort of a co-defendant to incriminate the defendant, even if successful, by itself demonstrate the requisite prejudice." Id. Prejudice may usually be avoided in such situations by the existence of the right to cross-examine the co-defendant and the use of limiting instructions. Id.

The court in Belieu found an abuse of the trial court's discretion when evidence of the defendant's prior criminal activity was offered by the co-defendant. This evidence, if used by the State over defendant's objection, would have denied him a fair trial. The evidence of other crimes was irrelevant to the State's case against him and was obviously highly prejudicial. These circumstances are not present in this case. The evidence offered by the co-defendant would have been admissible in the State's case against the defendant. It was certainly relevant to the co-defendant's defense and to the State's case and, although the evidence did implicate the defendant, there was no undue prejudice. The jury was not confronted with an either/or situation. If they had believed the alibi defense presented by the co-defendant and acquitted him, so too could they have found there was insufficient evidence against the defendant and likewise voted for his acquittal. The guilt of one co-defendant did not hinge on the guilt or innocence of the other.

The final safeguard against any possible undue prejudice was the effective cross-examination by defendant's counsel—particularly the cross-examination of Mr. Parrish which revealed that co-defendant Parris was Mr. Parrish's uncle, that defendant had been Mr. Parrish's boss at the Des Moines Club and had recently fired him, and that Mr. Parrish had repeatedly lied to the police and in his deposition.

II.

Defendant contends in his second assignment of error that the trial court erred in allowing the admission of prejudicial hearsay. The alleged hearsay is found in testimony given by co-defendant's witnesses, William Parrish and Muhammed Saadiq. The testimony by Mr. Parrish that the defendant objected to transpired during the State's cross-examination:

Q. [Mr. Thomas—counsel for the State] Did they say

anything to you about the robbery, how it actually happened? A. [William Parrish] Yes.

MR. PIAZZA [Defendant's counsel]: Your Honor, I'd object as a lack of foundation. It's not specific as to time and place and who the individual speaking is.

THE COURT: Sustained on foundation.

Q. [By Mr. Thomas] Did [Defendant] speak to you? A. Well, no, but Louis [Sawyer] did.

Q. When Louis was there and said something to you about the robbery, was [Defendant] also present? A. Yes.

Q. What did Louis say?

MR. PIAZZA: Your Honor, I'd interpose an objection on the basis that this would constitute hearsay, which would be inadmissible in a separate trial of my client, and further for all those reasons previously urged on a Motion for Severance.

THE COURT: Overruled.

A. He said that when he went in the store, when he got to the counter, that he gave her, this lady, a bag and told her to fill it up, and like he said that she thought he was kidding. So he said he pulled out the gun and said, "Fill it up," you know. And she started filling the bag up with the money.

Q. [By Mr. Thomas] He said he used the gun in the robbery? A. Yes.

Q. Did he say anything to you about what happened when he left the store? A. Well, he said he knocked over some guy when he walked—when he ran out the door. He said he held the gun up to fire in the store but the gun clicked which there wasn't a shell in the chamber.

Q. Did he say anything about where he ran or who picked him up? A. Oh, no, he didn't say where he ran. He just said he ran across the parking lot. I mean, I don't know where he did run, no.

The State argues that the defendant's hearsay objection was insufficient to preserve error. The State's theory of the cross-examination was to establish the defendant's presence during Sawyer's statements and that the defendant tacitly admitted their accuracy by not challenging Sawyer's story.

The State claims that a proper preservation of error would include the defendant's constitutional guarantee to exercise his fifth-amendment privilege. In support of this contention, the State cites State v. Holmes, 325 N.W.2d 114 (Iowa 1982), which discusses a similar objection. We need not continue at length discussing the "serious doubts" had by the Iowa Supreme Court in Holmes regarding the limited objection, nor do we need to discuss the similar doubts of this court, for any error, even if properly preserved by defendant, was again harmless.

The defendant objects to this testimony alleging it was offered for proof of the matters asserted. It is clear from defendant's brief that the major concern was the corroboration of the facts of the robbery, particularly the use of a gun. However, after reviewing the record we find other and sufficient corroboration of the facts of the robbery. All three cashiers who were robbed, a carryout, an employee from the drug department, and a fourth cashier testified to substantially the same facts and all testified the robber held a gun. This issue presents no reversible error.

Defendant's second hearsay objection came during the direct examination of Mr. Saadiq, a rebuttal witness called by co-defendant. Mr. Parrish had testified earlier that his version of the robbery had been told to Lew Busch, an employee of the Polk County Department of Court Services. Mr. Busch, a witness for the defendant, later testified that Parrish had not told him his version. Mr. Saadiq, who had met with the co-defendant and Busch, was then called to rebut the testimony of Mr. Busch. Saadiq testified in part as follows:

> BY MR. SMITH:
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> Q. What did he tell you was the source of his information about the robbery? A. I approached —
>
> Q. Just what did he tell you was the source of his information? Can you just answer the question. Maybe we

can speed it up. A. He said that Calvin was innocent.

> MR. PIAZZA: Your Honor, I would object to the answer to that question as not being responsive to the question asked, move that my objection precede the answer, the answer be stricken, the jury admonished to disregard it.
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> I'd object further that the nonresponsive answer invades the province of this jury.
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> THE COURT: Overruled.
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> Q. [By Mr. Smith] Did Mr. Busch indicate to you whether he had ever talked to William Parrish about it: A. No, sir.
>
> Q. He did not indicate that to you? A. No, sir.

Defendant claims that the co-defendant's counsel was seeking to obtain a hearsay statement establishing his client's innocence. Defendant was obviously referring to Mr. Saadiq's statement: "He said that Calvin was innocent." However, this hearsay objection was not raised below. Consequently, we do not consider it here. State v. Morehouse, 316 N.W.2d 884, 886 (Iowa 1982). Even if error had been preserved it was harmless for the reasons stated earlier in this opinion that the guilt of defendant did not hinge on the guilt or innocence of the co-defendant. In any event, the evidence would have been admissible to impeach the credibility of defendant's witness Busch since a prior inconsistent, out-of-court statement offered for impeachment purposes is not hearsay. State v. Hill, 243 N.W.2d 567, 570 (Iowa 1976).

Finding no reversible error, we affirm defendant's conviction.

AFFIRMED.