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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed October 7, 1977
vs.)
CRAIG ALLEN PRICE,) 240 / 59721
Defendant-Appellant.)

Appeal from Lee District Court - William S. Cahill, Judge.

Appeal from conviction for burglary raising question of abuse of discretion in allowing witness to testify who had violated the rule on sequestering witnesses. - Affirmed.

M. Carl McMurray, of Keokuk, for Defendant-Appellant.

Richard C. Turner, Attorney General of Iowa, Faison Sessions, Assistant Attorney General and James P. Hoffman, Lee County Attorney for Plaintiff-Appellee.

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

PER CURIAM

Defendant Craig Allen Price appeals his conviction by jury of the crime of burglary in violation of § 708.1, The Code. He was charged with breaking and entering the dwelling house of Mrs. Hazel Cooper with the intent to commit a public offense therein. After the jury was selected and at the beginning of trial, defendant requested the Rule on Witnesses. The rule is designed to prevent witnesses from testifying after having heard previous testimony and requires those who testify be out of the courtroom except during their own testimony. See generally Annot., 14 A.L.R.3d 21 (1967). The trial court granted defendant's request leaving the enforcement of the rule up to the attorneys, as the court did not know the witnesses.

On appeal, the defendant alleges the trial court abused its discretion in admitting the testimony of a State witness who violated the Rule on Witnesses by remaining in the courtroom throughout the testimony of the other witnesses against the direct order of the judge. Detective Wayne Beaird of the Keokuk Police Department, who was present during the entire course of the trial, was called on behalf of the State. Defendant objected to any testimony from Detective Beaird based upon violation of the rule. A hearing was held out of the presence of the jury after which the trial court overruled defendant's objection. The court based its ruling on the fact that Beaird was the only officer who investigated and handled the case and on the fact that it had told the attorneys that the court did not know the witnesses who would be called, that it asked them to police their own rule and that the court was not informed at any time during the course of the trial that the rule was being violated.

There is no statute or rule of procedure in Iowa with reference to the exclusion of witnesses. However, the rule for sequestering witnesses has been enforced by judicial decision. Frazier v. State Central Savings Bank, 217 N.W.2d 238, 245 (Iowa 1974). In In re Will of Smith, 245 Iowa 38, 45, 60 N.W.2d 866 (1953), our supreme court stated:

> We prefer to follow the majority rule, implicit in State v. Pray, supra, which holds the trial court has a reasonable discretion in disqualifying a witness who has violated an exclusionary order. It must be expected this discretion will

> be exercised in a spirit of fairness and so that it will not unjustly deprive a litigant of helpful testimony. The trial court is on the scene; it knows the situation far better than we can possibly do, and, within reasonable limits, it must be permitted to enforce its own rules, by disqualification of the witness in a proper case. Any other holding would make a rule of exclusion valueless.

Accord: **Frazier**, supra; State v. Agee, 257 Iowa 1345, 1348-49, 136 N.W.2d 419 (1965); State v. Musack, 254 Iowa 104, 111-12, 116 N.W.2d 523 (1962); State v. Pray, 126 Iowa 249, 252-53, 99 N.W. 1065, 1066 (1904).

Abuse of discretion will be found only where there is no support for the decision in the evidence. State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975). "In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." **Warner**, supra. Our focus is whether the trial court abused that discretion

The minutes of testimony filed with the information stated Detective Beaird would testify that he checked the house belonging to Mrs. Cooper, that a small window on the south side of the house had been pried and that the screen was lying against the house. He also would testify that a small glass in the door next to the window was broken and that the individuals gained entrance to the house through this door. He would further testify that once inside the house he discovered that two rooms on the main floor as well as three bedrooms on the second floor were ransacked and that there were red candle wax drippings on the floor of the house in the hallway and kitchen.

There is no evidence that suggests Beaird's testimony was affected by the other witnesses he heard or was contrary to his proposed testimony as set forth in the minutes of testimony. The trial court held a hearing on the objection outside of the jury's presence before allowing Beaird to testify. It was in the best position to view the situation and defendant is unable to point to anything which suggests he was prejudiced by the trial court's decision. There was no abuse of discretion.

Affirmed.