FILED
APR 27 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )
Plaintiff-Appellee, ) Filed April 27, 1982
vs. ) 184
WILL S. DAVIS, ) 1-415/66372
Defendant-Appellant. )

Appeal from Scott District Court - J. Hobart Darbyshire, Judge.

Defendant appeals his conviction and sentence of second-degree robbery in violation of sections 711.1 and 713, The Code 1979. On appeal defendant asserts: (1) that the evidence was insufficient to find him guilty of second-degree robbery; (2) that the State's failure to reveal plea negotiations with the State's principal witness when the witness indicated he was not aware of any plea arrangements denied the defendant due process of law; (3) that the trial court erred by allowing the State to examine the defendant about his co-defendant's extra-judicial confession; (4) that the trial court erred in allowing the State to improperly impeach a co-defendant with evidence that he had plead guilty to a charge arising out of this incident; and (5) that the trial court erred in failing to give the defendant's proposed instruction on assault as a lesser included offense of robbery. REVERSED AND REMANDED.

Chris Odell, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals his conviction and sentence of second-degree robbery in violation of sections 711.1 and 711.3, The Code 1979. On appeal defendant asserts: (1) that the evidence was insufficient to find him guilty of second-degree robbery; (2) that the State's failure to reveal plea negotiations with the State's principal witness when the witness indicated he was not aware of any plea arrangements denied the defendant due process of law; (3) that the trial court erred by allowing the State to examine the defendant about his co-defendant's extra-judicial confession; (4) that the trial court erred in allowing the State to improperly impeach a co-defendant with evidence that he had plead guilty to a charge arising out of this incident; and (5) that the trial court erred in failing to give the defendant's proposed instruction on assault as a lesser included offense of robbery.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. We reverse and remand.

I.

On August 21, 1980, the defendant was charged by county attorney's information with first-degree robbery in violation of sections 711.1 and 711.2, The Code 1979. The charge stemmed from an incident in which police officers observed the defendant, Kenny Campbell, and Michael Tolbert attack Rick Wilson on August 15, 1980. Two police officers observed defendant, Campbell, and Tolbert acting suspiciously and followed them to a parking lot. The officers observed Tolbert approach a car in the lot and throw a piece of asphalt through the car windshield. The occupant of the car, Rick Wilson, got out of the car and officers observed the defendant and Tolbert attacking Wilson. There were items of value in open view in the car. The police converged on the area and all participants in the fight attempted to flee. The police subsequently captured the defendant and his companions. The defendant denied any knowledge of Tolbert's intent to throw

something at the car or any participation in the assault. Campbell and Tolbert testified at the trial that they did not discuss or plan to commit a crime, specifically a robbery, with the defendant.

At a pretrial hearing, the prosecuting attorney indicated that there were plea negotiations in a criminal case involving Rick Wilson, that an agreement was prepared in which the State would recommend no incarceration for Wilson if he testified in the present case, and that the agreement had not yet been accepted by the defense in that case. At the trial, the defendant asked Wilson whether he had engaged in any discussions with the county attorney concerning the result of the criminal action against him in exchange for his testimony in this case and whether he knew of any contemplated or completed arrangement concerning that charge and his testimony. Wilson responded negatively to both questions.

At the close of the State's case during the trial, the defendant moved for a judgment of acquittal on the grounds that the evidence was insufficient for a robbery conviction. The trial court overruled the motion.

During cross-examination of defendant, he was asked by the State whether he was aware that Tolbert told the police that at the time the asphalt was thrown through the window, "our intentions were to rob this subject of his money." The defendant objected to the question on the grounds that it went beyond the scope of direct examination, it called for testimony from another witness, and was inadmissible hearsay. The trial court overruled the objection and the defendant indicated that he was aware of the statement.

Kenny Campbell, a defense witness, testified that he did not participate in these incidents. The State subsequently asked him whether he had pleaded guilty to a charge arising out of this incident. The defendant objected to such evidence on relevancy grounds. The court overruled the objection.

The trial court refused to give defendant's requested instruction on assault,

finding that it did not meet the test for establishing it as a lesser included offense. A jury subsequently found defendant guilty of second degree robbery. Defendant was sentenced to a term not to exceed 10 years on November 26, 1980. On January 20, 1981, defendant filed his notice of appeal.

II.

Defendant asserts that the State's failure at trial to reveal plea negotiations with its principal witness, Rick Wilson, denied defendant a fair trial. The State argues that the testimony of Mr. Wilson was not misleading because the trial court had been informed during a pretrial hearing that while a plea agreement had been drafted at the time of trial, no plea agreement had actually been reached with either Wilson or Wilson's attorney. The following testimony was given by Mr. Wilson during cross-examination by the defense counsel and redirect examination by the county attorney:

CROSS-EXAMINATION

BY MR. ENGELMANN:

Q. Were you charged with any crime for any action that occurred that evening?

A. Yes, I was.

Q. What were you charged with?

A. I was charged with Possession of Cocaine.

Q. Is that charge still pending?

A. Yes, it is.

Q. And have you had any discussions with the County Attorney with respect to the result of that charge in regard to your testimony here today?

A. No, sir.

Q. Do you know if any arrangement is either contemplated or completed with respect to that charge and your testimony here?

A. To my knowledge, no. I have talked to my lawyer, but I do not know—

Q. Your testimony then is that it could be, but you don't know about it?

A. My testimony is I don't know.

REDIRECT EXAMINATION

BY MR. SISSEL:

Q. Mr. Wilson, did you voluntarily appear in court this afternoon?

A. Yes, I did.

MR. SISSEL: No further questions.

(emphasis supplied)

The testimony set out above clearly gave the jury the false impression that Wilson's testimony was entirely voluntary and not induced by any promises on the part of the prosecution. We find the State had a duty to correct this false impression and that by failing to do so defendant was denied a fair trial. See Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). The instant case is distinguishable from State v. King, 256 N.W.2d 1 (Iowa 1977) (jurors knew all existing facts regarding plea negotiations when they retired to deliberate) because the jury here was not informed either that negotiations were pending or that the State had made a written plea offer. We find that under these circumstances defendant is entitled to a new trial.

III.

Defendant asserts that the trial court erred by allowing the State to cross-examine defendant with his co-defendant's extra-judicial confession. Co-defendant Tolbert told the police that when the asphalt was thrown at the car window "our intentions was to rob this subject of his money." The State contends that this statement was only used to establish defendant's knowledge of Tolbert's statement and, therefore, it was not inadmissible as hearsay. We disagree.

This statement was clearly not used only to prove defendant's knowledge of the statement. It appears to be a common example of hearsay in that it was used to prove the truth of the matter asserted, i.e. that defendant had an intent to rob the victim. Tolbert's statement is inadmissible because it does not fall under an exception to the hearsay rule. We find the trial court erred when it overruled defendant's objection during cross-examination and reverse on this issue.

IV.

Defendant next asserts that the trial court committed reversible error by allowing the State to impeach Kenny Campbell, a co-defendant, with evidence that he had plead guilty to a charge arising out of this incident. Based upon the record in this case we cannot agree that the trial court committed reversible error. We find that the defendant did not properly request a hearing under State v. Martin, 217 N.W.2d 536, 543-44 (Iowa 1974) when his only objection was one of relevancy. However, upon remand he will be entitled to a Martin hearing to determine whether Campbell can be properly impeached with regard to any prior felony convictions.

V.

Defendant also asserts that the trial court erred by failing to give his requested instruction on assault as a lesser included offense of robbery. The state concedes this was error. We therefore reverse on this issue without further discussion.

VI.

Although there is ample justification to reverse and remand this case for a new trial based only upon the issues previously decided, we also agree with defendant's assertion that there was insufficient evidence to support his conviction for robbery in the second degree. Evidence is sufficient to support a conviction if the evidence is such that it would convince a rational fact-finder

beyond a reasonable doubt of the defendant's guilt, State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). The reviewing court will review all of the evidence in the light most favorable to the state, Schrier, 300 N.W.2d at 306. It is for the fact-finder to determine the credibility of the witnesses and the weight of the evidence, State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980). Our review of the existing evidence indicates that at most, the evidence would support a finding that defendant committed an assault. Defendant is acquitted on the robbery conviction and remanded for a new trial on the lesser charge of assault.

REVERSED AND REMANDED.