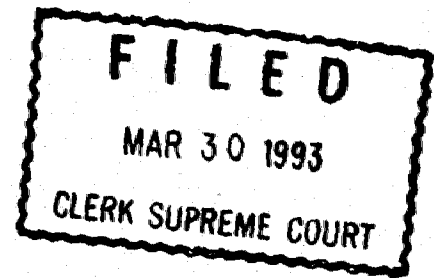


IN THE COURT OF APPEALS OF IOWA

No. 3-004 / 91-1736



STATE OF IOWA,

Appellee/Cross-Appellant,

vs.

CORNELL HOOSMAN,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Black Hawk
County, George L. Stigler, Judge.

Defendant appeals the district court's failure to grant
a mistrial. **AFFIRMED.**

Richard H. Zimmermann of Zimmermann Law Offices, Iowa
City, for appellant.

Bonnie J. Campbell, Attorney General; Thomas S. Tauber,
Assistant Attorney General; Thomas J. Ferguson, County
Attorney; and Raymond Walton, Assistant County Attorney,
for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

The defendant, Cornell Hoosman, appeals his conviction on the grounds the district court erred by (1) refusing to grant defendant's three mistrial motions; (2) improperly admitting out-of-court statements; (3) refusing to give a spoliation instruction; (4) denying defendant's motion for acquittal because the jury verdict was not supported by substantial evidence. The State cross-appealed claiming the district court erred in refusing to impose the mandatory minimum sentence. We affirm.

The State charged Cornell Hoosman with the attempted murders of DeShawn Bullock and Brandon Allen in violation of Iowa Code section 707.11 (1991). The State alleged Hoosman shot Allen and Bullock while they were sitting in their car at a stop light. One bullet struck Bullock in the face and one bullet struck Allen in the buttocks.

Following a trial, the jury found Hoosman guilty of two counts of attempted murder. Hoosman filed a motion for a new trial which the trial court overruled. The court entered judgment on the convictions and sentenced Hoosman to a term of imprisonment not to exceed twenty-five years on each count. The sentences run concurrently. The sentencing court refused to impose the five-year mandatory minimum sentence for using a firearm while participating in a forcible felony in violation of Iowa Code section 902.7 (1991).

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

I. Defendant's Motions for Mistrial.

Hoosman contends the trial court erred in failing to grant his three motions for mistrial. Hoosman argues that in three separate incidents two police officers volunteered inadmissible and highly prejudicial testimony.

A. Officer Smith's Testimony

Officer Smith testified about how the shooting occurred based on his reconstruction of the events. His testimony included the following:

PROSECUTOR: Why did you come to the conclusion that the number one shot was, in fact, the first shot fired?

SMITH: That after the shot was fired the vehicle would have accelerated through the intersection and also from the statements of the two victims in the car that they were able to see and they did know the suspect in the case was Cornell Hoosman so that he would have been visible to them slightly ahead of the vehicle before the shots were fired and not after the vehicle would have come -- and not from when the vehicle would have come from their rear past, at which time one of the last shots would have been where he would have been shot in the head. At that time I don't think he would have known who it was or recognized who it was; so I assume that the first shots were fired when the suspect, Mr. Hoosman, was slightly ahead of the vehicle.

Hoosman objected stating the answer was non-responsive coupled with hearsay. The trial judge sustained the objection but refused to grant Hoosman's request for a mistrial. The trial judge found the witness's answer was cumulative to admissible evidence, and therefore Hoosman was not prejudiced.

In addition, the following dialogue between the trial court and the defense counsel cannot be ignored:

COURT: All in all, I don't think that the record requires the granting of a mistrial at this instance. If you ask me to, I will instruct the jury to disregard that part of this witness' answer as provided that the victims allegedly told the officers that Mr. Hoosman was the individual who had shot them. If you want me to instruct the jury to disregard that, I will do so, Mr. Zimmerman.

* * *

MR. ZIMMERMAN: Your Honor, we would, rather than amplify the harm that's already done, we would not ask for an instruction --

Bullock would later testify that Hoosman was the one who shot him and Allen. Allen's statement that Hoosman shot him was also admitted as an "excited utterance" (see Part II). We therefore find the trial court did not abuse its discretion in refusing to grant a mistrial. The hearsay evidence was cumulative of evidence the State intended to offer and did later offer.

B. Officer Moeller's Interview at the Hospital.

Hoosman's next request for a mistrial occurred during Officer Moeller's testimony. Officer Moeller stated Allen and Sergeant Hofmann told him Hoosman shot the victims. Hoosman objected because the statements were hearsay and

requested a mistrial. The trial judge refused to grant a mistrial, but instructed the jury to disregard that portion of the witness's answer that relates to what he learned from Sergeant Hofmann. Generally, an improper statement is not unduly prejudicial when the trial court admonishes the jury to disregard it. State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986).

We find the trial judge did not abuse his discretion by refusing to grant a mistrial. The jury was instructed to disregard Sergeant Hofmann's statement. As discussed in Part II of this opinion, Allen's statement was admissible as an "excited utterance."

C. Officer Moeller's Interview of Wardale Collins.

Hoosman's third request for a mistrial occurred when Officer Moeller was explaining how he obtained a statement from a witness, Wardale Collins.

PROSECUTOR: Investigator Moeller, can you give us an example of something that you talked about with -- with Wardale Collins where you had to question him a little bit more closely about what he may have saw or heard?

MOELLER: Wardale was not going to admit that, come out and sit and say, I have to ask him, "Now, do you have knowledge of Cornell having carried a gun in the past?" "Yes." "Okay." I would type this in, "I know Cornell carried a gun in the past." That's one example. . . .

Collins' previous testimony conflicted on several facts with his statement to the police. The statement was therefore used on several occasions to impeach Collins' testimony. Collins claimed the police statement was not accurate because the officer who took the statement put

words into his mouth. Officer Moeller's testimony was offered to illustrate the process by which Officer Moeller obtained Collins' statement. This was done to impeach Collins' trial testimony that the officer had put words in his mouth when the statement was made. Collins had already admitted that his police statement said, "I know Hoosman to carry a gun." Officer Moeller's testimony was offered to show how the police statement came to be.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Iowa R. Evid. 801. Since Officer Moeller's testimony about what Collins said was not offered for the truth of the matter asserted, but only as an example of how the process occurred, it was not hearsay. Therefore, we affirm the trial court on this issue.

Hoosman also contends the trial court abused its discretion in denying his motion for a mistrial based upon the cumulative impact of the testimony. We disagree for the reasons stated above and affirm the trial court on this issue.

II. Allen's Out-of-Court Statement.

Hoosman contends the trial court erred in admitting the statement which Allen gave to the police. Officer Moller testified that while Allen was in the hospital, shortly after the shooting, he identified Hoosman as the person who

shot him. The district court ruled the hearsay was admissible as an "excited utterance."

Iowa Rule of Evidence 803(2) excepts from the hearsay rule "[a] statement relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition." The trial court considers several relevant factors including: the time lapse between the incident and the statements; the extent to which the questioning elicited statements that otherwise would not have been volunteered; the age and condition of the declarant; the characteristics of the event being described; and the subject matter of the statements. State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986).

We conclude the trial court did not abuse its discretion in determining Allen's statements were admissible as excited utterances. Allen gave his statement in the emergency room of the hospital within one-half hour of the shooting and the officer who took the statement described Allen as "sort of excited" and "very willing to talk."

III. Spoliation Instruction.

Hoosman also contends the trial court erred in failing to give the jury a spoliation instruction. Allen told the officer at the emergency room that Hoosman had shot them from his car. A police officer located Hoosman's car. He

touched the tailpipe of the car which was cold, and concluded the car had not been driven recently. The officer looked in the car and saw nothing which appeared to have evidentiary value. The vehicle was never impounded. Hoosman claims potentially exculpatory evidence, such as lack of gun shot residue or missing bullet casings, was destroyed by the State's failure to impound the vehicle.

When intentional destruction of evidence is established, the fact finder may infer the evidence was unfavorable to the party responsible for the spoliation. State v. Langlet, 283 N.W.2d 330, 333 (Iowa 1979). The spoliation inference is not appropriate when the destruction is not intentional. State v. Hines, 478 N.W.2d 888, 891 (Iowa App. 1991).

There is nothing in the record which suggests the police intentionally lost or destroyed evidence. The police officer mistakenly believed the car had no connection to the crime. Thus he saw no reason to impound or search the car at the time he located it. Later attempts to relocate the car were unsuccessful. We find the trial court did not abuse its discretion by refusing to give a spoliation instruction.

IV. Substantial Evidence to Support Conviction.

Finally, Hoosman contends there is insufficient evidence to support his conviction. He argues that the

evidence at trial is at best confusing. He also points to the un rebutted testimony of his alibi witnesses.

When the defendant challenges the sufficiency of the evidence, we review that evidence in the light most favorable to the State. State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988). However, we must consider all the evidence and not just the evidence which supports the verdict. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984). Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. LaPointe, 418 N.W.2d at 51. The function of the jury is to sort out the evidence presented and place credibility where it belongs. Blair, 347 N.W.2d at 420. The jurors may reject even uncontroverted testimony if they find it not to be credible. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

From our review of the record we determine there was substantial evidence to support the jury's verdict.

V. Mandatory Minimum Sentences.

The State has cross-appealed. The State contends the sentencing court erred in refusing to impose a five-year mandatory minimum sentence following Hoosman's conviction of two forcible felonies in which he was armed with a firearm. Iowa Code § 902.7 (1991). The State failed to allege in the trial information that Hoosman was armed with a firearm and the State failed to request submission to the

jury of a special interrogatory as required by Iowa Rule of Criminal Procedure 6(6).

In State v. Lockett, 387 N.W.2d 298 (Iowa 1986), our supreme court held that when the State fails to comply with rule 6(6), the State is in no position to exact the mandatory sentence under Iowa Code section 902.7. Id. at 301. "If rule 6(6) is to have any meaning compliance must be mandatory." Id. The State failed to comply with rule 6(6), therefore, the State was not entitled to a mandatory sentence under the statute.

We affirm the trial court on all issues.

AFFIRMED.