IN THE COURT OF APPEALS OF IOWA

No. 2-010 / 90-1944

1264

STATE OF IOWA,

Appellee,

vs.

JACK LESLIE TAYLOR,

Appellant.

FILED
APR 28 1992
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Defendant appeals his conviction and sentence, following a jury trial, for first-degree robbery in violation of Iowa Code sections 711.1 and 711.2. **AFFIRMED.**

John P. Messina, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General; Sheryl A. Soich, Assistant Attorney General; John P. Sarcone, County Attorney; and Kathleen Deal, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

On June 20, 1990, at approximately 10:30 p.m., Chung Christopher Lo was using a pay phone on Sixth Avenue in Des Moines. Mr. Lo was approached by a man who asked him how long he would be on the phone. Lo responded that he would be "just a minute." The man grabbed the phone and hung it up, saying "No, I think you're done." Brandishing a knife and holding it to Lo's chest, the man said "Give me your money." When Lo said he had none, the man retorted "Don't fuck with me. I'll cut you up right now. Give me your wallet." Lo surrendered his wallet, and the robber fled.

The day after the robbery, Janice Heavener, the defendant's girlfriend, told the police the defendant had admitted to robbing a "Chinese guy" at a pay phone the previous evening. The police showed a photo array including the defendant's picture to Lo who, without hesitation, identified him as the robber.

In August 1990 the defendant, Jack Leslie Taylor, was charged by trial information with first-degree robbery in violation of Iowa Code sections 711.1 and 711.2. In October 1990 the case proceeded to trial before a jury. Police investigator Dennis Westover testified at trial concerning the statements made to him by Taylor's girlfriend on the day following the robbery. Westover testified as follows:

> Q. Did she tell you that the defendant was or that the friend, Jack Taylor, was very drunk?

> A. She made no statements about him being intoxicated. She did make a statement that the man was gone for two hours and that he had been on a drug run.

Taylor objected to the statement that he had been on a "drug run" and asked that it be stricken on the grounds it was nonresponsive to the question, it was hearsay, and it was improper evidence of other crimes. Taylor also requested a mistrial asserting a mere instruction that the jury disregard the statement would be insufficient to cure the prejudice. The district court refused to grant a mistrial but struck the objectionable statement and admonished the jury to disregard it.

The jury found Taylor guilty of first-degree robbery, and the court entered judgment against him. Taylor now appeals, arguing the trial court abused its discretion in failing to grant a mistrial. We are not persuaded and affirm.

The trial court has broad discretion in ruling on motions for mistrial. State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986); see also State v. Trudo, 253 N.W.2d 101, 106 (Iowa), cert. denied, 434 U.S. 903 (1977). The trial court is in the best position to observe the effect, if any, the challenged evidence has on the jury. State v. Brotherton, 384 N.W.2d 375, 381 (Iowa 1986). In challenging a trial court's ruling on a motion for mistrial, the defendant bears the heavy burden of establishing a clear abuse of the court's discretion. Brown, 397 N.W.2d at 699. To show an

abuse of discretion, one generally must show 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). We do not believe Taylor has made such a showing.

"Generally, [the] trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice." Id. Taylor notes that in some circumstances an admonishment is simply not sufficient to cure the prejudice. We agree.

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations in the jury system cannot be ignored.

State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980). However, we do not believe this is such a case.

We do not believe the suggestion that Taylor used or sold drugs created such an overwhelmingly negative impression on the jurors that they were unable to adhere to the court's instruction. The jury in this case had already heard testimony, without objection, that Taylor used alcohol, robbed another man, and had beaten his girlfriend. We do not believe the trial court abused its discretion in denying Taylor's motion for mistrial.

The costs of this appeal are taxed to Taylor.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.