FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

283

STATE OF IOWA,)

Plaintiff-Appellee,) Filed August 9, 1979

vs.)

CORDELL RUSSELL KIRBY,) 723
61356

Defendant-Appellant.)

Appeal from Polk District Court Dale S. Missildine, Judge.

Defendant appeals from judgment and sentence following his conviction of the offense of robbery with aggravation. AFFIRMED.

James Cleary of Des Moines, Iowa, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Faison J. Sessoms, Assistant Attorney General, for appellee.

Heard by Oxberger, C.J., and Donielson, Snell and Carter, JJ. Johnson, J., takes no part.

PER CURIAM

Defendant appeals from judgment and sentence following his conviction of the offense of robbery with aggravation in violation of section 711.2, The Code 1977. He was accused of taking by force an automobile and items of personal property from one Jack Barden and escaping in the victim's car. On appeal, defendant asserts that two instructions given to the jury by the trial court were erroneous. We affirm the judgment and sentence.

I. We first consider defendant's claim that the trial court erred in giving instruction number six. That instruction provided:

> Where intent is an essential element of the offense charged, it must be proved beyond a reasonable doubt. The intent with which an act is done is a purpose or mental condition seldom capable of proof by positive or direct evidence. Such intent, if any, may be arrived at by such just and reasonable inferences and deductions from the facts and circumstances proved by the evidence as the guarded judgment of a candid and cautious person would ordinarily draw therefrom. The law warrants an inference that when a person intentionally commits an act, he intends the natural results or consequences to follow which ordinarily do follow such acts.

The objection lodged to the giving of this instruction at the trial related to the last sentence thereof and was as follows:

> The defendant feels that the last sentence is improper in a case of this type which warrants a very specific intent, the intent, if resisted, to kill and maim, and believes that the language such as "the law warrants the inference that when a person intentionally commits an act, he intends the natural result [sic] or consequence [sic] to follow that [sic] ordinarily do follow such an [sic] act"—the defendant feels that the language is extremely prejudicial and not proper in a case such as this one where specific intent is involved, not a general intent.

We interpret this objection to be that such an instruction is inappropriate in all instances with respect to a specific intent crime. Defendant cites no authority to support this claim and we deem it to be without merit.

In addition, defendant, on appeal, asserts that instruction number six served to deny him due process of law by shifting the burden of proof in whole or in part with respect to an essential element of the crime. Defendant in particular relies upon the decision in Sandstrom v. Montana, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ (1979). We do not reach this issue because no such exception was taken to the instruction at trial. The issue was raised for the first time in a motion for new trial. As stated in

State v. Buchanan, 207 N.W.2d 784, 787 (Iowa 1973): "If a defendant undertakes to except to instructions at trial he must rest on those exceptions. He cannot in a postverdict motion amplify them or add new ones." We conclude that defendant has failed to preserve error on the issue of shifting the burden of proof either as a general proposition or as a consitutional claim.

II. Defendant also attacks the giving of instruction number fifteen by the trial court. That instruction states:

> It is claimed by the State that the defendant, Cordell Russell Kirby, fled and endeavored to escape from arrest by flight, and in this regard you are instructed that if you find beyond a reasonable doubt the offense charged herein was committed and you further find beyond a reasonable doubt that the defendant fled from the scene for the purpose of avoiding and retarding the prosecution, then such flight was a circumstance tending to connect the defendant with the commission of the crime; and the jury would be justified in considering such flight as evidence of guilt.

The objection lodged to this instruction at trial was that it was not supported by the evidence. From what was said at the time, we interpret this claim to be that the evidence was insufficient to show that it was in fact the defendant who fled from the scene of the crime in defendant's car and later fled from defendant's car on foot. Our reading of the record dispells any such contention. The evidence is strong that it was the defendant who fled. We hold the exception taken to the instruction at trial is lacking in merit.

We also consider defendant's claim that instruction number fifteen is an unwarranted comment on the evidence. This objection to the instruction was raised for the first time in defendant's motion for new trial. But because instruction number fifteen was added to the court's instruction after arguments to the jury, such objection may be raised in this manner. See section 780.35, The Code 1977; R.C.P. 196.

While we believe the instruction was perhaps inappropriate and added little to the jury's understanding of the issues, we fail to see how it could have prejudiced defendant. Under the instruction the jury could not attribute guilt to the defendant as a result of the alleged flight unless it found, beyond a reasonable doubt, that (a) the offense charged had been committed by someone; and (b) that it was the defendant who fled from the scene. The initial flight from the scene was in the victim's car and was of

such temporal proximity to the robbery as to be part of the same transaction. Under these circumstances, if the jury found that defendant was the person who fled from the scene of the crime it is inescapable that it simultaneously found that he was the person who committed the robbery. There was no prejudice to defendant in the giving of instruction number fifteen.

Other challenges made to instruction number fifteen by defendant are resolved favorably to the State in State v. Barr, 259 N.W.2d 841, 842 (Iowa 1977). We have considered all issues presented and find no basis for reversal.

AFFIRMED.