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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed January 24, 1984

vs.)

STEVEN LEON TOBIN,) 3-372 / 69491

Defendant-Appellant.)

Appeal from the Iowa District Court for Linn County - Larry J. Conmey, Judge.

Defendant appeals from the judgment and sentence entered upon his conviction of six counts of false use of a financial instrument in violation of Iowa Code section 715.6 (1981). REVERSED AND REMANDED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Defendant, Steve Leon Tobin, appeals from the judgment and sentence entered upon his conviction of six counts of false use of a financial instrument in violation of Iowa Code section 715.6 (1981). Defendant asserts that the trial court abused its discretion and violated his constitutional right to due process by excluding testimony which was relevant to the issue of whether the defendant knew the checks he cashed carried a forgery. The defendant also asserts that the district court exceeded its authority by ordering his sentences to run consecutively to any he might begin to serve in the future. The State argues that the district court imposed illegal sentences by failing to sentence defendant as a habitual offender on all six counts. We affirm defendant's conviction and reverse and remand for entry of a new sentence.

The trial information charged defendant with presenting six checks, ranging in amounts of $40 to $99, to a Cedar Rapids grocery store, and obtaining cash. The trial information was divided into six counts and the defendant was accused in each count of being a habitual offender. The checks were all drawn on the account of Paul J. Harrington and were all made payable to the grocery store. The checks were presented over a period of eight days with three of the six checks presented on the same day. It was alleged in each count that defendant acted "knowing that the check was not what it purported to be and further knowing that he had no authority to use said check."

Our review of criminal cases is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. The defendant contends that the trial court erred in excluding evidence that Roxanne Wright usually received one or two checks a week from Pat Alexander [a third party] and checks from other people as well. Defendant alleges on appeal that the trial court ruling denied him his due process right to present a defense. We assume the defendant is asserting this alleged

constitutional error under the principle delineated in Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). He did not, however, urge this contention in the trial court and cannot raise it for the first time here. State v. Windsor, 316 N.W.2d 684, 688 (Iowa 1982). Defendant did preserve the issue on grounds of relevancy which we consider next.

Defendant sought to show that he had obtained the checks in question from Roxanne Wright; that Wright was a prostitute who was often paid by check; and that he [defendant] often cashed checks for her as a favor. Defendant established by cross-examination of the State's witnesses that he [defendant] had cashed checks which were not his own in the grocery store for the past two years. Detective Potter, a Cedar Rapids police officer, also testified that Wright had told him that she received money from several different men practicing prostitution. Robert Larson, a document examiner, testified that the checks had been written by Wright.

Wright testified during direct examination that while she had trouble cashing checks at the grocery store because she lacked the usual items of identification, she could cash checks at an establishment known as "BJ's." Wright also testified that he had no knowledge as to how defendant obtained possession of the checks. Wright further testified without objection that it was not unusual for her to get checks from Pat Alexander. When defense counsel questioned her if she would get several checks a week from Alexander, the State objected on what appears to be relevancy grounds and the trial court sustained those objections. In an offer of proof, defense counsel established that Wright often obtained several checks a week from Alexander and from other people as well. The trial court continued, however, to exclude the testimony on relevancy grounds.

"The test of relevancy is whether the evidence offered would render the desired inference more probable than it would be without such evidence. Irrelevant evidence is that which has no logical tendency to establish any material

proposition." State v. Mark, 286 N.W.2d 396, 410-11 (Iowa 1979) (citations omitted). The determination of relevancy rests in the discretion of the trial court. State v. Windsor, 316 N.W.2d at 688. Moreover, even when evidence has some probative value, the trial court has wide discretion to exclude it if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, waste of time, or needless presentation of cumulative evidence. Id.

Finally, even when the ruling is erroneous, reversal is not required when no prejudice results. Windsor, 316 N.W.2d at 688. Where the alleged error does not assume constitutional dimensions, as here, we apply the following rule to determine whether a ruling on admission of evidence was prejudicial: Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice. State v. Trudo, 253 N.W.2d 101, 107 (Iowa), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977).

Defendant argues this evidence tends to render more probable the inference that he was merely cashing the checks for a friend and had no knowledge of the forgery. The State asserts that even assuming the evidence was relevant its probative value was outweighed by the possibility of confusion. We are not required in this case to determine whether the objection should have been overruled. Assuming the ruling was wrong, we conclude in this instance there was nothing so prejudicial as to constitute reversible error.

There was overwhelming evidence in this case that Wright wrote the checks in question. Each of the grocery store employees testified that defendant had cashed checks which were not his own the last two years at the store. Detective Potter testified that Wright told him she often received money from men and that she was a prostitute. Moreover, Wright testified that she did receive checks from Pat Alexander and that she was a prostitute. Defendant was able to present

substantial evidence to support his case. We find the defendant's case was not injuriously affected by the alleged error, nor did it result in a miscarriage of justice.

We hold the defendant was not prejudiced by the exclusion of the controverted testimony.

II. The defendant next contends that the trial court acted illegally in ordering that his sentences run consecutively to any he might begin to serve in the future. See State v. Jones, 299 N.W.2d 679, 682 (Iowa 1980). Although the language used by the sentencing court is confusing, we do not believe it, in fact, ordered the sentences imposed to run consecutively to any defendant might begin to serve in the future. This case, however, must be remanded for resentencing on other grounds.

The district court stated at sentencing that it had found the defendant to be a habitual offender and that it had "the option of sentencing the Defendant as an habitual offender with regard to any one or all of the counts." Iowa Code section 902.9(2) provides "[a]n habitual offender shall be confined for no more than fifteen years." A court may not impose a sentence that is contrary to statute. State v. Ohnmacht, ___ N.W.2d ___, ___ (Iowa 1983). The sentencing court lacks authority to establish a lesser maximum sentence. State v. Dohrn, 300 N.W.2d 162, 164 (Iowa 1981). The district court sentenced defendant on counts I, II and III for an indeterminate term and not to exceed ten years on each count. After having found the defendant to be a habitual offender on those counts, a ten year indeterminate sentence is not a sentencing option. These sentences are void.

The State asks us to exercise our discretion under Iowa Rule of Criminal Procedure 23(5)(a) and correct the illegal sentence. See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980). We believe, however, that all the sentences should be vacated and remanded for resentencing. See State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979). The sentencing court exercised its discretion to impose consecutive

sentences under the mistaken impression that it could impose a lesser sentence on counts I, II and III. See Iowa Code § 901.8 (1981). The ambiguities which defendant assert as error in sentencing are not likely to recur upon remand.

Accordingly, we reverse and remand to the district court for vacation of defendant's present sentences and the entry of new sentences.

REVERSED AND REMANDED.