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IN THE COURT OF APPEALS

STATE OF IOWA,)

Appellee,)

Filed February 14, 1977

vs.)

SAUNDRA SUE CURTIS JAMES,)

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58957

Appellant.)

Appeal from Polk District Court - A. M. Critelli, Judge.

Appeal from conviction of robbery with aggravation in violation of Section 711.2, The Code. - Reversed and remanded for new trial.

Earl M. Willits, of Des Moines, for appellant.

Richard C. Turner, Attorney General, and Ray Fenton,
Polk County Attorney, of Des Moines, for appellee.

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

SNELL, J.

Defendant, Saundra Sue Curtis James, appeals her conviction by jury of robbery with aggravation, Section 711.2, The Code. One question is presented on appeal. Should a mistrial have been declared based upon the prosecutor's question, "Is it a fact that your husband has admitted his guilt to involvement in the robbery?" We reverse and remand for new trial.

About 6:30 p.m. on April 4, 1975, the Neil Drug Store in Des Moines was robbed by two persons, both of whom were carrying guns. Three people were in the drug store at the time of the robbery. They were Anna Hartman, part owner, her daughter, Lois Ann Hearst, part owner and pharmacist, and Norma Nereim, a customer. Their testimony was that a man came into the drug store, pulled a gun, announced "This is a stickup," and told Lois Hearst and Norma Nereim to lie down on the floor.

At this point, a woman came into the drugstore carrying a gun. Anna Hartman testified that she was wearing a dark gray wig, wore a striped cap like a railroad man's cap and a short blue shirt. The store was robbed of cash, narcotics and electric watches. Neither person was masked during the robbery.

On July 4, 1975, defendant, her husband, Quinn James, and a man named Powell were arrested on an unrelated matter at Ward's Drug Store in Des Moines. Defendant was seated in the driver's seat of a Plymouth car bearing Oklahoma license plates, which was parked in the alley behind the pharmacy with the engine running. Officer Dennis Morgan of the Des Moines Police Department asked to see her license and noticed a revolver in defendant's purse, which was open and in plain view beside her on the front seat. Defendant, her husband, and Powell were arrested.

The witnesses at the Neil Drug Store robbery identified defendant and her husband from photographs as the robbers. Thereupon defendant and her husband were indicted for robbery of

the Neil Drug Store on April 4, 1975.

Prior to trial, defendant's husband was convicted of robbing Ward's Drug Store on March 25, 1975. After that conviction, he pled guilty to the armed robbery of the Neil Drug Store on April 4, 1975, for which defendant was standing trial. Prior to trial, defendant made a Motion in Limine to prevent any reference by the county attorney or any of the witnesses to the conviction of her husband, to the Ward's Pharmacy robbery or his guilty plea to the Neil Drug Store robbery. The court ruled that the State refrain from any reference to the convictions of defendant's husband, in opening remarks. The court also directed the State to inform its witnesses that they should abstain from that type of answer. The court further ruled that whether it could come out at any other point in the trial would be based on what defendant did by way of testimony, keeping that part under advisement to deal with it as it came up. The court advised defendant's counsel that if he opened it up on cross examination, that would be a different story.

At trial, defendant testified that she was a beautician in Oklahoma City and that the wig found in her car was one she was fixing for another woman. She relied on alibi as a defense, testifying that she was married to Quinn James on April 3rd in Perry, Oklahoma, and spent all of April 4th in Oklahoma City. She testified she visited her brother, Robert Mansel, who corroborated her visit on that date.

During cross examination by the State, the prosecutor interrogated defendant as follows:

"Q. Isn't it a fact that you and your husband held up the Neil Drug Store on April 4, 1975? A. No, sir."

"Q. Where is your husband now?"

Defendant's counsel objected to the question; the court sustained.

"Q. Is it a fact that your husband has admitted his guilt to involvement in the robbery?"

Defendant's counsel objected to the question and asked to take up a matter of law in chambers. A motion was then made out of the presence of the jury for mistrial on the ground that the question irreparably prejudiced the jury. Defendant's counsel recalled to the court his Motion in Limine, argued the question was a direct violation of the court's ruling on the motion and that the question was asked with full knowledge by the State of the motion. The court took the motion for mistrial under advisement and directed the county attorney to proceed with the trial without asking questions of like nature, at least on cross examination.

In open court, in the presence of the jury, the State then withdrew the question.

Section 781.13, The Code, states:

"When the defendant testifies in his own behalf he shall be subject to cross examination as an ordinary witness, but the State shall be strictly confined therein to the matters testified to in the examination in chief."

The scope and extent of the cross examination are largely within the discretion of the trial court. *State v. Monroe*, 236 N.W.2d 24 (Iowa 1975). Cross examination may cover fully and fairly all matters raised on direct examination. *State v. Everett*, 214 N.W.2d 214, 219 (Iowa 1974).

The State claims the questions were proper to attack the credibility of defendant's alibi that she was not in Des Moines on April 4, 1975, but was in Oklahoma City. The question of defendant's credibility is clearly open to attack once the defendant has made the decision to testify. *State v. Walker*, 218 N.W.2d 915, 918 (Iowa 1974).

"It is inceptionally understood a testifying defendant stands in the same position as any other witness. His credibility is therefore in issue and may be open to appropriate attack."

Evidence which has no direct tendency to impeach, contradict, explain or otherwise rebut evidence is not ordinarily admissible on rebuttal. See State v. Willey, 171 N.W.2d 301, 302 (Iowa 1969), quoting State v. Hephner, 161 N.W.2d 714, 718 (Iowa 1968).

It is obvious the questions posed by the county attorney to the defendant as to her husband's whereabouts do have a direct tendency to impeach or contradict defendant's testimony that she was in Oklahoma City at the time of the commission of the crime. When defendant submits herself as a witness, she must answer in cross examination on matters affecting credibility as a witness, even though it may degrade her. However, the purpose of the cross examination must be confined to discrediting the one examined as a witness and not as a defendant. See State v. Haffa, 246 Iowa 1275, 1283, 71 N.W.2d 35 (1955). The danger of course lies in the defendant being denied a fair trial.

In State v. Underwood, 248 Iowa 443, 80 N.W.2d 730 (1957), defendant was charged with the crime of breaking and entering the Younkerman Seed Company. A witness, not the defendant, was interrogated as follows:

"Q. Were you charged with breaking and entering the Younkerman Seed Company? A. Yes.

Defense counsel: Just a moment. That is incompetent, irrelevant and immaterial.

The Court: Well, he has answered it. (Defendant excepts.)

Q. Did you enter a plea to that charge?

The Court: Overruled. (Defendant excepts.)

A. Yes."

In reversing the conviction, the Supreme Court agreed that the testimony was prejudicial and denied a fair trial. The court stated 248 Iowa at 445:

"It is hard to see wherein such testimony has probative value in determining the guilt or innocence of the defendant. It does not, except perhaps by an improper inference, tend to prove defendant's guilt by establishing the fact that another, although an alleged accomplice, entered a plea of guilty to the same crime. This was not an interrogation as to the witness's acts at the time in question.

Evidence of the plea of guilty of one alleged accomplice is not admissible to prove the guilt of another charged with and on trial for the same offense. . . . Except for the purpose of impeachment of the witness, it is also improper to examine him as to his prior conviction of any felony. . . . Evidence relating to a prior conviction of a felony is not to be considered by the jury as evidence tending to connect the defendant with the commission of the offense charged, nor for the purpose of establishing his guilt, but may be used only for the purpose of testing the credibility of the witness. . . Any other implication is improper."

And on page 447 of 248 Iowa, State v. Underwood:

"The danger in allowing the credibility of the accused or an accomplice to be impeached by interrogations concerning prior convictions lies in the tendency of juries to use the prior conviction as evidence of the fact that accused committed the specific criminal act for which he is then being tried. It must not be worded so as to implicate the defendant with the crime charged."

In State v. Frese, 256 Iowa 289, 127 N.W.2d 83 (Iowa 1964), defendant was convicted of assault with intent to commit rape. The State's theory of the case was that the attack involved five men who aided and abetted one another in committing the crime. The principle issue in the case was whether or not the prosecutrix consented. Defendant took the stand in his own defense, claiming that intercourse with prosecutrix was voluntary on her part. On cross examination, defendant was asked to repeat the names of three of the men with him and was then asked the present whereabouts of each.

Over objection that such was irrelevant and immaterial and outside of the scope of direct examination, defendant was required to answer one was at Anamosa and the other two at Fort Madison. Defendant moved for a mistrial, the trial court overruled the motion and took no curative action.

The principal issue in the case was whether the prosecutrix consented. The State claimed that defendant opened that issue and thus allowed the State to question defendant as to the whereabouts of the accomplices in order to refute defendant's testimony. The Supreme Court reversed the case stating:

"Would the record of the conviction or plea of guilty of these men have been admissible in rebuttal? We think not. It would not be admissible to prove lack of consent on the girl's part as far as defendant is concerned, the principal issue in the case. It does not discredit defendant in any way. It does not show he made contrary or inconsistent statements or took a contrary position at another time. What it does show is that someone else took a contrary position at another time. In the case of a guilty plea, that another defendant thought the evidence showed the attack on his part was against her will. In the case of conviction, that another jury took a different view of the evidence. We think it follows defendant cannot be cross-examined relative to the whereabouts of the others or of their convictions." 256 Iowa at 293, 127 N.W.2d at 86.

"The matter was properly objected to and motion for a mistrial made at the time. To say such is without prejudice is to allow the deliberate introduction of inadmissible evidence at will. The full impact on the jury of such evidence cannot be known, but it gives rise to the illogical inference that if one is guilty, the other is." 256 Iowa at 295, 127 N.W.2d at 87.

In the case at bar, the issue brought up by defendant's alibi is whether she was in Des Moines or Oklahoma City at the time the crime was committed. She had testified that she was in Oklahoma City with her husband. The husband's guilty plea of course by implication includes the admission that he was in Des Moines on that date. We note, however, that even this is somewhat shrouded. The plea occurred after he had been convicted of robbing Ward's east side pharmacy on March 25, 1975, and he told his lawyer that he wanted to plead guilty in order to get to an institution where he could get treatment for his arm.

The problem with the prosecutor's attempt to attack defendant's credibility is that he went too far. The question as

to the guilt of defendant's husband moved directly into the area of jury determination; i.e., the guilt of defendant. There is no way of separating that matter from the issue of credibility. The fact that the question went unanswered makes no difference. The answer was contained in the question which was more a statement than a question.

We also note that a Motion in Limine had been filed and ruled upon prior to trial. These events alerted all to the danger inherent in referring to the husband's conviction for this crime. At the least, the prosecutor should have asked for a consultation with the trial court in chambers whereupon he could have made a record as to his proposed interrogation and obtained a court ruling thereon.

The implication of guilt is even stronger than in the usual accomplice case by virtue of the accomplice being defendant's husband.

No cautionary instruction was given by the court, nor do we believe the prejudice would have been removed by one.

A mistrial should have been declared. Reversed and remanded for new trial.

All judges concur except Donielson, J., who concurs specially.

Donielson, J. (concurring specially)

I would reverse solely on the handling of the motion in limine and the questions involved therein. The motion was properly and timely filed to prevent any mention of the husband's guilty plea to the crime charged. The trial judge sustained the motion as it applied to the opening statements and the State's case in chief. He then quite properly took the motions under advisement as it related to matters that might come up during the defendant's case. The questions that came up during cross-examination of the defendant are the subject matter of this appeal.

My view is that the questions should have never been asked. The motion in limine and the rulings alerted counsel and the court to its importance in the trial, and I view it improper to "spring" the question even on cross-examination. The prosecutor should have had a bench conference or more properly asked the court to take up a matter of law outside the presence of the jury.

Under the circumstances of this case, I view the presence of the defendant's husband in Des Moines on the day of the robbery unquestionably admissible as it relates to the matter of impeachment of the defendant not in that form, however, as pointed out by the majority. The prosecutor in consultation with the trial judge and that defense counsel could have worked out a multitude of ways to admit this impeachment without such impact. This inquiry failed to give the defense counsel and the judge appropriate time to work out the admissibility aspects of the problem.