FILED
DEC 1 7 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )

Plaintiff-Appellee, ) Filed December 17, 1987

vs. ) 409

DWIGHT WILLIAM SNYDER, ) 7-387
86-1338

Defendant-Appellant. )

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Appeal from the Iowa District Court for Mahaska County (No. 5279), Max H. Ruschmeyer, District Associate Judge.

The defendant appeals from his conviction of possession of firearms by a felon. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and James R. Huff, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Charles A. Stream, County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

**DONIELSON, J.**

The defendant appeals from his conviction of possession of firearms by a felon, contending that the district court erred in: (1) refusing to suppress firearms seized during a consented-to search of his residence; and (2) allowing the State to elicit testimony from him on cross-examination concerning a previously suppressed audio tape for impeachment purposes. We affirm.

On March 9, 1986, the defendant consented to a request by Oskaloosa police officers to conduct a warrantless search of his house for stolen telephones, answering machines, and miniature cassette recorders. While searching the defendant's bedroom, the officers discovered two encased firearms in an open closet and seized them. On April 8, the officers returned and received consent to search in defendant's absence from his estranged wife. The officers seized an audio tape purporting to be the defendant's will containing a statement that he was leaving his firearms to his son.

The defendant was accused of possession of a firearm by a felon. On April 25, 1986, he moved to suppress the firearms seized from his residence, contending that: (1) the encased weapons were not within the scope of the consented-to search; and (2) they were not admissible under the plain view doctrine because their discovery was not inadvertent and their incriminating nature was not immediately apparent. The trial court overruled this motion without comment. At the same pretrial hearing, the court suppressed evidence of the taped will, ruling that the officers had invaded the defendant's privacy by searching under the authority of his estranged wife's consent.

At his trial, the defendant maintained that the weapons seized from his house belonged to his wife. On cross-examination, he denied owning any firearms prior to the date that the weapons were seized. The prosecutor then elicited testimony from the defendant concerning his statement in the taped will. The

trial court overruled the defendant's objection to this evidence, ruling that such testimony was admissible for impeachment purposes. On June 13, 1986, the jury found the defendant guilty as charged. The trial court overruled the defendant's motions for new trial and arrest of judgment and sentenced him to a prison term of up to two years. Defendant appeals.

Because the issues involved are constitutional, we review the record de novo, making an independent evalutaion of the totality of the circumstances. State v. Nelsen, 380 N.W.2d 589, 591 (Iowa 1986).

I. We address defendant's first contention that the trial court erred in refusing to suppress firearms seized during a consented-to search of his residence. He contends that his consent to the officers to search his house did not extend to a search for firearms, but only to stolen property not including guns. Defendant also asserts that the plain view doctrine does not allow admission of this evidence because the guns were not in plain view since the officers had to remove them from containers before they confirmed that the items contained therein were firearms; hence, the guns' incriminating nature was not immediately apparent. He also asserts that the discovery of the firearms was not inadvertent.

Both the Constitution of the United States and the Constitution of the State of Iowa grant to all citizens the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, § 8. The federal guarantee also applies to the states through the due process of clause of the fourteenth amendment to the United States Constitution. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1089-90 (1961); U.S. Const. amend. XIV, § 1.

A warrantless search and seizure is proper if it comes within one of the recognized exceptions to the constitutional warrant requirement; plain view is one of those exceptions. State v. Eubanks, 355 N.W.2d 57, 58 (Iowa 1984).

The "plain view" doctrine will justify seizure of evidence following a warrantless entry only if the intrusion is justified, the discovery of the object is inadvertent, and the object's incriminating nature is immediately apparent. State v. Emerson, 375 N.W.2d 256, 259 (Iowa 1985). The United States Supreme Court recently clarified the applicable standard regarding the quantum of proof needed regarding this last requirement in Arizona v. Hicks, 480 U.S. ____, 108 S. Ct. ____, 94 L. Ed. 2d 347 (1987). In Hicks, the Supreme Court held that under the plain view doctrine a police officer can search and/or seize an object found in plain view if he has probable cause to believe it is contraband or evidence of a crime. Id. at ____, 108 S. Ct. at ____, 94 L. Ed. 2d at 352, 354-55. While probable cause to either search or arrest requires more than mere suspicion, it is a significantly less stringent standard than, say for arrest, proof of guilt. See State v. Gregory, 327 N.W.2d 218, 220 (Iowa 1982). In State v. Oliver, 341 N.W.2d 744, 746-47 (Iowa 1983), the supreme court held that seizure of an item in plain view is proper if a person of reasonable caution could believe that it was evidence of a crime; "a practical, non-technical probability" that the object is associated with criminal activity is all that is required.

We believe the three requirements set forth in Emerson, 375 N.W.2d at 259, have been met in allowing admission of the firearms under the plain view doctrine. The record before us establishes that the condition of a justified intrusion was satisfied by defendant's consent to a search of the home. We find the discovery of the two guns was inadvertent. The evidence discloses that the closet doors of defendant's bedroom were open and that the police officer saw the lower part of a shotgun in a case sitting in the corner of the closet and also saw a handgun and holster sitting on top of some boxes on the closet shelf at about eye-level. We find this record is sufficient to establish that the police had probable cause to believe, before removing the two guns

from the closet and from their individual containers, that defendant did have two guns in the closet. The police knew defendant had previously been convicted of a felony. The guns constituted both contraband and evidence of a crime, since Iowa Code section 724.26 (1985) makes it a crime for a convicted felon to possess a firearm. Therefore, the seizure of the guns was proper. See State v. Hamilton, 236 N.W.2d 325, 329 (Iowa 1975) (evidence of a crime is subject to seizure). We find removal of the guns from their containers and from the closet was proper under the plain view doctrine. See United States v. Woods, 560 F.2d 660, 664-65 (5th Cir. 1977) (where officer reasonably believed metal object he saw protruding from under a cabinet was a shotgun barrel, plain view seizure was proper despite possibility the object observed was a pipe); United States v. Drew, 451 F.2d 230, 232-33 (5th Cir. 1971) (plain view rule allowed officer to open bulging, opaque plastic folder which he reasonably believed contained a gun because gun's outline showed through; it was irrelevant that the officer did not know "with absolute certainty" that a gun was inside the folder until he opened it). We therefore affirm the trial court's denial of defendant's motion to suppress the firearms.

II. We now address defendant's second contention of error. Before trial, the court suppressed an audio tape which purported to be defendant's Last Will and Testament, which had been seized during a search of defendant's home that occurred subsequent to the search which resulted in recovery of the two guns discussed under Division I of this opinion. In that tape, defendant indicated that he would leave his guns to his son. During cross-examination, the prosecutor asked defendant if he had owned any guns during the period from January 1, 1986, to March 9, 1986, when the two guns were found in his home. Defendant replied in the negative. The prosecutor was then allowed, over objection, to elicit that on January 31, 1986, defendant had made a tape-recorded

will and that on the tape he had indicated that he was leaving his guns to his son. On appeal, defendant claims the trial court erred when it ruled that this evidence was admissible as proper impeachment. Defendant argues: "If a defendant cannot make a simple denial of an element of the offense with which he has been charged, without opening the door to the admission of illegally obtained evidence, he has no meaningful right to take the witness stand in his own defense."

When a defendant seeks to commit perjury at trial, he will not be allowed to escape prosecution rebuttal evidence by using as a shield the government's illegal method of gathering that evidence. While at one time criminal defendants appear to have had such a shield, the Supreme Court has quite properly taken away this tool for perjury, as a criminal trial has but one purpose—to seek the truth. See United States v. Havens, 446 U.S. 620, 626-27, 100 S. Ct. 1912, 1916, 64 L. Ed. 2d 559, 565-66 (1980); Harris v. New York, 401 U.S. 222, 225-26, 91 S. Ct. 643, 645-46, 28 L. Ed. 2d 1, 4-5 (1971).

The United States Supreme Court initially stated in Agnello v. United States, 269 U.S. 20, 33-34, 46 S. Ct. 4, 7, 70 L. Ed. 145, 149 (1925), that "the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment." The Supreme Court later created an exception to this exclusionary rule in Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). In Walder, a defendant charged with a narcotics violation testified he had never sold drugs in his life. The government was permitted to impeach him on cross-examination with evidence of illegally-seized narcotics from another crime, the charge for which earlier had been dismissed. As the Walder court stated, a defendant cannot turn the "illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." Walder, 347 U.S. at 65,

74 S. Ct. at 356, 98 L. Ed. at 507. Walder, however, also included the following dicta:

> Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

Walder, 347 U.S. at 65, 74 S. Ct. at 356, 98 L. Ed. at 507.

Although later United States Supreme Court decisions do not expressly overrule the Walder dicta, review of those cases and their rationales demonstrates the Walder dicta to be a dead letter. The primary case reflecting this is Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). In Harris, the defendant was charged with two counts of selling heroin. On direct examination he denied the first sale and stated that the second sale did not involve heroin. The State was permitted to use as impeachment his voluntary statements (which were inadmissible substantively because of a Miranda violation) to rebut the defendant's direct testimony. The Court, in finding the impeachment to be proper, stated:

> It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in Walder.

Harris, 401 U.S. at 225, 91 S. Ct. at 645, 28 L. Ed. 2d at 4. The court also observed in Harris: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." Id. Finally, the Supreme Court in Harris found that sufficient deterrence of improper police conduct is achieved by barring improperly obtained evidence from the prosecution's case in chief and excluding

its use as impeachment evidence would provide no meaningful additional deterrence and would contravene the compelling interest against allowing perjury to go unanswered. Harris, 401 U.S. at 225-26, 91 S. Ct. at 645-46, 28 L. Ed. 2d at 4-5.

The Supreme Court's subsequent decision in United States v. Havens, 446 U.S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980), makes clear that the rule of Harris v. New York is not limited to impeachment evidence improperly obtained in violation of the fifth amendment, but also extends to fourth amendment violations. Moreover, the Supreme Court also held that illegally obtained evidence can be used to impeach not only a defendant's direct testimony, but also his testimony in response to questions on cross-examination which are reasonably suggested by his testimony during direct examination. Id. at 624-28, 100 S. Ct. at 1915-17, 64 L. Ed. 2d at 564-566.

In light of the above authority, we find the trial court properly allowed the instant impeachment of defendant's testimony. The decisions of Harris and Havens allow impeachment of testimony "bearing more directly on the crimes charged" and reject the claim that only collateral matters (i.e., testimony outside the essential elements) may be impeached. Harris, 401 U.S. at 225, 91 S. Ct. at 645, 28 L. Ed. 2d at 4. Iowa reviewing court decisions follow the rules announced in Harris v. New York and United States v. Havens. See Washington v. Scurr, 304 N.W.2d 231, 233 (Iowa 1981); State v. Donelson, 302 N.W.2d 125, 134 (Iowa 1981); State v. Washington, 257 N.W.2d 890, 894-95 (Iowa 1977); State v. Hatter, 381 N.W.2d 370, 372-74 (Iowa App. 1985).

It is also clear that any possible error in admission of this evidence would be harmless. A trial court's error in admitting evidence does not require reversal if no prejudice resulted. State v. Windsor, 316 N.W.2d 684, 688 (Iowa 1982). Error which is harmless does not dictate reversal because the primary purpose

of criminal trials is to determine the factual question of a defendant's guilt or innocence and promote public respect for the criminal process by focusing on the fairness of the trial rather than presence of immaterial error. Delaware v. Van Arsdell, 475 U.S. ____, ____, 106 S. Ct. 1431, 1436-37, 89 L. Ed. 2d 674, 684-85 (1986). The presence of other overwhelming evidence of guilt is persuasive of the harmlessness of an alleged error. State v. Freeman, 297 N.W.2d 363, 367-68 (Iowa 1980); State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). The other evidence presented by the prosecution was more than sufficient to allow a rational factfinder to find defendant guilty; thus, we find any error in admission of the impeachment evidence would be harmless.

We affirm the conviction of defendant.

**AFFIRMED.**