FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed September 30, 1987
vs.	)	257
VERNON KELTON MOON,	)	7-114 86-628
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 30467), Dick Strickler, Judge.

Defendant appeals from his conviction for first-degree robbery. **AFFIRMED.**

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

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; and Nan Horvat, Assistant Polk County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Schlegel, and Sackett, JJ., but considered en banc.

DONIELSON, J. 258

Defendant Vernon Kelton Moon appeals from his conviction following a jury trial for robbery in the first degree. Defendant contends the trial court erred (1) in admitting evidence of two knives found in his car when there were no allegations a knife had been used during the robbery, and (2) in admitting evidence of an unidentified witness's description of the getaway car. We affirm the conviction.

On December 7, 1985, a man entered a Taco John's in Des Moines and demanded employee Dawn Purdy give him the money in the cash register. Purdy gave him money. The man fled and Purdy immediately called the police. While she was talking to a police dispatcher, an unidentified customer who had been in the parking lot came in and told Purdy the man had left in a green station wagon with license number HTN 130. Purdy gave this information to the police dispatcher, who also testified she heard the customer in the background give the license number and vehicle description. The police determined the car was registered to defendant.

Approximately 20 minutes later police stopped defendant's vehicle. Defendant's vehicle matched the description the customer had given. Defendant was a passenger in the vehicle. Police found a pocket knife and handgun in defendant's pockets. Police also found a hunting knife when they searched defendant's vehicle.

I.

Our scope of review in this action is on assigned error only. Iowa R. App. P. 4. The trial court is vested with broad discretion concerning the admission of evidence at trial. State v. Thompson, 326 N.W.2d 335, 337 (Iowa 1982); State v. Hightower, 376 N.W.2d 648, 651 (Iowa App. 1985). The trial court's rulings on admissibility will be disturbed only upon a clear abuse of discretion. Id.

at 651. Abuse will be found only where the discretion "was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Thompson, 326 N.W.2d at 337 (quoting State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982)).

II.

Defendant first contends the trial court erred in admitting into evidence the two knives that police found in his car. Defendant argues the evidence was irrelevant because there were no allegations a knife was used during the robbery. Defendant maintains the admission of the knives resulted in unfair prejudice which requires reversal.

The State contends the knives are admissible because Purdy testified she believed defendant was armed, although Purdy never saw a weapon. The State further argues the knives are relevant to the issue of whether defendant was armed with a dangerous weapon.

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. See Carter v. MacMillan Oil Co., 355 N.W.2d 52 (Iowa 1984); State v. Chadwick, 328 N.W.2d 913 (Iowa 1983) (Irrelevant evidence is that which has *no logical tendency to establish any material proposition).*

> Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly probable in the case. Does the item of evidence tend to prove the matter sought to be proved?

Fed. R. Evid. 401 Advisory Committee's Note.

At trial, Dawn Purdy, the attendant on duty at Taco John's at the time of the robbery, testified concerning her observations of the defendant:

> Q. What happened next? A. He told me not to be afraid, but he wanted me to open the register and give him the bills.
> Q. When he said that, what, if anything, did you observe about him? A. He kept his right hand in his pocket at all times.

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Q. When he said that to you, and after you observed his right hand in his pocket, what were you thinking? A. I thought there was a possibility that he would have a gun.
Q. When you say he had his hand in his pocket, was he pointing a pointed object or anything at you? A. No.

* * *

Q. How did his hand appear in his pocket? A. I don't know, just like you put your hand in your pocket.

* * *

Q. Did he say he had a gun? A. No.
Q. Did you see a gun? A. No.
Q. Did you think he had a gun? A. Yes.

The record reveals that only twenty minutes later, the police stopped the defendant's vehicle. The police found a pocket knife and handgun in the defendant's pockets and also found a hunting knife that was wedged between the seat and the car itself on the passenger side.

The trial information charges that the defendant ". . . did commit robbery in the first degree upon Dawn Purdy, while armed with a dangerous weapon . . . ." The knives found in defendant's possession twenty minutes after the robbery constitute dangerous weapons under the statute and are therefore relevant evidence.

However, no weapon was actually seen during the commission of the robbery, although Dawn Purdy positively stated it was her belief that the defendant possessed a gun. It was on the basis of this information that the State alleged in the concluding clause in the trial information: ". . . and that during the commission of this offense the defendant represented that he was in the immediate possession and control of a firearm, displayed a firearm in a threatening manner or was armed with a firearm in violation of section 902.7 of the Code." Iowa Code section 902.7 is a sentencing enhancing separate statute which provides

that a person who commits a forcible felony while in possession or having control of a firearm must serve a minimum of five years.

Recitation of the violation of section 902.7 does not limit the charge alleging violation of section 711.2. Evidence of any dangerous weapon is admissible unless the State has limited its charge to a firearm. We place special significance in the use of the words "and that" contained in the clause:

> . . . while armed with a dangerous weapon and that during the commission of this offense . . . in violation of 902.7 The Code.

We read the information to charge a general violation of section 711.2, and an additional violation of section 902.7, in the event the jury finds the defendant had a firearm.

There is no sentence enhancement statute for using a knife in a robbery. If the prosecutors had not charged a violation of section 902.7 they would not have been entitled to consideration of the section 902.7 enhanced sentence. We do not consider the recitation of section 902.7 an election of the type of weapon used in the robbery.

In State v. Fuhrman, 257 N.W.2d 619, 623 (Iowa 1973), the Iowa Supreme Court recognized that "[o]rdinarily weapons not used in the commission of a crime are inadmissible." The court, however, also recognized that where there is sufficient proof to justify a reasonable inference a weapon was or may have been used in the perpetration of an offense, it is generally admissible in evidence. Fuhrman, 257 N.W.2d at 623. As noted earlier, Dawn Purdy testified that although she did not see any weapon, it was her firm belief that the defendant possessed a weapon at the time of the robbery and also stated that she believed it was a gun, based upon her observation that defendant kept his right hand in his pocket at all times. Given the facts of the present case, we find it immaterial whether Purdy believed the defendant possessed a gun or a knife, since

both were found in the defendant's pockets at the time of his arrest only twenty minutes after the robbery. The State only had to prove that a dangerous weapon was used or may have been used and not necessarily what weapon was actually used. These facts alone justify a reasonable inference that a dangerous weapon of some type was used or may have been used in the perpetration of the robbery.

Since the defendant concedes that both of the knives were dangerous weapons for purposes of Iowa Code section 702.7 (1985), we find that the introduction of the knives in evidence tended to make the question of whether the defendant committed the robbery with a dangerous weapon more probable than had the knives not been offered in evidence. We therefore hold that the trial court did not abuse its discretion in admitting the knives in evidence, considering the trial court's broad discretion in such matters. Hightower, 376 N.W.2d at 651.

III.

We now address the other assignment of error, which we also find to be without merit. Defendant contends the trial court erred in admitting evidence of an unidentified witness's description of the getaway car because it was prejudicial hearsay. Defendant argues the customer did not testify at trial; thus, there is no way of knowing whether she spoke from first-hand knowledge. In meeting defendant's arguments, we will assume the challenged testimony was offered to prove the truth of the statements asserted by the declarant.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Iowa R. of Evid. 801(c). State v. Mueller, 344 N.W.2d 262, 264 (Iowa App. 1983). Hearsay testimony is not admissible unless it comes within a recognized exception to the rule. Iowa R. of Evid. 802. Admission of hearsay evidence

is presumed to be prejudicial error unless the contrary is firmly established. Mueller, 344 N.W.2d at 266.

The State argues and we agree that the evidence was admissible as a present sense impression exception to the hearsay rule. Iowa R. of Evid. 803(1). Rule 803(1) provides:

> A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter [is admissible as an exception to the hearsay rule].

See State v. Flesher, 286 N.W.2d 215, aff'd on rehearing, 286 N.W.2d 218 (Iowa App. 1979). Rule 803(1) is identical to the federal rule excepting present sense impressions from the hearsay rule:

> The underlying theory of [the present sense impression exception] is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation. . . . If the witness is not the declarant he may be examined as to the circumstances as an aid in evaluating the statement.

Fed. R. Evid. 803 Advisory Committee's Note to paragraphs (1) and (2).

In determining admissibility, the duty of the trial court is to assess the time element and determine whether the statement was made at or near the time of occurrence. Id; Flesher, 286 N.W.2d at 218. See State v. Case, 100 N.M. 714, 676 P.2d 241 (1984). Permissible subject matter is also limited under this exception to a description of the event or condition observed, the assumption being that spontaneity in the absence of a starting event, can extend no further. Fed. R. Evid 803 Advisory Committee's Note on paragraphs (1) and (2).

Defendant argues that the evidence concerning the vehicle description and license number should not have come in under the present sense impression exception because there is no evidence the unidentified customer actually observed defendant. McCormick on Evidence, 858 (3d ed. 1984) addresses the standard for competency of declarant's statement:

> Must the declarant meet the tests of competency for a witness? In a modified manner the requirement that a witness have had an opportunity to observe that to which he testifies is applied. Direct proof is not necessary; if the circumstances appear consistent with opportunity by the declarant, this is sufficient. If there is doubt the question is for the jury. Especially in cases where the declaration is of low probative value, however, it is usually held inadmissible if there is no reasonable suggestion that the declarant had an opportunity to observe.

See Thacker v. Eldred, 388 N.W.2d 665, 670 (Iowa App. 1986) (Direct and circumstantial evidence are equally probative).

Cases in other jurisdictions also support admissibility of an unidentified bystander's present sense impressions which are based on circumstantial evidence regarding personal observation. In State v. Smith, 285 S.2d 240, 244-45 (La. 1973), the court upheld admissibility of a license plate number which an unidentified bystander had written on paper and had given to the victim immediately after the robbery. During the course of the robbery the victim had been forced into the back of his delivery truck and could not see the getaway car. Id. at 244. The court permitted the evidence because "the elapsed time between the event and her communication of her declaration to the victim was sufficiently brief that her act of writing down the license number was a spontaneous reaction to the event she viewed, and not the product of reflection, or likely a fabrication." Id. The court added that the fact the declaration was made contemporaneously with the event being described adds reliability in that there is no danger of a defective memory rendering the declaration unreliable. Id. at 245. See People v. Burns, 324 N.W.2d 589, 592 (Mich. App. 1982) (Court upheld admissibility of declarations of unidentified witness who warned the store manager of the robbery and who described the getaway car to police).

We determine the trial court could reasonably find evidence to support a finding the customer's declarations were made contemporaneously to the robbery and were based on personal observation. Purdy testified the customer

was in the Taco John's parking lot when defendant fled from the premises into the parking lot. No measurable time passed between the customer's observations and when the declaration was made. Purdy stated the customer came into Taco John's immediately after the defendant fled and immediately gave Purdy both the license number and description of the getaway car.

Other evidence also supports the trial court's determination that the customer's declarations were based on personal observation. The customer was able to report which direction defendant fled, exactly where the getaway car was waiting and in what direction the getaway car went. The evidence supports the trial court's determination that the unidentified customer's statements to Purdy were based on personal knowledge and were not mere speculation or surmise. We therefore find no abuse of discretion in the admission of the declarations of the unidentified customer and find such testimony possessed a sufficient basis of contemporaneity and personal knowledge to establish a guarantee of trustworthiness of that evidence. State v. Mateer, 383 N.W.2d 533, 536 (Iowa 1986).

We therefore affirm the conviction.

AFFIRMED.

All judges concur except Sackett and Schlegel, JJ., who dissent.

SACKETT, J. (concurring in part and dissenting in part)

I concur in Division III of the majority opinion wherein it rules the trial court did not err in admitting evidence of the unidentified witness's description of the getaway car.

I dissent from the majority's holding in Division II that the knives are admissible. Evidence should not be admitted which has no tendency or only a slight tendency to establish the guilt or innocence of the accused or which, if effective at all, could serve only to prejudice, mislead or excite the passions of the jury. State v. Brown, 341 N.W.2d 10, 17 (Iowa 1983); State v. Wallace, 259 Iowa 765, 770, 145 N.W.2d 615, 619 (1966). See State v. Webb, 309 N.W.2d 404 (Iowa 1981) (Court held evidence should be excluded where danger of unfair prejudice substantially outweighs probative value).

Ordinarily weapons not used in the commission of a crime are inadmissible. State v. Fuhrman, 257 N.W.2d 619, 623 (Iowa 1979). A weapon is admissible only where there is sufficient proof to justify a reasonable inference a weapon was or may have been used in the perpetration of the offense. Id.

In Wallace a victim, who was walking along a roadside, was forced by defendant into a vehicle. A short time later police stopped the vehicle and the victim told what had occurred. Wallace, 259 Iowa at 767-68, 145 N.W.2d at 617-18. The victim said she was not molested and no weapons had been used. Subsequently police searched the vehicle and found a shotgun and shells which were admitted in evidence. The court determined the trial court abused its discretion in admitting the shotgun and shells because (1) the record clearly disclosed none of the witnesses mentioned or inferred any use of a shotgun or any other weapon in the perpetration of the offense here charged, and (2) there was not even a scintilla of evidence which tended to connect defendant with the gun and shells or which disclosed he knew they were in his mother's car. Wallace, 259 Iowa at 772, 145 N.W.2d at 619-20.

In this case there is no evidence defendant used a knife or knives when he robbed Taco John's. None of the witnesses mentioned a knife or knives were used. The State argues Purdy testified defendant had his right hand in his pocket and she thought there was a possibility he had a gun. The question is whether this evidence generated an inference the knives were in defendant's pocket at the time of the robbery. See Fuhrman, 257 N.W.2d at 623. I believe this evidence is not sufficient to generate an inference the knives were used in the robbery.

The trial court should have sustained defendant's objection to admission of the knives into evidence. I would reverse and remand for a new trial.

Schlegel, J., joins this dissent.