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IN THE COURT OF APPEALS OF IOWA

|                        |   |                         |
|------------------------|---|-------------------------|
| STATE OF IOWA,         | ) |                         |
| Appellee,              | ) | Filed February 22, 1979 |
| vs.                    | ) |                         |
| MICHAEL MORTON NICHOL, | ) | <u>757</u>              |
| Appellant.             | ) | 61138                   |

Appeal from Polk District Court - Theodore H. Miller, Judge.

Defendant appeals his conviction for keeping a house of ill fame asserting errors in the admission of evidence and in refusing requested instructions. - Affirmed.

Yale H. Iverson, Des Moines, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Faison Sessoms, Assistant Attorney General and Dan L. Johnston, Polk County Attorney, for Appellee.

Heard by Oxberger, C. J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

## PER CURIAM

This case is an appeal from a conviction for keeping a house of ill fame in violation of § 724.3, The Code 1977. The defendant asserts several grounds for error. We affirm the rulings of the trial court in all respects.

The defendant first maintains that the trial court erred in overruling defendant's motion in limine. The primary purpose of a pretrial motion in limine is to avoid disclosing to the jury prejudicial matters which may later necessitate the declaration of a mistrial. *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974); *State v. Wright*, 203 N.W.2d 247, 250 (Iowa 1972); *State v. Johnson*, 183 N.W.2d 194, 197 (Iowa 1971). The motion is a drastic one, *Lewis v. Buena Vista Mutual Ins. Ass'n.*, 183 N.W.2d 198, 201 (Iowa 1971), and should not, except upon a clear showing, be used to reject evidence. *Twford*, supra; *Wright*, supra; *Johnson*, supra. In this case the trial court had reason to believe the State's evidence was relevant and could be presented in a manner not prejudicial to the defendant. The court's denial of the defendant's motion in limine was proper. See *Twyford*, supra at 922-24.

The defendant further maintains that the trial court erred in admitting the testimony of Officer Jerry Johnson and Officer Jim Brewster relating conversations with two of the defendant's employees. The defendant contends that this testimony constituted inadmissible hearsay. The State, at trial, sought admission of the testimony as an admission against interest made by co-conspirators of the defendant. On appeal, the State makes no mention of this exception to the hearsay rule but claims the testimony was not hearsay since it was not admitted to prove the truth of the matter asserted or, in the alternative, that the testimony was admissible under the res gestae exception of the hearsay rule. The State may assert new grounds for sustaining the trial court's admission of the testimony in question since it is not reversible error if the trial court's ruling admitting the evidence in controversy may be upheld on any grounds. *State v. Pepples*, 250 N.W.2d 390, 393 (Iowa 1977); *State v. Rush*, 242 N.W.2d 313, 320 (Iowa 1976), citing *State v. Hamilton*, 236 N.W.2d 325, 333 (Iowa 1975); *State v. Hinkle*, 229 N.W.2d 744, 748 (Iowa 1975).

The employees of the defendant, while actively soliciting for prostitution

purposes, could not automatically be deemed keepers of a house of ill fame and thus coconspirators with the defendant. *State v. Anderson*, 240 Iowa 1090, 1094, 38 N.W.2d 662, 664 (1949). Thus the testimony of the officers could not be admitted as admissions made by coconspirators.

The State maintains that the testimony was properly admitted since it was not hearsay. We agree with this contention. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. *State v. Kidd*, supra at 864; *State v. Rush*, 242 N.W.2d 313, 319 (Iowa 1976). A distinction exists, though, between statements offered to prove the truth of the matter asserted and those offered only to prove the fact that such statements were made. *State v. Jones*, 271 N.W.2d 761, 767 (Iowa 1978); *Rush*, supra. Testimony of a statement given only to show that the statement was made is testimony of a verbal act and is not inadmissible hearsay. *State v. Wycoff*, 255 N.W.2d 116, 118 (Iowa 1977); *Rush*, supra. In this case, the officers' testimony was introduced to show that the verbal act of solicitation had occurred. The truthfulness of the testimony was dependent upon the veracity and credibility of the testifying officers who were at trial and subject to cross-examination. *Rush*, supra. The testimony was, therefore, not hearsay and the trial court did not err in admitting it. Because of this conclusion, it is unnecessary to discuss the State's res gestae argument.

The defendant further contends that the trial court erred in allowing the testimony of the witness, David Taylor, on the ground that the testimony was used as evidence of other crimes tending to show the bad conduct of the defendant. The general rule is that evidence of crimes other than the one for which the defendant is charged is inadmissible. *State v. Harper*, 222 N.W.2d 450, 452 (Iowa 1974). Furthermore, evidence of a third person's crimes is ordinarily not relevant to the issue of the guilt of the accused. *Harper*, supra at 453. Nonetheless, the admission of such evidence is largely within the trial court's discretion as based upon the court's determination of relevancy. *State v. McDaniel*, 265 N.W.2d 917, 921 (Iowa 1978); *State v. Oppedal*, 232 N.W.2d 517, 520 (Iowa 1974); *Harper*, supra at 452. Reversal will occur if the admitted evidence was plainly irrelevant and prejudicial.

McDaniel, supra; Oppedal, supra; Harper, supra.

The State asserts that the evidence of David Taylor's illegal activities and of the defendant's familiarity with these activities was relevant and thus admissible to prove the defendant's guilty knowledge. We agree with the State's argument.

Where guilty knowledge or intent is a material issue in the prosecution of a crime, proof of other similar offenses is admissible, especially if closely connected in time and circumstances to the offense being prosecuted. *State v. Davis*, 212 Iowa 582, 591, 234 N.W. 858, 862 (1931). See *State v. Boyd*, 195 Iowa 1091, 1094, 191 N.W. 84, 86 (1922); *State v. Warren*, 212 N.W.2d 509, 517 (Iowa 1973). In this case, knowledge that a house is a house of ill fame is essential to the charge that one managed and controlled such a house. *Anderson*, supra at 1099, 38 N.W.2d at 66-67; *State v. Clark*, 78 Iowa 492, 493, 43 N.W. 273, 273 (1889); *State v. Hathaway*, 224 Iowa 478, 482, 276 N.W. 207, 209 (1937). Taylor's testimony concerning his activities in keeping houses of ill fame and conversations with the defendant about the same was relevant to establish defendant's guilty knowledge. Furthermore, Taylor's illegal activities and his conversations with the defendant concerning these took place at a time proximate to the time that defendant established his own illegal business. The trial court was correct in allowing this testimony.

The defendant further contends that the trial court erred in failing to sustain defendant's motions for mistrial. The controlling question in ruling upon a motion for mistrial is whether such prejudice occurred which rendered defendant's trial an unfair one. *State v. Trudo*, 253 N.W.2d 101, 106 (Iowa 1977), cert. denied 434 U.S. 903 (1977). The trial court has wide discretion in granting or denying a motion for mistrial. *Trudo*, supra. Only upon a showing of clear and obvious abuse of discretion will reversal be justified. *Trudo*, supra; *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976); *State v. Brewer*, 247 N.W.2d 205, 211 (Iowa 1976). No such abuse is shown here.

In defendant's first motion for mistrial, claiming undue prejudice resulting from the prosecutor's opening statements, the court had sufficient reason to believe that the prosecution had alluded to evidence which would be material, relevant, and properly admissible. See 23A C.J.S. Criminal Law § 1085 at 99-100 (1961).

Furthermore, statements made were not prejudicial or inflammatory, *State v. Ampey*, 210 N.W.2d 433, 435 (Iowa 1973), nor does it appear that the prosecutor in any sense had acted in bad faith. *State v. Thompson*, 241 Iowa 16, 29, 39 N.W.2d 637, 645 (1949); *State v. Trusty*, 122 Iowa 82, 84-5, 97 N.W. 989, 990 (1904). The court's denial of the motion was proper.

The denial of defendant's second motion for mistrial was also proper where the State's exhibit of a photograph of a gun found on the premises was withdrawn from evidence and where the jury was admonished to disregard testimony concerning the weapon. The striking of improper testimony or the withdrawal of improper evidence, accompanied by an admonition to the jury to disregard such testimony or evidence, is ordinarily sufficient to cure error and assure a fair trial. *State v. Fuhrmann*, 257 N.W.2d 619, 623 (Iowa 1977); *State v. Burrell*, 255 N.W.2d 119, 122 (Iowa 1977); *State v. LeMatty*, 263 N.W.2d 559, 563 (Iowa Ct. App. 1978); *State v. Peterson*, 189 N.W.2d 891, 896 (Iowa 1971). Reversal is mandated only in those instances where it is manifest that the prejudicial effect of the testimony or evidence on the jury remained despite its exclusion. *LeMatty*, supra; *Fuhrmann*, supra; *Peterson*, supra. In this case, involving a charge for keeping a house of ill fame, it is not at all clear that the photographic exhibit of a gun and subsequent testimony concerning it was so inflammatory or prejudicial that the jury would be unable to abide by the trial court's admonition. The denial of defendant's motion was well within the trial court's discretion.

The trial court, furthermore, did not abuse its discretion in denying defendant's third motion for mistrial which asserted that the cumulative effect of the admission of testimony by officers Johnson and Brewster, the testimony of the witness, David Taylor, and the photographic exhibit of the gun on the premises and testimony concerning it was incurably prejudicial to the defendant. This contention is without merit. As noted above, the testimony of the officers and of David Taylor was properly admitted and the photographic exhibit was properly withdrawn. No prejudice to the defendant occurred.

The defendant also maintains that the trial court erred in overruling defendant's motion for a directed verdict. Defendant contends that the evidence

failed to show, either directly or indirectly, that the defendant permitted or consented to the illegal acts charged.

The Iowa Supreme Court has stated on numerous occasions that the cause in a criminal action should be submitted to the jury and the trial court should not direct a verdict of acquittal if there is substantial evidence reasonably tending to support the charge. *State v. Overstreet*, 243 N.W.2d 880, 883 (Iowa 1976); *State v. Graham*, 221 N.W.2d 258, 259-60 (Iowa 1974); *State v. Bell*, 223 N.W.2d 181, 184 (Iowa 1974); *State v. Clay*, 213 N.W.2d 473, 481 (Iowa 1973). When sufficiency of the evidence is challenged on appeal, the evidence is viewed in a light most favorable to the State and all reasonable inferences tending to support the verdict are accepted. *Overstreet*, supra, *Graham*, supra, *Bell*, supra.

In this case, substantial evidence existed to merit submission of the cause to the jury. The jury could reasonably infer from the testimony of David Taylor concerning his own illegal activities in keeping houses of ill fame and concerning conversations Taylor had with the defendant on how the defendant could establish his own similar business and from the testimony of the officers concerning the actions of the defendant after the arrest of one of his employees on charges of solicitation for prostitution purposes that defendant knew of and consented to the prostitution activities taking place in a house which he managed and controlled. The denial of the motion for a directed verdict was proper.

The defendant next contends that the trial court erred in refusing the defendant's requested instruction #A. The State asserts the defendant waived his right to appeal this issue. We agree with the State. The defendant submitted his requested instruction but failed to except to the court's overruling of that instruction. As a result, the defendant waived the right to appeal on this basis. *State v. Sallis*, 262 N.W.2d 240, 248 (Iowa 1978); *State v. Reese*, 259 N.W.2d 771, 777 (Iowa 1977); *State v. Feddersen*, 230 N.W.2d 510, 516 (Iowa 1975); *State v. Overmann*, 220 N.W.2d 914, 918 (Iowa 1974).

Finally, the defendant asserts that the trial court erred in using the language "on or about" in its jury instructions #6 and #7. This technical complaint is without merit. A reversal for errors in the instructions is mandated only if there is a

reasonable basis for finding that the jury was confused, or that the instructions, viewed as a whole, were so contradictory that the jury may have been misled, *State v. Lynch*, 197 N.W.2d 186, 190 (Iowa 1972), cert. denied, 409 U.S. 1116, 93 S. Ct. 916, 34 L.Ed.2d 700 (1972), or that the defendant was unduly prejudiced. *State v. Frink*, 255 Iowa 59, 66, 120 N.W.2d 432, 436 (1963), cert. denied, 375 U.S. 911, 84 S. Ct. 207, 11 L.Ed.2d 150 (1963). A minute, hypercritical analysis is to be avoided. *State v. Jacoby*, 260 N.W.2d 828, 835 (Iowa 1977). In this case, the jury was adequately instructed. The "on or about" language in no way lessened the burden of the State to prove beyond a reasonable doubt each and every element of the crime charged. See *State v. McCausland*, 137 Iowa 354, 355, 113 N.W.2d 852, 853 (1907). The trial court committed no error.

For all the reasons stated above, the judgment below is affirmed.