



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

GARY EUGENE SMUCK,)

Defendant-Appellant.)

Filed November 30, 1983

3-287
69425

Appeal from Polk District Court, Anthony Critelli, Judge.

Defendant appeals his conviction of burglary in the second degree, Iowa Code sections 713.1 and 713.3 (1981), claiming the trial court abused its discretion by refusing to give a requested instruction on impeachment by prior inconsistent statements, and by excluding certain testimony as hearsay. AFFIRMED.

Robert A. Wright, Jr., Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

PER CURIAM

Defendant, Gary Eugene Smuck, was arrested for burglary of Hanawalt Elementary School in Des Moines in the early morning hours of January 27, 1982. Police had been summoned to the school by a silent alarm. They observed three persons outside the school. The police captured a co-defendant at the site and later apprehended defendant at the nearby home of the co-defendant. Our review is on assigned error.

I. Instruction on Impeaching Witness

The case was tried to a jury. The police officer who was first to respond to the burglary call testified that he had observed two people near the school carrying a television set. The officer had said in a deposition taken by defendant that he saw only one person carrying the television. The defendant used the deposition to impeach the officer's testimony.

Defendant requested the court to give a specific instruction on impeachment by prior inconsistent statements. The trial court denied the request, stating that it was not convinced foundation requirements for use of the inconsistent statements had been met and that any inconsistencies were immaterial. Defendant was found guilty and sentenced to up to ten years confinement; the sentence was suspended conditioned on two years' probation.

Defendant appeals, claiming foundation requirements were met and that the inconsistencies were material. Defendant testified at trial that he was at the scene of the crime but that he took no part in it. Therefore, he argues, it is material whether the officer was properly impeached as to his testimony of how many people were carrying the television. We disagree.

First, the contradiction was immaterial. Three people were involved in the criminal episode; the one carrying the television was apprehended at the scene, the other two temporarily evaded the police. The officer did not testify as to the identity of the other person who was helping to carry the television. A jury did

not have to conclude that it was defendant.

Second, the requested instruction was substantially covered in the general instruction on credibility of witnesses. The Iowa Supreme Court summarized the review for challenges made to jury instructions as follows:

It is necessary to read the court's instructions as a whole when determining whether there has been error. State v. Jones, 193 N.W.2d 509, 513 (Iowa 1972); State v. Morelock, 164 N.W.2d 819 (Iowa 1969). "The object of requesting an instruction is to see that the subject is covered. . . ." Jones, 193 N.W.2d at 514-15. "A trial court is not required to instruct in the language of requested instructions if the subject is covered in the court's own instructions." Id. at 514; See State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974)(citing Jones with approval). "A party cannot complain if instructions fail to emphasize circumstances favorable to him. This is precisely what instructions should avoid." State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974); See State v. Seehan, 258 N.W.2d 374, 379 (Iowa 1977).

State v. Horn, 282 N.W.2d 717, 730 (Iowa 1979).

Because the subject matter in the requested instruction was covered in the instructions which were actually given, and because the contradiction was immaterial, there was no abuse of discretion by the trial court. See State v. Harrington, 284 N.W.2d 244, 250(Iowa 1979); State v. Torrence, 257 Iowa 182, 131 N.W.2d 808 (1964).

II. The defendant testified at trial that he went into the school to tell his friends that breaking into the school was stupid and that they should get out. One of the co-defendants was asked by defendant's counsel to testify as to what defendant said to him in the school; the court did not allow the witness to answer because the question called for hearsay. No offer of proof was made to show what the witness would have answered had the court allowed him to respond.

Defendant claims the trial court should not have excluded the testimony as hearsay because the statement was not an assertion offered to prove the truth of its content, but rather was offered for the purpose of corroborating defendant's testimony to show that the statement was made. However, without an offer of

proof to indicate what the testimony might have been, no issue is presented for review. See State v. Hahn, 259 N.W.2d 753, 759 (Iowa 1977). We cannot determine whether the trial court erred in refusing to admit the testimony. Id.

AFFIRMED.