IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-394 / 95-1283

STATE OF IOWA,

Appellee,

vs.

TIMOTHY A. CASKEY,

Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra (trial and sentencing) and Bobbi M. Alpers (plea and withdrawal of plea), Judges.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of first-degree robbery, first-degree burglary, and second-degree theft. **AFFIRMED.**

Penelope C. Souhrada, Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Donald E. Frank, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ.

STREIT, J.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of first-degree robbery, first degree burglary, and second-degree theft. We affirm.

Timothy Caskey and the State entered into a plea agreement that Caskey was to "give full and complete testimony against Richard Hoon and any others involved in Case No. 1798968 . . . prior to the Hoon trial on 6/5/95. Failure to give such statement shall be cause for withdrawal of this agreement." The case involved a breaking and entering into the home of an eighty-eight year old woman and robbing her at gun point. Upon questioning by police about an unrelated incident, Caskey gave incriminating statements about his and Richard Hoon's involvement in this crime.

Caskey gave deposition testimony admitting his own and another's involvement, but denied Richard Hoon was involved in the burglary. The State moved to withdraw its plea agreement with Caskey. The court rescinded and revoked the agreement and stated Caskey's deposition testimony could not be used against him. The case proceeded to jury trial and Caskey was found guilty as charged on all counts

Caskey appeals. He contends: (1) his Fifth Amendment right against self-incrimination was violated by the State's bargaining methods in obtaining the plea agreement; (2) the district court abused its discretion in granting the State's motion to rescind the plea agreement; (3) he was impermissibly subjected to multiple punishments

when the court entered judgment on and ordered consecutive sentences for both the burglary and robbery charges violating the Double Jeopardy Clause.

I. *The Plea Agreement*

Caskey contends the State bargained for specific testimony in his plea agreement to implicate Hoon which did not require that he testify truthfully or honestly in the matter, therefore it was inadmissable testimony. The Defendant argues that when he gave deposition testimony which incriminated himself but exonerated Hoon, the State violated his Fifth Amendment. The State concedes the prosecutor violated the rule against bargaining for specific testimony. Defendant failed, however, to object to the State's procedure in obtaining the plea agreement at the trial level. Error which is not preserved is waived. *See State v. Heacock*, 521 N.W 2d 707, 710 (Iowa 1994). We decline to address Defendant's arguments about the State's bargaining tactics used for obtaining testimony by the Defendant since he did not object at trial. This issue is not preserved on appeal.

Further, Caskey contends the State may not withdraw from a plea agreement if he has detrimentally relied on it. Defendant raised a timely objection at the plea proceedings regarding the withdrawal of the plea agreement, therefore error is preserved We reverse a trial court's ruling on acceptance or withdrawal of a plea agreement only upon a showing that the court abused its limited discretion. *State v. Hovind*, 431 N.W.2d 366, 368 (Iowa 1988).

When a defendant fails to uphold his end of a plea bargain, the State has no obligation to provide defendant the anticipated benefits of that bargain. *State v. Aschan*, 366 N.W 2d 912, 917 (Iowa 1985). Caskey failed to uphold his end of the bargain by not offering testimony that implicated Hoon. Defendant argues the State impermissibly bargained for specific testimony and the plea bargain was improper. The district court ordered Caskey's deposition testimony could not be used against him after the plea agreement was revoked. This placed Caskey in the same position he was before plea negotiations. Caskey made the same incriminating statements voluntarily to the police before his deposition regarding his involvement in the burglary and robbery. There was no detrimental reliance by the Defendant on the plea agreement.

II. *Double Jeopardy*

Caskey claims the district court erred by entering judgments on both the burglary and robbery charges, subjecting him to multiple punishments and ordering consecutive sentences for both charges. Error was preserved for appeal. We review constitutional challenges de novo. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994). The Double Jeopardy Clause of the federal constitution is found in the Fifth Amendment and the states are bound through the Fourteenth Amendment to the federal Constitution. *State v. Aguiar-Corona*, 508 N.W.2d 698, 701 (Iowa 1993) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707, 716 (1969)).

Caskey was charged with first-degree burglary and first-degree robbery He argues the crime of first-degree robbery can be considered a lesser-included offense of first-degree burglary. We use the legal elements test to determine lesser included offenses. *Aguiar-Corona*, 508 N.W.2d at 702; *State v. Jeffries*, 430 N.W.2d 728, 736 (Iowa 1988). The legal elements test provides that if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater. *Id.*; *Jeffries*, 430 N W 2d at 730. In addition, when the statute provides alternative ways of committing the crime, the alternative submitted to the jury controls. *Id.*; *see State v. Steens*, 464 N.W.2d 874, 875 (Iowa 1991).

First-degree robbery, as submitted to the jury in this case, requires either an assault or a threat directed toward the victim First-degree burglary, as submitted to the jury, can be committed without any actual contact with the victim. Under the legal elements test, first-degree burglary and first-degree robbery of which Caskey stands convicted are not the same offense. Contrary to Caskey's contention, double jeopardy is not implicated in this case.

Caskey contends consecutive sentences for burglary and robbery which were part of the same criminal transaction and occurred within minutes of each other are cumulative and violate the continuous offense doctrine prohibiting multiple punishments under the Fifth Amendment. We disagree.

Under a double jeopardy claim, the continuous offense doctrine prohibits multiple convictions of a defendant who commits only one, continuous offense *Aguiar-Corona*, 508 N.W 2d at 703, 704 (citing *Frink v. Iowa*, 968 F 2d 734, 737 (8th Cir. 1992)). The test for determining whether a continuous offense doctrine applies "is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . . If the latter, there can be but one penalty " *Aguiar-Corona*, 508 N.W.2d at 704 (citing *Blockburger v. United States*, 284 U.S. 299, 302, 52 S Ct. 180, 181, 76 L. Ed. 306, 308 (1932))

Caskey was found guilty of two separate crimes--first-degree robbery and first-degree burglary under Iowa Code sections 711.2 and 713.3. Although Caskey committed the burglary and robbery from the same course of conduct, they are not the same offense for double jeopardy purposes. There is no indication that the legislature intended to prohibit multiple enhancement penalties for these crimes. *See* Iowa Code §§ 711.2, 713.3. The multiple punishments the district court imposed does not violate the Double Jeopardy Clause even though the offenses occurred within minutes of each other Therefore, we conclude the court may impose sentences to be served consecutively on the robbery and burglary convictions.

AFFIRMED.