

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
vs.)
)
HARVEY W. BONE,)
)
Defendant-Appellant.)

Filed April 20, 1988

8-64
86-1760

179

Appeal from the Iowa District Court for Adair County - (No. 15467) -
Richard Strickler, Judge.

Defendant appeals his conviction. **REVERSED AND REMANDED.**

Philip F. Miller, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney
General; Willard Olesen, County Attorney; and Kirk R. McCormick, Assistant
County Attorney, for plaintiff-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ., but considered
by Oxberger, C.J., and Donielson, Schlegel, Sackett and Habhab, JJ. Hayden,
J. takes no part.

PER CURIAM

Defendant Harvey W. Bone appeals his conviction of burglary in the second degree. He contends the trial court erred in (1) giving a flight instruction, (2) overruling his objection to the search of his automobile, and (3) allowing the State's witness to give an opinion on burglar tools. We reverse and remand for new trial.

I.

Defendant contends the trial court erred in giving over his objection a flight instruction. At approximately 7:00 p.m. on December 15, 1986, an Adair County deputy sheriff clocked on radar an oncoming vehicle at seventy miles per hour in a fifty-five mile per hour speed zone. When the deputy turned his car around to stop this vehicle, a high speed chase ensued. The chase ended when the suspect vehicle left the road, stopping in a soybean field 100-150 yards from the highway. The vehicle was empty when the deputy got to it, but two sets of footprints in the snow led away from the driver's door of the vehicle. These tracks ran parallel very briefly and then separated. Defendant was found hiding behind a shed at the restaurant where the other set of tracks ended. Defendant acknowledged he had been the driver of the abandoned vehicle and stated he had eluded the deputy because he did not have a valid driver's license. One Paul Caldwell was found lying in the snow at the end of the other set of tracks. Caldwell asserted he had been hitchhiking when he was "picked up by a young man with shoulder-length hair, about six foot to six foot two inches tall, weighing a hundred fifty pounds." Caldwell stated that when the pursuit by the deputy started, this man held a gun on him. Caldwell contended he ran from the vehicle because he feared for his life.

The next morning, at approximately 7:30 a.m., a hardware store and a farmers' coop in Orient, Iowa, reported burglaries. A subsequent search

of the trunk of the suspect vehicle revealed a number of items which had been taken from these businesses. An initial search the evening before of the passenger compartment of the vehicle had disclosed a pair of bolt cutters and a metal pry bar. Bone and Caldwell, who had apparently been detained overnight, were thereupon arrested for these burglaries.

Bone and Caldwell were tried together. At trial the State requested a flight instruction. The instruction given was adapted from 2 Iowa Uniform Jury Instructions No. 214 (criminal) and stated:

If you find the offenses charged were committed, and that the defendants thereafter fled from the scene of the crime for the purpose of avoiding or retarding prosecution, then such flight is a circumstance you may consider in determining the guilt or innocence of the defendants.

The credit and weight, if any, to be given such circumstances is for the jury to determine from a consideration of all the evidence in the case.

Defendant asserts the submission of this instruction, which he contends unduly emphasized his alleged flight and was an improper comment on the evidence, constituted reversible error.

Although flight instructions are rarely advisable, the submission of a flight instruction does not necessarily constitute reversible error. State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986). An error in instructing the jury does not necessitate reversal unless it is prejudicial. State v. Gansz, 376 N.W.2d 887, 891 (Iowa 1985); State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1983). Such error is presumed prejudicial, though, unless the contrary appears beyond a reasonable doubt from a review of the whole case. State v. Davis, 228 N.W.2d 67, 73 (Iowa 1975). But see State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986) ("defendant has failed to show he was prejudiced by the flight instruction"). The inquiry is whether the evidence was so dispositive of the issue that a reviewing court can say beyond a reasonable doubt that the jury would have found

it unnecessary to rely on the instruction. See Rose v. Clark, 478 U.S. 570, ___, 106 S. Ct. 3101, 3109, 92 L. Ed. 2d 460, 474 (1986) (discussing harmless error analysis in the context of Sandstrom error and citing Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983) (Powell, J., dissenting)).

In State v. Marsh, 392 N.W.2d 132 (Iowa 1986), our supreme court concluded, under all the facts adduced, the defendant was not prejudiced by the flight instruction given. Id. at 134. The court determined the instruction, essentially identical to the one at issue herein, was a correct statement of the law. Id. The court found it significant the defendant conceded he fled from the police officer investigating the scene, but contended he was not one of the suspects the officer was chasing. Id. In light of this contention, the court also found significant the strong evidence the State presented through two eyewitnesses that the defendant was almost continuously observed by one or the other of those witnesses from the time he left the scene of the crime until he was taken into custody. Id.

The facts in this case are markedly different from those in Marsh. Defendant contended he fled from the pursuing deputy sheriff because he did not have a drivers license not because he had committed a crime. There was no evidence connecting the high speed chase to the burglary. This is unlike Marsh where defendant was almost continuously observed from the time he burglarized the establishment. In fact there was no evidence of observation of defendant until he was actually found.

As stated in Marsh, "flight instructions are 'rarely advisable,' and should be cautiously given. In most cases, the significance of flight evidence should be left to counsel's arguments, and the court would be correct in giving only a general instruction on circumstantial evidence." Marsh, 392 N.W.2d at 134 (citations omitted). In this case, such a general instruction was given, in addition

to the flight instruction. We conclude the trial court should have only given this general instruction. The evidence in the case was not so dispositive of defendant's guilt that we can say beyond a reasonable doubt the jury would have found it unnecessary to rely on the flight instruction. We reverse and remand for a new trial.

II.

Defendant next contends the trial court erred in allowing into evidence tools and stolen property obtained from his truck after the deputy obtained a search warrant.

Contrary to defendant's argument, we find the application for the search warrant articulated facts from which the issuing officer could conclude probable cause supported the issuance of the warrant. See Seiler, 342 N.W.2d at 267. The evidence was properly admitted.

III.

Defendant contends other evidence was improperly admitted. We have considered the issues and find no error.

REVERSED AND REMANDED.

Oxberger, C.J., and Schlegel and Sackett, JJ., concur; Habhab and Donielson, JJ. dissent.

I respectfully dissent. In doing so I reaffirm the supreme court's statement in State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986), that flight instructions are "rarely advisable . . . and should be cautiously given" The reason for caution, of course, is clear and unambiguous for a flight instruction by its very terms draws to the attention of the jury a specific piece of evidence. This should not be for instructions are to state the applicable rule of law for the jury and are not to give undue prominence to certain evidence involved in the case. State v. Milliken, 204 N.W.2d 594, 596 (Iowa 1973).

But Marsh also holds that the submission of a flight instruction is not necessarily reversible error. Marsh, 392 N.W.2d at 134. It is only when the defendant has been prejudiced that error occurs. Id. at 134.

A review of the record reveals to me that the defendant has not been prejudiced. The instruction represents a correct statement of the law. By that instruction, any inference to be drawn from the defendant's flight is left to the jury when they consider all the evidence.

In view of the other evidence produced by the State, which in my opinion substantiates the guilt of the defendant beyond a reasonable doubt, I would affirm the trial court. He just was not prejudiced.

Donielson, J., joins this dissent.