

FILED

MAY 20 1977

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IN THE COURT OF APPEALS OF THE STATE OF IOWA
COERK SUPREME COURT

STATE OF IOWA,

:

Appellee,

: Filed May 20, 1977

vs.

:

BENNY BOYD,

:

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58351

Appellant.

:

Appeal from Scott District Court - Lowell D. Phelps,
Judge.

Appeal from conviction by jury of robbery with aggravation
in violation of Section 711.2, The Code. - Judgment affirmed.

Doren Shifley, of Shifley, Giese & Yeggy, of Davenport,
for Appellant.

Richard C. Turner, Attorney General of Iowa, Ray Sullins,
Assistant Attorney General, and Edward N. Wehr, Scott County
Attorney for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger
and Carter, JJ.

SNELL, J.

Defendant, Benny Boyd, appeals his conviction by jury of robbery with aggravation in violation of Section 711.2, The Code. Defendant alleges two errors on appeal: the trial court lacked jurisdiction to proceed with trial because defendant was denied his constitutional right to effective assistance of counsel and the court erroneously allowed hearsay testimony of a prior offense to be admitted into evidence. We affirm.

Defendant contends he was deprived of effective assistance of counsel which he is entitled to under the United States and Iowa Constitutions. He argues that inadequacy of counsel is a constitutional defect which deprives the trial court of jurisdiction to proceed with the trial and sentence the accused. *See Walker v. Brewer*, 189 N.W.2d 605, 609 (Iowa 1971); *Kime v. Brewer*, 182 N.W.2d 154, 156 (Iowa 1970).

Defendant contends the following established inadequacy of his court-appointed counsel: 1) failure to preclude a juror from serving on the jury after being informed by the defendant that the juror was biased; 2) failure to object to evidence admitted concerning a prior offense; 3) failure to object to over zealous cross-examination of defendant by the prosecutor which insinuated illegal conduct by the defendant; 4) failure to properly investigate and prepare for trial.

It is presumed that a court-appointed counsel for an indigent defendant acts properly. The burden of proof is on the defendant to establish his counsel was ineffective and he did not have a fair trial. *State v. Kendell*, 167 N.W.2d 909, 910-11 (Iowa 1969).

"The test is whether in all the circumstances counsel's performance was within the range of normal competency." *Moore v. United States*, 432 F.2d 730, 737 (3rd Cir. 1970).

To warrant finding a deprivation of due process, such circumstances must include "an affirmative factual basis demonstrating counsel's inadequacy of representation." In re Parker, 423 F.2d 1021, 1025 (8th Cir. 1970). Ogden v. State, 215 N.W.2d 335, 337 (Iowa 1974).

Jury prejudice cannot be presumed, and appellant has the burden of showing its existence. This is especially true where the appellant seeks to have the judgment set aside. Fabian v. United States, 358 F.2d 187, 191 (8th Cir. 1966) *citing* Beck v. Washington, 369 U.S. 541, 558, 82 S. Ct. 955, 8 L. Ed.2d 98 (1962). Unless the actual existence of prejudice affecting the impartiality of the jury be shown, the juror need not be set aside. Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L. Ed.2d 751, 757 (1961). There is no *per se* rule of bias. Johnson v. United States, 484 F.2d 309, 310 (8th Cir. 1973).

Defendant failed to establish that juror Daniel Dirksen was actually prejudiced. Nor did he attempt to have him discharged for cause. Therefore, no error exists. Johnson, *supra*; State v. Coffee, 182 N.W.2d 390, 396 (Iowa 1970). However because defendant asserts the failure to strike the prospective juror was due to ineffectiveness of counsel and not a part of the trial strategy as in *Coffee*, we consider this assertion in the totality of the circumstances.

Evidence of a crime other than the one with which a defendant stands charged is inadmissible except in certain limited exceptions. State v. Harper, 222 N.W.2d 450, 452 (Iowa 1974) and cases cited therein. Identity is one of those exceptions. Harper, *supra*.

When evidence of other crimes has relevancy, the trial court must exercise discretion to determine whether the probative value of the evidence is outweighed by its prejudi-

cial effect. State v. Johnson, 224 N.W.2d 617, 621 (Iowa 1974). A reversal is justified only where the trial court abused its discretion in balancing the probative force of the evidence against the danger of undue prejudice. State v. Harmon, 238 N.W.2d 139, 145 (Iowa 1976).

Defendant contends the testimony to his involvement in a March robbery was prejudicial and that the inability of the witnesses to identify him at the time required the trial court to reject the evidence. Therefore, his counsel's failure to object, indicates ineffectiveness of counsel. However, when a witness belatedly identifies a defendant when she had been previously unable to do so, a question of credibility and not admissibility exists. State v. Hinsey, 200 N.W.2d 810, 814 (Iowa 1972). We do not believe trial court abused its discretion in admitting the evidence or that failure to object to the evidence indicates counsel was ineffective.

Defendant's contention that over zealous cross-examination by the prosecutor resulted in prosecutorial misconduct to the extent that he was denied a fair trial must fail. This is not a case where the same question was asked repeatedly after defense counsel's objection had been sustained by the court. State v. Moon, 167 Iowa 26, 148 N.W. 1001 (1914). Nor is this a case where the record is so permeated with repeated misconduct by the assistant county attorney that it can be only classified as prejudicial. State v. Levy, 160 N.W.2d 460, 468 (Iowa 1968).

Not all misconduct by the prosecution entitles defendant to a new trial. It must reach such proportions that defendant is denied a fair trial. State v. Hansen, 225 N.W.2d 343, 348 (Iowa 1975); State v. Johnson, 222 N.W.2d 483, 486-88 (Iowa 1974). We do not approve questioning defendant's use of narcotic cough syrup when the indictment was for armed robbery.

The questioning should have ceased after it was established that defendant had made several prior purchases at the drug store and had written his name and address in the narcotic purchase record book. However, we do not think the misconduct was sufficient to deny a fair trial.

When lack of preparation is asserted as the basis of denial of proper representation the entire record must be examined and the totality of circumstances evaluated to determine counsel's effectiveness. The test is whether in all the circumstances counsel's performance was within the range of normal competency. *State v. Massey*, 207 N.W.2d 777, 779-80 (Iowa 1973). After a review of the entire record, we cannot say that the totality of the circumstances demonstrates a lack of or inadequate preparation so as to deprive defendant of adequate counsel.

Finally, defendant contends trial court erred in allowing hearsay evidence. The question related to the events of a robbery of the drug store in March whereas defendant was charged with a June robbery. Objection was made and overruled that the question lacked proper foundation. Although the hearsay objection was not made we address that issue because of the claim of inadequacy of counsel.

The answer by Neoma Buooa to the prosecution's question dealt with what the witness thought, observed and did during the March 1974 robbery. The remainder of the response repeated what Ruth Mundell had said to Buooa immediately after the robbery. The testimony was admissible as part of the *res gestae*. *Gibbs v. Wilmeth*, 261 Iowa 1015, 157 N.W.2d 93 (1968). Moreover, the out-of-court declarant, Ruth Mundell, was called, testified to substantially the same facts, and was cross-examined by defense counsel. Under such circumstances there was no

prejudicial error. State v. Mattingly, 220 N.W.2d 865, 869 (Iowa 1974) *citing* State v. McCollom, 260 Iowa 997, 983, 151 N.W.2d 519, 522 (1967).

We have examined the contention that the totality of errors claimed demonstrates inadequacy of counsel. Trial counsel's representation of defendant was well within the standard of normal competency. State v. Massey, *supra*. Defendant had a fair trial.

Judgment affirmed.