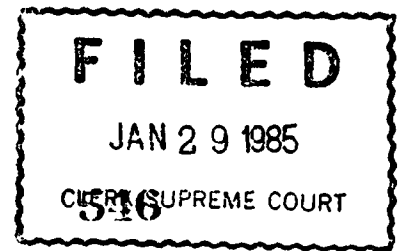


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
BYRON DWAYNE YOUNG,)
Defendant-Appellant.)

4-430
84-169

Appeal from the Iowa District Court for Marshall County - M. D. Seiser and
Louie F. Beisser, Judges.

The defendant appeals from his convictions for robbery in the first degree,
theft in the second degree, and carrying a weapon. AFFIRMED.

Charles L. Harrington, Chief Appellate Defender, and Patrick R. Grady,
Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney
General, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel, and Hayden, JJ.

Defendant, Byron Young, appeals from his convictions for first-degree robbery, second-degree theft, and carrying a weapon. All three charges arose from a robbery of a Pizza Hut in Marshalltown.

At approximately 4:00 a.m. on Sunday, April 24, 1983, an armed robbery occurred at a Pizza Hut located on Highway 30 in Marshalltown, Iowa. At about the same time as the robbery, an off-duty police officer driving home on Highway 30 noticed a brown or gold Lincoln automobile parked on the north shoulder of the road pointed in a westerly direction approximately four blocks east of the Pizza Hut in the vicinity of the Rose Hill Cemetery. The officer reported this information after hearing a radio report of the robbery which stated that officers were near the Rose Hill Cemetery area looking for a getaway vehicle. A police officer sent to the scene followed the robber's tracks to a set of tire tracks on the highway shoulder east of the restaurant. At 4:17, a third police officer spotted a bronze Lincoln Continental heading west on Highway 30. After following the car for a short time, he stopped it. Upon stopping the car, he learned that one of the occupants matched the description of the robber. Both the driver, Robert Hawthorne, and the passenger, defendant Young, were taken into custody. A subsequent search of the car pursuant to a search warrant revealed among other things a Pizza Hut money bag and a loaded gun. These items were introduced into evidence at defendant's trial.

Shortly after arrest, Hawthorne told officers that he was solely responsible for the robbery, that the defendant had remained in the car during the robbery, and that the defendant had not known in advance about Hawthorne's intention to commit a robbery. Officers then questioned the defendant, telling him that he would be released if the investigation indicated he was not involved. In the course of this questioning, the defendant said he had remained in the parked car during Hawthorne's absence but had slouched down so the car would look abandoned.

On appeal, the defendant contends that there was no probable cause for the stop of the car, and that the trial court therefore erred by refusing to suppress the items found in the car.

The defendant also contends the trial court should have excluded his comment about slouching down in the car so it would look abandoned. He asserts this comment was involuntary because it was prompted by an improper promise of leniency. The State responds that the investigating officer's reference to release was not a promise and in any event had no tendency to prompt a comment about slouching.

Finally, the defendant contends the prosecutor's closing argument included improper references to the defendant's failure to testify or to produce exculpatory evidence. He argues the trial court erred by denying his motion for mistrial. We disagree.

I. Vehicle Stop. We review criminal cases de novo when constitutional rights are at issue. State v. Dickerson, 313 N.W.2d 526, 530 (Iowa 1981). The principles applicable to investigatory stops of vehicles are set forth in the following passage:

It is well settled that the fourth amendment requires reasonable cause to stop a vehicle for investigatory purposes. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); State v. Cooley, 229 N.W.2d 755, 759 (Iowa 1975). When a stop is challenged on the basis that reasonable cause did not exist, the State must show that the stopping officer had cause to support a reasonable belief that criminal activity may have occurred." State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980) (emphasis added). Circumstances giving rise to suspicion or curiosity will not suffice. State v. Dixon, 241 N.W.2d 21, 23 (Iowa 1976). The officer is bound by the true reason or reasons for making the stop; that is, the officer may not rely on reasons that he or she could have had but did not actually have. Aschenbrenner, 289 N.W.2d at 619. If the State fails to meet its burden, the evidence obtained as a result of the stop must be suppressed. State v. Reese, 259 N.W.2d 793, 796 (Iowa 1977).

State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982). Applying these principles to the facts of that case, the court in Lamp stated:

In this case Officer Bowersox clearly had reasonable cause to stop defendant: (1) he was investigating a specific crime; (2) he had been given a description of the assailant and the vehicle he was driving; and (3) the perpetration of the crime was reasonably close in time (approximately four and one-half hours) and distance (approximately five miles) to the investigatory stop under the circumstances.

Id.

In the present case the same factors support the reasonableness of the stop: (1) the police officer was investigating a specific crime; (2) he had been given a description of the suspect and of a vehicle close to the scene of the crime which was thought to be the getaway car; and (3) the vehicle was stopped about twenty minutes after the robbery on the same highway as the location of the crime. Furthermore, the car was known to have been located in the same direction from the restaurant as the robber had fled on foot.

We conclude that there was reasonable cause to stop defendant's vehicle and consequently the trial court did not err in overruling defendant's motion to suppress evidence obtained as a result of the stop. This is in conformity with our holding in the companion case of State v. Hawthorne, 353 N.W.2d 889-91 (Iowa Ct. App. 1984).

II. Admissibility of Statements. The defendant was read his Miranda rights before he was questioned. He indicated that he understood and voluntarily waived these rights. During the questioning, defendant was told that "if the information didn't indicate he was involved he would be released." Defendant subsequently admitted that he slouched down in the car to make it look abandoned. On appeal, defendant claims that this statement was involuntarily induced by promises of leniency.

It is true that a confession induced by improper promises of leniency cannot stand as a constitutionally voluntary admission. See, e.g. State v. Kase, 344 N.W.2d 223, 225-26 (Iowa 1984) (statements made in response to promise that no criminal charges would be filed were involuntary); State v. Hodges, 326 N.W.2d 345, 348-49 (Iowa 1982) (defendant's confession was induced by improper promise

of leniency where officer stated that a lesser charge would be more likely if defendant gave "his side of the story").

We do not find that the statements by the police officer in this case constitute improper promises. Defendant was told that he would be released if the information indicated he was not involved. This is significantly different from promises that the defendant would be released or charged with a lesser crime in exchange for statements which would aid the police. The admission of defendant that he slouched down to make the car appear abandoned was proper and did not constitute reversible error.

III. Closing Statement. During his closing statement, counsel for the State said: "Nobody said the defendant didn't commit this crime. Not one person." Defense counsel objected at that time and a discussion was held off the record. Later, during the State's rebuttal, counsel stated:

[Prosecutor]: So, I should call Templeton to have him tell you that too? I suppose I could also call Tom Haiden, the deputy who transported the defendant to the police department to tell you that he didn't say anything particularly interesting in the car. I suppose I could have called Officer Streeter from the State Center Police Department to tell you what happened while he sat out there twiddling his thumbs waiting for the police department to get back with the search warrant. I suppose I could have made a career out of this case. I could have called people who saw Officer Wacome in Gilman and at the time he left the prom there. I suppose we could have spent two or three weeks trying this case.

But, I tried to present here that evidence that I felt showed the elements of the offense -- offenses. And the Defense can call any witness they want also. They didn't have to call any. They don't have to call -- That's our law. The Defense does not have to put on one single thread of evidence because the State has the burden of proof. But, they did. They put on evidence. And they made an argument.

But, what was the evidence? Nothing, but the defendant is a nice guy. The defendant goes to college and goes to the YMCA. That was all the evidence that you heard.

A second objection was made and counsel for the defense asked for a

mistrial on the grounds that counsel for the State was making improper statements about the defendant's failure to testify. The trial court heard argument on this point and overruled the motion for a mistrial.

Counsel for the State argued that his rebuttal statements were directed at defense counsel's argument where he stated:

[Defense counsel]: First thing [the State] didn't do, they didn't call Mr. Hawthorne, did they? Why do you suppose they didn't call Mr. Hawthorne? They had him right here paraded out in front of you. They didn't call him to the stand.

Mr. Krejci will say, perhaps, well, because Mr. Hawthorne probably would just lie anyway. I don't know why they didn't call him. But, the inference that I draw is because Mr. Hawthorne is going to say the same thing that he said before. And that was that Byron Young didn't know what Mr. Hawthorne was going to do. And if Mr. Hawthorne is lying about that, Mr. Krejci is a very skilled attorney. He's a very good cross-examiner.

The second thing that troubles me is where is Darrell Templeton? Lack of evidence. Darrell Templeton, ladies and gentlemen, was the person who interviewed both Hawthorne and Young.

Detective Reed, as you heard, went out to the crime scene and then came back and was only in on a portion of what occurred at the police station. Yet, we don't call Darrell Templeton.

I think that you, ladies and gentlemen, are entitled to hear all of the evidence in the case.

Defendant argues that the prosecutor's statements constitute improper references to his failure to take the stand. The State argues that taken in context they are not improper references and that they were, in part, provoked by and in reply to comments by defense counsel.

In Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the Supreme Court held that prosecution comments concerning the accused's silence violate the self-incrimination clause of the fifth amendment. Id. at 615, 85 S. Ct. at 1233, 14 L. Ed. 2d at 110. The Iowa Supreme Court followed Griffin in State v. Johnson, 257 Iowa 1052, 1055, 135 N.W.2d 518, 520-21 (1965). In State v.

Nelson, 234 N.W.2d 368 (Iowa 1975), the supreme court analysed the cases dealing with improper prosecution comments:

In State v. Osborne, 258 Iowa 390, 393, 139 N.W.2d 177, 179 (1965), we interpreted Griffin and Johnson, supra, to mean the silence of an accused may not be used directly or indirectly to aid the prosecution. And in State v. Kimball, 176 N.W.2d 864, 869 (Iowa 1970), we displayed a marked sensitivity to this right of an accused, holding it would be reversible error, in absence of a defense request, even to give an instruction that no inference might be drawn from defendant's failure to testify. We reasoned such an instruction might inadvertently cause jurors to consider adverse inferences which would not otherwise occur to them.

.... An overt statement is not required. See United States v. Flannery, 451 F.2d 880, 882 (1st Cir. 1971) (statement that testimony as to private conversations between defendant and another was "uncontradicted"); Tanner v. United States, 401 F.2d 281, 289 (8th Cir. 1968), cert. denied, 393 U.S. 1109, 89 S. Ct. 922, 21 L. Ed. 2d 806 (1969) (statements that "[t]his evidence has not been disputed," where the only person who could contradict it was defendant); Commonwealth v. Davis, 452 Pa. 171, 305 A.2d 715 (1973) (repeated references, over objection, to evidence against defendant being "uncontroverted," where defendant did not testify or offer other defense). See Annotations, 24 A.L.R.3d 1093 (1969), 18 A.L.R.3d 1335 (1968).

Id. at 371.

When viewed in the context of the entire argument, we find that the prosecutor's remarks and comments were not improper and that defendant was not unfairly prejudiced by them. The trial court did not abuse its discretion by overruling defendant's motion for mistrial. These remarks served a purpose and did not naturally and necessarily focus the jury's attention on defendant's silence or failure to produce evidence. See State v. Taylor, 336 N.W.2d 721, 727 (Iowa 1983).

Some of the comments were in rebuttal to the defendant's attorney's remarks to the jury. The prosecutor was countering defendant's argument that the State was keeping important evidence from the jury. See State v. O'Kelly, 211 N.W.2d 589, 597 (Iowa 1973), cert. denied, 417 U.S. 936, 94 S. Ct. 2652, 41 L. Ed. 2d

240 (1974). This is part of the heat of battle and the parry and thrust of a trial. Albeit this may be a close call by the trial court, we do not find that the prosecutor stepped over the line or into the pitfall of prosecutorial misconduct in his summation and closing argument to the jury. This case is distinguishable from State v. Nelson, 234 N.W.2d 368 (Iowa 1975). In Nelson there were no defense statements which logically invited the comments. We hold that it was proper for the prosecutor to comment on the lack of evidence if he didn't comment on the failure of the defendant to give it. See Jacobs v. U.S., 395 F.2d 469, 477 (8th Cir. 1968).

AFFIRMED.

Schlegel, J., concurs; Snell, P.J., dissents.

I respectfully dissent from the majority's finding that remarks and comments made by the prosecutor were not improper and did not unfairly prejudice the defendant.

In my opinion, this case is similar to State v. Nelson, 234 N.W.2d 368 (Iowa 1975), where the supreme court found that the prosecutor's comments that the defense had failed to present evidence controverting the evidence presented by the State to be improper. Id. at 371-72. In this case the defense counsel on two occasions made references to the defendant's failure to present evidence: once during his closing argument when he said: "Nobody said the defendant didn't commit this crime. Not one person."; and second, during his rebuttal when he said: "But, what was the evidence? Nothing, but the defendant is a nice guy." I reject the majority's finding that these comments were part of "the heat of battle and the parry and thrust of a trial."

I believe that the prosecution made improper statements during closing arguments concerning the defendant's failure to take the stand and that these statements violated the defendant's right against self-incrimination. The trial court should have granted the motion for mistrial.