FILED
AUG 06 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-181 / 92-968

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STATE OF IOWA,

Appellee,

vs.

LARRY JUNIOR SMITH,

Appellant.

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

Smith appeals from his conviction, following a jury trial, of one count of attempted murder, in violation of Iowa Code section 707.11 (1991), one count of willful injury, in violation of Iowa Code section 708.4 (1991), one count of going armed with intent, in violation of Iowa Code section 708.8 (1991), and one count of possession of a firearm by a convicted felon, in violation of Iowa Code section 724.26 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie Halligan Brown, Assistant Attorney General, and Diann Wilder-Tomlinson, County Attorney, for appellee.

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Heard by Oxberger, C.J., and Donielson, J. and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J. 000969

The defendant, Larry Junior Smith, appeals from judgments and sentences imposed upon him and based upon jury verdicts of guilty of the offense of attempted murder in violation of Iowa Code section 707.11, the offense of willful injury contrary to Iowa Code section 708.4, the offense of going armed with intent contrary to Iowa Code section 708.8, and the offense of possession of a firearm by a convicted felon contrary to Iowa Code section 724.26.

We affirm.

During the early morning hours of January 14, 1992, the defendant appeared at the residence of Sandra Deahl located in the City of Marshalltown, Iowa. When Deahl came to the door, she was confronted by the defendant who asked why Deahl and Janice Smith, his former wife, were with two other men on several prior occasions. Because of the early morning hour, Deahl replied that she would visit with the defendant at some other time. The defendant then fired a shotgun into Deahl's abdomen. Smith attempted to reload the gun, a single shot .410 shotgun, and Deahl managed to push him from her house. She called the police immediately. As a consequence of the assault, Deahl suffered severe damage to her liver and a serious loss of blood.

Prior to trial, the defendant filed his motion in limine requesting that all evidence that he might have acted in conformity with his character or evidence of other

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crimes committed by him and offered for the same purpose be excluded. This motion was, in part, sustained by the trial court, who directed that no evidence relative to any threats that the defendant might have made against his former wife would be admissible.

During the second day of trial, the defendant filed a notice of an additional defense witness indicating that he intended to call a police officer to testify. The objection of the State to the admissibility of the evidence of that additional witness was sustained by the court pursuant to Iowa Rules of Criminal Procedure 12(4).

Based upon the foregoing, the defendant asserts on appeal that the trial court erred in refusing to permit the police officer to testify and further, that the trial court erred in refusing to grant a mistrial upon motion of the defendant after several witnesses testified that the defendant had made threatening remarks on several occasions. Included in the latter is the assertion that defendant was deprived of his Sixth-Amendment right to effective assistance of counsel inasmuch as counsel for the defendant did not object to several violations of the order on the motion in limine and did not request the court to admonish the jury to ignore such comments.

With respect to the first claimed error that the trial court erred in refusing to permit the officer to be called as a defense witness, the trial court ascertained that certain reports of the officer, as well as a deposition of

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Deahl, had been available to defense counsel for ten days or more prior to the onset of trial in accordance with Iowa Rule of Criminal Procedure 12(4). The purpose of calling the officer was to impeach a portion of Deahl's testimony at trial, which was presumably at odds with both the report she gave the officer at the time of the incident and her deposition. This information, therefore, was readily apparent prior to trial and well in advance of the deadline imposed by said rule. However, the deposition and the report were available and used by the defendant at trial in an attempt to impeach Deahl insofar as the purported discrepancy was concerned.

Our review is on the record for errors at law. Iowa R. App. P. 4.

The evidence to impeach Deahl was admitted. The admitted evidence established the discrepancy between the police report and Deahl's deposition and her testimony at trial. We, therefore, find that such exclusion, if error on the part of the trial court, is not reversible error. In State v. Hicks, 245 N.W.2d 319 (Iowa 1976), the supreme court held that if the fact is established by other evidence, improper exclusion of other comparable evidence is not reversible error.

The trial court ordered that there would be no reference at trial to any threats that the defendant had made against his former wife.

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At trial, one witness stated that the defendant "is always threatening somebody." No objection was lodged to that statement.

Thereafter, another witness, an officer, testified on behalf of the State that he knew the defendant "over the past number of years" and that he had "other dealings with Mr. Smith for different reasons." This was not violative of the pretrial order since the testimony did not allude to any threats or other conduct by the defendant since the officer did not testify as to the nature of those contacts. Again, no objection was lodged by the defendant to this testimony.

A third witness conformed to the court order in testifying for the State on direct examination. On cross-examination, however, and after a long colloquy with the defense counsel, this witness stated that the defendant had made threats to the victim and to his former wife. In this particular exchange, defense counsel first asserted as a fact that the witness had not mentioned anything to the investigating officer about her knowledge of past threats made by the defendant to Deahl. Defense counsel then put the question--why didn't the witness tell the officer about such threats? The response of the witness was that she did tell the officer, but was told that it would not be a concern in the case. Then defense counsel asked whether or not the witness knew what the officer was then investigating, and she acknowledged that the officer was

investigating an attempted murder of Sandra Deahl. Finally defense counsel again asked why the witness did not think it relevant to tell the officer about the threats the defendant made against Deahl. The witness again corrected the questioner and said that she had told the officer that the defendant had made many threats before to Deahl and to his former wife.

Testimony was already in the record that the defendant was "always threatening somebody." Similar evidence was therefore in the record without objection, and the admission of testimony of the third witness would not be prejudicial. State v. Whitfield, 315 N.W.2d 753 (Iowa 1982). We are further buttressed in this conclusion because in large part the defendant invited this comment from the witness by assuming as a fact what the witness denied several times and by finally asking why the witness did not tell the officer about the threats to Deahl. It is at this point and after a long and arduous cross-examination the witness suddenly mentioned the threats to Deahl and to the former wife. State v. Hinkle, 229 N.W.2d 744 (Iowa 1974).

The trial court is granted wide discretion whether or not to grant a mistrial. It was immediately after the testimony from the third witness that the defendant moved for a mistrial which was denied by the trial court. Discretion is abused only if it is shown by the defendant that prejudice resulted from an abuse of discretion and

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which prevented him from receiving a fair trial. State v. Calendar, 444 N.W.2d 768 (Iowa App. 1989).

The jury found the evidence against the defendant to be compelling. His threats against the victim, testimony of the victim, testimony of the defendant that he was at the house at the time of the incident and that he did not know if he had a gun with him at that time, and that all he remembered was a scream and a loud noise all militated against him. His defense of intoxication was disbelieved by the jury.

Under these circumstances, the failure of the trial court to grant the mistrial was not such an abuse of discretion so as to prejudice the defendant from receiving a fair trial. State v. Anderson, 448 N.W.2d 32 (Iowa 1989).

The role of counsel in failing to object to the prior testimony of threats is best examined by postconviction relief proceedings which the defendant may pursue. We, therefore, affirm the judgments of guilty and the sentences imposed thereon.

AFFIRMED.