

IN THE COURT OF APPEALS OF IOWA

No. 2-475 / 91-1418

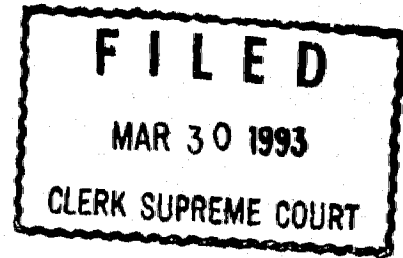
STATE OF IOWA,

Appellee,

vs.

MICHAEL RAYMOND LAVENDER,

Appellant.



Appeal from the Iowa District Court for Black Hawk County, Joseph C. Keefe, Judge.

The defendant, Michael Lavender, appeals the judgment and sentence entered upon his conviction for burglary in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda A. Hall, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

In the early morning hours of April 2, 1991, Officers Hammitt, Tomkins, and Thompson received a call an alarm had sounded at the Third Street Market. Being only one-half block away from that location, the officers responded quickly. Upon arrival at the scene, Officer Hammitt observed two white males standing near the trunk of a Buick parked behind the store. According to Hammitt, one individual appeared to be wearing a checkered shirt and dark pants, while the other had dark hair and was wearing a tan shirt. Officer Tomkins testified he saw one individual as they drove up to the scene, and Officer Thompson testified he did not see any individuals behind the market. Officer Hammitt proceeded to the rear of the market while the other two officers proceeded to the front of the market. Officer Hammitt testified the two individuals he had spotted behind the market ran in separate directions when they saw the officers. Officer Hammitt gave chase but eventually lost sight of the two individuals and returned to the market. Officer Hammitt then provided a description of the individuals over the police radio. Meanwhile Officer Tomkins had seen an individual exit the market wearing dark pants and a dark jacket with yellow lettering. He gave chase to this individual.

Officer Rathbone, hearing Hammitt's radio description, parked his car approximately one and one-half blocks away

from the store. Rathbone soon noticed some movement in nearby bushes and focused a large spotlight on the bushes. A man matching the description of the suspect dressed in a checkered shirt and dark pants ran from the bushes. Rathbone followed the individual and found him hiding under a nearby vehicle. The individual was later identified as Michael Lavender. Lavender told the officers he ran from the area because he was intoxicated and was afraid he would be arrested for public intoxication. Another suspect, later identified as Todd Renz, was apprehended later. A number of items found missing from the store, including cartons of cigarettes, beer, and small change, were found in the trunk of the car. The car was registered to Renz's wife.

Lavender was charged by trial information with a single count of second-degree burglary. At trial, Lavender testified he was on his way to buy a soda when he saw police cars. Lavender maintained he walked towards the area to see what was happening. Lavender testified he became fearful when he saw the officers because he was intoxicated and afraid he would be arrested for public intoxication. Lavender also expressed fear because earlier in the evening he had run away from a police officer after being questioned concerning a liquor robbery at the local Hy-Vee. Lavender had been riding in the car with Renz when they were questioned about the Hy-Vee robbery.

Officer Hammitt testified Lavender was one of the men he saw at the store the night of the crime. Officer Tomkins testified he only saw one individual, Renz, at the market.

At the close of the State's evidence and after all the evidence had been presented, Lavender moved for judgment of acquittal. The trial court denied both motions. Prior to submitting the case to the jury, Lavender objected to the trial court's jury instruction regarding joint criminal conduct. Lavender objected to the instruction, which provided "[w]hen two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene." Lavender argued the use of the words "escape from the scene" improperly lead to an inference of guilt based on his flight from the officers near the scene of the burglary. The trial court, however, overruled his objections to the instruction.

The jury ultimately found Lavender guilty of second-degree robbery. Lavender was sentenced to a term of imprisonment not to exceed ten years. Lavender has appealed.

I. Jury Instruction on Joint Criminal Conduct.

Lavender contends the trial court erred in instructing the jury on joint criminal conduct. He contends the trial court erroneously included "or escape from the scene" in the jury instruction. Lavender argues the jury criminal

conduct instruction allowed the jury to draw an improper inference of his guilt based on his flight from the officers. Lavender argues a separate crime was never committed to further either the escape or the initial burglary as required in order to establish joint criminal conduct, as distinguished from aiding and abetting.

We conclude defendant could not have been harmed by this instruction. State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981); see State v. Gibb, 303 N.W.2d 673, 686 (Iowa 1981). Use of the phrase was not prejudicial to defendant. State v. Bone, 429 N.W.2d 123, 127 (Iowa 1988) (citing State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1984)). We affirm on this issue.

II. Hearsay.

Lavender challenges the trial court's admission of a portion of Officer Hammitt's testimony. Specifically, Lavender argues Officer Hammitt's testimony regarding statements made by Todd Renz after his arrest was hearsay. At trial Officer Hammitt testified Renz stated two other individuals were also involved in the burglary. Defendant argues this testimony allowed the jury to infer he was one of the individuals involved in the burglary.

We recognize this portion of Officer Hammitt's testimony constituted hearsay. However, the testimony did not allude in any manner to this defendant, Lavender. The relevant testimony, as set forth below, did not implicate defendant in any criminal activity or link him personally

to the crime scene. We determine these hearsay statements did not prejudice Lavender.

Q. After you advised Mr. Renz of his rights, what did -- what was the nature of your conversation with him?

MR. LINDEMAN: [defense counsel] I'm going to object in case he's going to speak to the conversation as hearsay. THE COURT: Overruled.

A. Mr. Renz stated that he didn't want to go but the other two were going to go anyway and that they were going to take his car and that it wasn't him that broke the window.

Q. Did he indicate whether or not he was involved in this with someone else? A. Yes. When he stated that there were two others also, he stated that he had been at Jimmy's house and that Jimmy had taken the car, I believe.

Q. Did you sometime later determine who Jimmy was? A. Yes, we did.

Q. And who did you find out Jimmy was? A. Jimmy Kisner.

Testimony from other witnesses also alleged three individuals were involved in the burglary. The investigating officers provided descriptions of the three different individuals, one was wearing dark pants and a checkered shirt, another had dark hair and was wearing a tan shirt, and a third individual was wearing dark pants and a dark jacket with yellow lettering. At least one of the officers saw each of these individuals at the scene. The trial court did not abuse its discretion in admitting Officer Hammitt's testimony.

III. Motion for Acquittal.

Lavender maintains the trial court erred in failing to present sufficient evidence to sustain a conviction against him. Specifically Lavender argues the State failed to identify him as one of the burglars.

Because defendant challenges the sufficiency of evidence to sustain a jury verdict we must view the evidence in the light most favorable to the State and accept as established all reasonable inferences tending to support the jury's actions. State v. Jellema, 206 N.W.2d 679, 681 (Iowa 1973). A refusal to grant a motion for judgment of acquittal will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. Schertz, 328 N.W.2d 320, 321 (Iowa 1982) (citing State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981)).

Evidence presented at trial was sufficient to support the jury verdict. The evidence did more than raise a suspicion, speculation or conjecture. One officer at the crime scene identified defendant as being on the scene during the commission of the burglary. The officer provided a description of defendant's appearance and clothes and testified he saw defendant place items into the trunk of the vehicle parked outside the Third Street Market. In addition, there was the evidence of defendant's flight and evasive actions.

Viewing the fact situation overall, the rational juror, could well reach the conclusion the facts were inconsistent with any reasonable hypothesis of innocence. Stated differently, one cannot say a reasonable doubt existed as a matter of law. See State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976); cf. Jellema, 206 N.W.2d at 682. Defendant's

motions for acquittal were properly overruled. We affirm the trial court on this issue.

AFFIRMED.