FILED
MAY 31 1978
IOWA SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,
Appellee,
v.
DAVID CASON,
Appellant.

Filed May 31, 1978

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Appeal from Marion District Court - Van Wifvat, Judge.

Defendant appeals his conviction for receiving stolen goods in violation of § 712.1, The Code, raising issues regarding an instruction and the admission and sufficiency of evidence. Affirmed.

David A. Johnson, of Johnson, Jordan & Lane, Knoxville, for appellant.

Richard C. Turner, Attorney General, Thomas A. Evans, Jr., Assistant Attorney General, and Warren A. Reiter, Marion County Attorney, for appellee.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

David Cason appeals his conviction for receiving stolen goods in violation of § 712.1, The Code. He raises five issues, which we consider in the order briefed.

I. Defendant, in his first assignment, claims that trial court erred in refusing to grant a mistrial after an erroneous jury instruction was corrected during the jury's deliberations. We review refusals to grant mistrials on an abuse of discretion standard. State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976). The original, incorrect, instruction told the jury that it was necessary for the State to prove that the persons obtaining the property by theft had been convicted. The instruction as corrected informed the jury that no such showing was necessary. No issue is made of the correctness of the amended instruction. The error was brought to the attention of trial court by defendant's attorney, after the jury had begun deliberations.

Defendant's first three assertions on this issue are that the giving of an incorrect instruction is not obviated by giving a correct instruction on the same issue, that the amendment was confusing and therefore misleading, and that the correction over-emphasized one issue.

The first two assertions do not apply to the facts before us. The amended instruction replaced the prior instruction 11; it was not given in conjunction with it. It is apparent that the first instruction was rendered inoperative by the second, so the jury was not put in a position of having to resolve two conflicting or inconsistent statements of the law. It is for this reason that the case at hand is different from those which defendant cites.

Nor are the cases which find instructions to give undue emphasis to one issue in point. Those authorities generally involve repetitive instructions on a particular phase of a case. See, e.g., Rosenau v. City of Estherville, 199 N.W.2d 125, 133 (Iowa 1972); State v. Haesemeyer, 248 Iowa 154, 165, 79 N.W.2d 755, 761-62 (1956). The correction of instruction 11 probably did attract the jury's attention. There is nothing to indicate, however, that the issue involved was thereby given undue prominence. Trial court had the power to correct the erroneous instruction. Campbell v. State, 306 So.2d 482, 483 (Fla. 1975); see generally 23A C.J.S. Criminal Law § 1322 (1961).

In his concluding argument on this point, defendant complains that his attorney's interests were adverse to his own in that the attorney had an ethical obligation to reveal the error to the court, while defendant's interests would have required that the jury be allowed to labor under the misconception created by the original instruction. The attorney's actions were proper, however, and did not result in a failure to uphold his duty to his client.

"The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." Iowa Code of Professional Responsibility for Lawyers, EC 7-19. Defendant's argument to this court is based upon what has been termed the " 'alter ego' concept of a defense lawyer." ABA Standards Relating to the Defense Function, Commentary on § 1.1(c) (Approved Draft 1971). Adherence to that concept would make the attorney involved here ineffective because it would destroy his reputation for professional integrity. Mr. Johnson's response to the difficulty which arose from instruction 11 was commendable; it was also the only acceptable solution. In informing the court of its error, he demonstrated the proper professional detachment which will enable him to continue as a useful advocate on behalf of Mr. Cason and others who may require his services. Defendant was not entitled to, and could not expect, any other response by his attorney. He has not, therefore, been prejudiced. Refusal to grant the mistrial was an exercise of sound discretion.

II. Defendant next argues that trial court erred in overruling his motion in limine to prevent the State from showing he had been twice convicted of larceny in the nighttime.

The State contends that error was not preserved because no objection was made to the questions at trial and because the defendant testified about his convictions on direct examination. As in State v. Miller, 229 N.W.2d 762, 768-69 (Iowa 1975), the circumstances of this case indicate that error, if any, was properly preserved. The motion in limine was resolved immediately prior to the presentation of defendant's case in chief; trial court's ruling indicated beyond question that the challenged evidence would be admitted.

Defendant's specific complaint is that the requirement of State v. Martin, 217 N.W.2d 536 (Iowa 1974), that the prior conviction must not create a danger of prejudice which outweighs its probative value, was not met. Martin named four factors to be considered in making this determination. 217 N.W.2d at 542. In the case before us, the nature of the convictions and their bearing on veracity both weigh in favor of allowing the evidence. See State v. Conner, 241 N.W.2d 447, 455 (Iowa 1976) (felony involving theft reflects on veracity). The recency of the convictions also weighs in favor of admission. While two larceny in the nighttime offenses could have a propensity to improperly influence the jury, that is true of most prior felonies meeting the Martin criteria. We cannot say that such propensity was so great as to indicate an abuse of discretion by trial court.

III. In his third division, defendant asserts that trial court erred in failing to grant his motion for directed verdict made on the ground that there was no showing he controlled the premises on which the stolen property was found. Under the standards of review recited in State v. Overstreet, 243 N.W.2d 880, 883-84 (Iowa 1976) a sufficient showing of defendant's control of the premises was made out through the testimony of Captain Arden Graves. Defendant argues that Graves's testimony was weak and self-serving; that, of course, was for the jury's consideration.

IV. Defendant next disputes the admission of State's exhibit 14, a photograph depicting several items discovered in defendant's home during the search. He "contends that the exhibit had no probative value, as the actual items were already in evidence" and that it was prejudicial in that smoking items in the picture suggested drug involvement. He also complains that not all items in the picture were alleged to be stolen.

We review admission of photographs in the light of State v. Hall, 235 N.W.2d 702, 719-20 (Iowa 1975). See also State v. Brewer, 247 N.W.2d 205, 214 (Iowa 1976). Evidence is not inadmissible simply because it is cumulative. State v. Maxwell, 222 N.W.2d 432, 435 (Iowa 1974). The photograph was an aid in illustrating Captain Graves's testimony. Because the aspect of his testimony thus illustrated had a tendency to render the inference that defendant was guilty more likely than that inference would be without such evidence, the exhibit was relevant. Therefore, as against this attack, admission of the photograph was proper. See State v. Dillon, 161 N.W.2d 738, 740-41 (Iowa 1968).

The record does not reveal that defendant asserted to trial court that he would be prejudiced because the smoking apparatus suggested drug involvement. We, therefore, do not consider that argument here. State v. Reynolds, 250 N.W.2d 434, 441 (Iowa 1977). Raising this contention for the first time in his motion for new trial was not sufficient to preserve error. State v. Droste, 232 N.W.2d 483, 487-88 (Iowa 1975).

V. Finally, defendant suggests that the evidence is insufficient to support the verdict. We cannot agree. See State v. Overstreet, 243 N.W.2d at 883-84.

All assignments of error have been considered and found to be without merit.

AFFIRMED.