IN THE COURT OF APPEALS OF IOWA

No. 8-405 / 97-1006

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CHRISTOPHER JOHN KIBLER,

Defendant-Appellant.

FILED
AUG 28 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, L. Vern Robinson and William L. Thomas, Judges.

Christopher John Kibler appeals from his convictions for first-degree robbery and possession of an offensive weapon. **AFFIRMED.**

Stephanie C. Hassler of Roeder & Hassler, Manchester, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Christopher Kibler appeals his convictions for first-degree robbery and possession of an offensive weapon. He contends the trial court erred when it: (1) denied his motion to suppress evidence seized following an illegal search and seizure; (2) failed to strike a juror after receiving information regarding bias; and (3) improperly instructed the jury on the definition of reasonable doubt. We affirm.

At approximately 4:00 a.m. on November 14, 1996, two men wearing ski masks and dark clothing entered a Kum & Go on Mt. Vernon Road and 28th Street in Cedar Rapids, threatened the clerk with a sawed-off shotgun, took money from the cash register, and fled. Cedar Rapids police officers John Phipps and Joseph Clark were only a couple of blocks away and arrived at the store less than thirty seconds after they were dispatched. Clark testified the clerk told them two men, who she thought were black, fled the store in opposite directions, and she believed they went around behind the store which would be in a southerly direction. There is a parking lot behind the store.

Phipps and Clark then drove south on 28th Street. Approximately three blocks from the store the officers talked to a newspaper carrier who told them she had not seen anyone on foot, but a car had just come from the direction of the Kum & Go, passed her, turned around, and parked on the opposite side of the street. The newspaper carrier told the officers the car had been turned off after being parked, but

no one had left the car. The carrier also informed the officers the car was the only thing she had seen moving in the area.

Then, less than three minutes after the officers had received their dispatch to the Kum & Go, they drove toward the car, a gold Ford Thunderbird. As the officers approached the car they could see two black men in the front seat of the car. The driver of the car was slumped down so all that could be seen were his eyes, forehead, and the top of his head. The passenger was slumped so all that could be seen was the top of his head above the dashboard.

The officers parked their car in front of the Thunderbird so it could not be moved and called for back-up assistance. The officers, using the public address equipment on the squad car, ordered the occupants to put their hands on the ceiling of the car. At this time, the officers noticed a third person in the car.

When the back-up officers arrived, Phipps and Clark directed the occupants out of the car, patted them down for weapons, handcuffed them, and placed them in the back seat of the police car. The men were not dressed in dark clothing.

When the officers approached the car with their flashlights, the passenger door was open. Inside the car the officers saw a dark stocking cap, a pile of latex gloves, and a large pile of dark clothing, including sweatshirts, coats, and jackets. The officers then seized these items along with a wad of money which was found on top of the clothing. The officers also found a sawed-off shotgun with a pistol grip.

The two men were identified as Derome Robertson and Christopher Kibler,

and the third individual was a juvenile female. Robertson and Kibler were tried jointly.

I. MOTION TO SUPPRESS. The State contends Kibler failed to preserve error because he did not file his motion to suppress until forty-seven days after his arraignment.

Kibler was arraigned on December 12, 1996. The arraignment order stated all pre-trial motions must be filed "within the time limitations of the Iowa Rules of Criminal Procedure; however, in any event, all pre-trial motions must be on file at least ten (10) days before the final pre-trial conference." According to rule 10(4), such motions must be filed "no later than forty days after arraignment." Iowa R. Crim. P. 10(4). Motions to suppress are subject to this time limitation. Iowa R. Crim. P. 10(2)(c). Failure to file a pre-trial motion within the time limitation constitutes a waiver of the grounds forming the basis for the motion unless the court "for good cause shown" excuses the untimely filing. Iowa R. Crim. P. 10(3).

Robertson filed a timely motion to suppress the evidence obtained as a result of the seizure. However, Kibler did not file his motion joining Robertson's motion to suppress until January 28, 1997, forty-seven days after his arraignment. Even though the State did not resist the motion in the district court as untimely and unexcused for good cause, we will uphold the ruling on the admissibility of the evidence on this or any other ground appearing in the record, whether urged or not. *State v. Terry*, 569 N.W.2d 364, 368 (Iowa 1997). We find the motion was untimely.

Even if Kibler's motion to suppress had been timely, after a de novo review of the record, we find the trial court did not err when it denied the motion to suppress. *See State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995) (our review of constitutional issues is de novo).

II. JUROR BIAS. The State contends Kibler also failed to preserve this issue. The district court placed court attendant Joyce Burke under oath and questioned her regarding comments made by Brenda Sheehan, one of the jurors.

> COURT: Brenda Sheehan said something to you this morning about a complaint she had. Would you just tell us what she told you?
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> BURKE: She said she had a complaint on -- uh -- that she was asked where she worked and she didn't mind that but you -- Julie asked her to go farther into it. I don't remember.
>
> COURT: This is during the jury selection?
>
> BURKE: Right.
>
> COURT: Okay.
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> BURKE: And she was uncomfortable with the parents in the seating back there, that they would know that much information about her. They would know where she worked. They would know her name. And what if they were gang members and then they would know all that and come and get her or something like that.
>
> COURT: Is that the extent?
>
> BURKE: Exactly.
>
> COURT: What did you tell her?
>
> BURKE: That it was not unusual for the attorneys to ask questions like that and where they worked and that I would bring it to your attention.
>
> COURT: Thanks.
>
> COURT: Mr. Gonlubol or Ms. Trachta, go ahead and make whatever record you want. I'm not inclined to bring Ms. Sheehan in and question her about this. Frankly, that's not an uncommon concern of jurors in a criminal case. I've heard it many, many times before when I talk to them. I don't see it as a reason to examine a juror at this point, but go ahead and tell me whatever you want and maybe I'll reconsider.

> TRACHTA: Your Honor, obviously the primary concern I have is that the prospective -- that the juror is concerned or jumping to possibilities of gang involvement because there happen to be a couple of members present who were not even identified necessarily as being here for support of one or the other, but are simply here. They may be family members, maybe just friends or acquaintances. And it bothers me that the -- whether or not I could get a fair and impartial consideration of the evidence from a person who is already considering possibilities or putting -- gives a trait to my client that has not been in the record. There's no record in the case at all of any gang related activity. The -- the word gang hasn't even been spoken in this case, I believe throughout voir dire or in the presentation of evidence, and I would have concern whether or not this juror could in this instance give Mr. Robertson and Mr. Kibler a fair trial if those are the types of assumptions being jumped to by this prospective juror.
>
> I also have a concern that if -- if there's a perception by this juror that I asked more personal questions or possibly information other than where she worked. I don't recall doing that and that obviously causes me concern as far as if she is under a misconception that I asked any further identifying information from her.
>
> My main concern is whether this juror would be able to give Mr. Kibler primarily a fair trial if the mere association of other persons in the courtroom brought about presumptions of gang activity.
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> . . . .
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> COURT: Any comment that was made was made in hypotheticals. I'm not going to call this woman in and question her about that at this point. I don't think there's been a record at this point that would support doing that. I'm not going to. Okay.

Kibler argues the trial court twice indicated the juror would not be questioned and counsel effectively objected with enough specificity to preserve error. Counsel never actually objected and asked the court to strike the juror; instead, she stated some "concerns," but she never asked the district court to do anything about the concerns. It is elementary we do not determine questions of fact nor do we consider

issues not presented to or decided by the district court in the first instance. *State v. Gogg*, 561 N.W.2d 360, 368 (Iowa 1997).

Even if Kibler had preserved error, we find the trial court did not abuse its discretion. *See State v. Tillman*, 514 N.W.2d 105, 107 (Iowa 1994) (trial court is vested with broad discretion in ruling on challenge for cause). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestan*, 515 N.W.2d 356, 358 (Iowa App. 1994). However, because Kibler raises this claim on a constitutional basis our review is also de novo. *Haviland*, 532 N.W.2d at 768. We must look at the totality of the circumstances as shown by the entire record. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995). Thus, we must review the record de novo to determine whether the trial court abused its discretion.

In today's society, gang involvement, regardless of race, is a concern. The news and popular culture has expanded society's fear of gang violence and gang culture. The information provided by Burke did not show the juror was worried about gang involvement due to race; it also did not show she could not be an impartial juror. The trial court stated this was a common concern of jurors in a criminal case and not a reason to examine a juror. After a de novo review of the record, we find the trial court did not abuse its discretion and affirm the decision.

III. JURY INSTRUCTION. Kibler raises four complaints about the jury instruction on reasonable doubt. He alleges the instruction:

1) failed to indicate the State carried the burden of proof beyond a reasonable doubt;

2) failed to indicate the jurors should make their own determination based upon a full and fair consideration of all the evidence;

3) failed to indicate proof beyond a reasonable doubt required the jury to be firmly convinced of the defendant's guilt; and

4) indicated proof of a convincing character means that a reasonable person would not hesitate to rely and act upon it.

The State contends Kibler also has not preserved error on this issue because the objection to the instruction on proof beyond a reasonable doubt was made by Robertson's counsel, not Kibler's counsel. A defendant can rely on a co-defendant's objection to preserve error when they have entered into a blanket agreement to join co-defendant's motions before the court, including oral motions. *State v. Voelkers*, 547 N.W.2d 625, 631 (Iowa App. 1996). There is nothing in the record showing such an agreement here. It is also not implied from counsels' conversations with the judge they were joining each other's motions. Therefore, we find error was not preserved.

Even if Kibler had preserved error, after a review of the instructions given by the trial court, we find the jury instructions correctly conveyed the concept of proof beyond a reasonable doubt. *See State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996) (when a single instruction is challenged, it will be judged in context with other instructions relating to the criminal charge, not in isolation).

For these reasons, we affirm the convictions.

AFFIRMED.