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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 282

STATE OF IOWA,)

Plaintiff-Appellee,) Filed May 26, 1981

vs.)

ROBERT EARL CARTER,) 1-102 / 64247

Defendant-Appellant.)

Appeal from Scott District Court - Margaret S.Briles, Judge

Defendant appeals from his conviction by jury verdict of second-degree burglary in violation of sections 713.1 and 713.3, The Code, asserting that the trial court erred in failing to suppress evidence resulting from an allegedly illegal investigatory stop and in failing to instruct the jury on criminal trespass. AFFIRMED.

Jerald Feuerbach of Gomez, Feuerbach, May & Pries, Davenport, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

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

Defendant appeals from his conviction by jury verdict of second-degree burglary in violation of sections 713.1 and 713.3, The Code. He claims that the trial court erred in failing to suppress evidence resulting from an allegedly illegal investigatory stop and in failing to instruct the jury on criminal trespass. We affirm the conviction.

I. In his amended brief, filed with leave of court, defendant urges that criminal trespass is a lesser included offense to the principal charge and trial court erred in failing to so instruct the jury. The supreme court has determined that criminal trespass is, in some circumstances, a lesser included offense as to burglary in the second degree. State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). We need not determine whether such was the case on the facts of the present case because we find that defendant failed to properly raise this issue in the trial court.

The following exchange occurred between the court and defendant's attorney with respect to the subject of an instruction on criminal trespass:

> MR. FEUERBACH: . . . The defense would submit at this time, after review of the evidence in this case, that an instruction in regard to Criminal Trespass be provided to the jury, in that from the evidence that has been proposed and introduced in this case, that the jury could return a verdict of guilty of the offense of Criminal Trespass.
>
> THE COURT: I don't think Criminal Trespass is an included offense.
>
> MR. FEUERBACH: Criminal Trespass is not an included offense, as I understand it, under Burglary. I would ask that it be submitted on the grounds that the jury could reasonably find a verdict of guilty on that charge, and that would avoid any possibility of acquittal on one offense and then refiling or retrial on a Criminal Trespass offense.

From this colloquy it is apparent that defendant was not raising the issue involved in Sangster, i.e., that criminal trespass is a lesser included offense vis-a-vis second degree burglary. Indeed, defendant in the present case expressly conceded that this was not the case and the reason which he advanced for giving an instruction on criminal trespass was an entirely different reason which was lacking in merit, was properly rejected by the trial court, and is not urged on appeal.

When a specific objection to an instruction is overruled at trial, it is effective on appeal to the extent of the ground specified and no other. State v. Winquist, 247 N.W.2d 256, 259 (Iowa 1976). Every ground of exception which is not particularly specified is lost on appeal. State v. Droste, 232 N.W.2d 483, 487 (Iowa 1975). An objection which might have been supported by a legitimate reason but was not cannot support

reversal. Winquist, 247 N.W.2d at 259. No reversible error has been preserved on the issue of lesser included offenses.

II. We next consider the issue of whether trial court erred in denying defendant's motion to suppress evidence. The merit of this motion depends entirely on whether the police had sufficient cause to make a valid investigatory stop of defendant prior to his identification by the victim.

It is well established that investigatory stops are not per se unconstitutional. See e.g., Adams v. Williams, 407 U.S. 143, 145, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 616 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."). Any such detention which occurs without probable cause to arrest, however, "must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid v. Georgia, ___ U.S. ___, ___, 100 S. Ct. 2752, 2753, 65 L. Ed. 2d 890, 894 (1980). In the context of an investigatory stop of a motor vehicle, our own supreme court has stated that such a stop "is constitutionally permissible only if the stopping officer has specific and articulable cause to reasonably believe criminal activity is afoot. Circumstances evoking mere suspicion or curiosity will not suffice." State v. Dixon, 241 N.W.2d 21, 23 (Iowa 1976).

With these principles in mind, we examine the facts surrounding defendant's detention and subsequent arrest to determine whether his motion to suppress any evidence arising therefrom should have been granted. On April 2, 1979, at about 9:30 p.m., Maria Mendoza was in her house at 740 Charlotte Street in Davenport. While talking with a friend on the telephone, she heard the lock turn in the front door. She then saw a man wearing a dark blue hooded sweatshirt in her bedroom. She advised her friend of what was occurring and the friend asked if she should call the police. Mendoza answered, "yes." She subsequently yelled at the intruder who then fled. Before running away the intruder turned around, giving Mendoza a chance to see his face. At about this time, Officer Robert Sandberg, who was on duty at the front desk at the Davenport police station received a call from Mendoza's friend telling him that a burglary was in progress at 740 Charlotte Street. The caller also told him that "a black male with a blue hooded sweatshirt" was involved; this information was then broadcast to the patrol units in the vicinity.

Officer Kevin Marxen was in the eight hundred block of Charlotte Street when he heard that broadcast. While driving toward the Mendoza residence, he saw a black male (defendant) "running through the yards toward the alley." Marxen drew his weapon and told the man to stop. Officer Carolyn Beaston went to the alley to help Marxen pat down defendant to search for weapons. In the meantime, Officer John Mack arrived at the Mendoza residence and later asked Marxen and Beaston to bring defendant back for identification purposes. Mendoza, after requesting that defendant's hood be put on, positively identified him as the man who had been in her home. Defendant was then arrested, given his Miranda rights and taken to the police station.

We conclude that Officer Marxen was justified in stopping and detaining defendant. A burglary had just been reported at 740 Charlotte Street, defendant was stopped while running through yards just a few houses away, and he was wearing clothing that matched the description heard by Marxen on police radio broadcast. The fact that the officers had been informed of a specific crime which had just occurred in the vicinity in which they were investigating together with the similarity of defendant to the description which had been furnished makes this case much like Dixon, 241 N.W.2d at 24, wherein an investigatory stop was upheld. The motion to suppress was properly denied. We have considered all issues presented and find no basis for reversal.

AFFIRMED.