

FILED

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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Appellee,

)

Filed November 22, 1978

vs.

)

DANIEL DEAN HILDRETH,

)

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60645

Appellant.

)

Appeal from Pottawattamie District Court - Harold L. Martin, Judge.

Defendant appeals conviction of the crime of robbery with aggravation claiming error in the admission of evidence of other criminal activity in violation of a sustained motion in limine. - Affirmed.

John W. Logan, Council Bluffs, for Appellant.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General, and David E. Richter, Pottawattamie County Attorney, for Appellee.

Submitted to Oxberger, C.J., and Donielson, Snell and Carter, JJ.

PER CURIAM

Defendant Daniel Dean Hildreth appeals his conviction by jury of the crime of robbery with aggravation in violation of § 711.2, The Code (1975). On appeal, defendant alleges the trial court erred in admitting into evidence testimony concerning the defendant's involvement with crimes or criminal activity other than that charged in the information, thus depriving him of a fair trial. Initially, defendant argues he should have a new trial because highly prejudicial evidence was presented in the presence of the jury after the court had sustained a motion in limine restricting evidence of defendant's other criminal activity, and without conducting an independent hearing on the admissibility of such evidence outside the presence of the jury.

The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel declaring a mistrial. *State v. Johnson*, 183 N.W.2d 194, 197 (Iowa 1971). However, a failure to rule or a denial of a motion in limine, and by analogy, a sustaining of a motion in limine, cannot, in and of itself, constitute reversible error. The objectionable material has not yet reached the jury's ears. It is only when the material is offered in the jury's presence that the harm or error, if any, has been done. *State v. Garrett*, 183 N.W.2d 652, 655 (Iowa 1971). Since the objectionable material may never reach the jury, when the motion is sustained, it is incumbent upon the objecting party to make a proper record, through an offer of proof out of the jury's presence, to preserve the issue for appeal.

In the instant case, the trial court sustained defendant's motion in limine. During the course of trial, a witness for the State testified that he first met defendant when defendant came to him to purchase drugs. Counsel objected, the objection was sustained and the jury was quickly admonished to disregard the testimony. This same witness later testified the he met defendant on another occasion, shortly after the robbery in question, to drop off some drugs and to pick up some money. Counsel again objected, but the court reserved ruling on the objection to afford the State an opportunity to connect the transaction with the crime charged. The objection was subsequently overruled.

"Careful procedure dictates the trial court's order on a motion in limine should prohibit disclosure of questionable evidence until the court during trial in the jury's absence has been presented an offer and objection." Johnson, supra. Nevertheless, in the instant case, the trial court did not err in overruling defendant's motion for mistrial. Prompt withdrawal of testimony which is improperly admitted with a cautionary statement to the jury to disregard it, leaves no ground for complaint, except in extreme instances where it is manifest its prejudicial effect remained or where it would probably remain to influence the verdict despite its exclusion. State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974); Johnson, supra. The trial court promptly admonished the jury and we find the present case is not one of the 'extreme instances' where a cautionary statement is insufficient. Cf. State v. Jensen, supra.

As to the second statement, we also find the trial court correctly overruled defendant's objection and motion for mistrial. At the time of the robbery the robber was masked; as such, the identity of the perpetrator of the crime was in dispute. The evidence showed that 20 to 30 rolls of quarters, each having a value of \$10, was part of the money taken. The witness in question stated that when he delivered the drugs, he picked up between \$100 and \$200. He also stated there was a large amount of quarters included; there were ninety dollars worth of quarters, nine rolls of ten dollar rolls of quarters.

Although the general rule is that evidence of other crimes is inadmissible to prove the crime charged, evidence of other offenses is competent to establish the identity of the person charged with the commission of the crime on trial. Johnson, supra. See also State v. Johnson, 224 N.W.2d 617, 619 (Iowa 1974); State v. Wright, 191 N.W.2d 638, 639-40 (Iowa 1971). The State properly connected the other transaction with the crime charged. There was no error.

Defendant separately argues that evidence showing the commission of crimes other than the one which a defendant is charged with is inadmissible. We acknowledge that this is the general rule. Johnson, supra; Wright, supra. However, we also noted earlier that evidence of other crimes is competent to establish the issue of the identity of the person charged with the commission of the crime on

trial. Defendant argues that the probative value of this evidence is far outweighed by the prejudicial effect that the evidence had on the minds of the jury. The trial court has discretion to determine whether the probative value of the evidence is outweighed by its prejudicial effect. The problem is one of balancing of needs, with the leeway of discretion lying in favor of the defendant and the exclusion of the evidence. State v. Johnson, 224 N.W. at 621. In the instant case we find no abuse of discretion nor reversible error.

AFFIRMED.