



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed October 28, 1982

vs.

)

2-284
65502

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ROBERT LEE WRIGHT, JR.,

)

Defendant-Appellant.

)

Appeal from Black Hawk District Court, Dennis D. Damsgaard, Judge.

The defendant appeals from his conviction for first-degree burglary. He contends the trial court erred by permitting the prosecutor to cross-examine him in too much detail about his criminal record, by excluding his impeachment evidence relating to possible bias of a State's witness, and by admitting hearsay testimony about a similar crime allegedly committed earlier the same night by a person resembling the defendant. He also contends his trial attorney rendered ineffective assistance. AFFIRMED.

W. H. Gilliam of Rapp & Gilliam, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

The defendant appeals from his conviction for first-degree burglary, contending (1) that the trial court erred by permitting the prosecutor to cross-examine him in too much detail about his criminal record; (2) by excluding his impeachment evidence relating to possible bias of a State's witness; and (3) by admitting hearsay testimony about a similar crime allegedly committed earlier the same night by a person resembling the defendant. He also contends (4) that his trial attorney rendered ineffective assistance. We affirm.

Mr. Wright was charged with first-degree burglary upon the property of John Brennan and with intentionally and recklessly inflicting serious injury upon John Brennan at the time, all in violation of Iowa Code § 713.2 (1980). He was convicted after a trial to a jury on May 8, 1980.

The incident for which Mr. Wright was convicted occurred on the morning of February 18, 1980. John Brennan, staying at the Cedar Falls Holiday Inn, was partially dressed at about 6 a.m. when he heard a knock at the door. A man indicating that he was with security entered the room, struck Mr. Brennan, picked up his billfold and money clip, and then ran out the door. Mr. Brennan remembered that a female accompanied the man who assaulted him, but was not able to identify the woman, other than to describe some of her attire.

At trial, Officer Sink of the Cedar Falls Police Department identified a particular photograph as depicting the man who committed the burglary against Mr. Brennan.

Defense counsel on cross-examination asked Officer Sink about a similar crime that had occurred the same morning in Waterloo in which a black female had been identified. In response to defense interrogation, Officer Sink identified

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black female, and related the details of a statement concerning the Waterloo incident she had given. Continuing his response to the defense counsel's questions, Officer Sink testified that the same woman had accompanied Mr. Wright to Mr. Brennan's room, and that Wright had entered the room, struck Brennan on the face, and taken his wallet and money clip.

In response to his own counsel's questions, the defendant testified that he had several prior convictions for firearms violations, failure to register firearms, receiving stolen property, and sale of heroin.

I. Evidence of Defendant's Prior Convictions

A defendant has a right to testify in his own behalf, and may be cross-examined as to his previous convictions for a felony under Iowa Code § 622.17 (1981) for the sole purpose of impugning his credibility. However, such impeachment is limited to those felony convictions which involve dishonesty, truth, or veracity. State v. Martin, 217 N.W.2d 536 (Iowa 1974).

The Martin restrictions apply, however, only to cross-examination, and not to direct examination by defendant's own counsel, and only when timely and proper objections have been made. Martin, 543, 544. See also State v. Miller, 229 N.W.2d 762, 769 (Iowa 1975). Wright's counsel sought by pretrial motion in limine to preclude presentation of evidence concerning Wright's previous convictions, but this motion was overruled. The court cautioned counsel for both parties to follow the precepts laid down in Martin and in Twyford v. Weber, 220 N.W.2d 919 (Iowa 1974); State v. Johnson, 222 N.W.2d 483 (Iowa 1974), and State v. Conner, 241 N.W.2d 447 (Iowa 1976). In addition, the court ruled that counsel for both parties should "take this matter up with the trial court prior to selection of the jury." Defendant's counsel failed to do so, and also failed to raise proper and timely objections to the introduction of evidence concerning Wright's prior felony

convictions at appropriate stages of the trial. See State v. McKee, N.W.2d 907, 911 (Iowa 1981). Having failed to object to the questions of the prosecutor and defendant's responses, the defendant has waived any error in connection with the testimony of evidence of his prior convictions. State v. Bucklin, 304 N.W.2d 452, 454 (Iowa Ct. App. 1981); State v. Reese, 299 N.W.2d 771, 775-76 (Iowa 1977); State v. House, 223 N.W.2d 195, 196-97 (Iowa 1974).

Wright contends that the trial court committed reversible error by failing to interpose objections or exclude evidence regarding defendant's prior felony convictions sua sponte. However, "it is not ordinarily the duty of the court on its own initiative to exclude such evidence or to interpose an objection to a question." State v. York, 211 N.W.2d 314, 318 (Iowa 1973). See also State v. Thornburg, 220 N.W.2d 579, 584 (Iowa 1974).

We conclude, then, that there was no abuse of judicial discretion when the court failed to limit, sua sponte, testimonial evidence of defendant's prior convictions.

II. The Court's Refusal to Allow Defendant to Introduce Certain Documentary Evidence.

Defense counsel attempted to introduce into evidence two letters written by Virginia Harmon, Wright's alleged accomplice. After objections were raised by the State, the court refused to admit these exhibits into evidence on the ground that they were irrelevant, incompetent, and immaterial. Outside the presence of the jury, but on the record, defense counsel argued that the purpose of submitting the second of these letters was to show whether the statement she had given to the police was voluntary. The court found that defense counsel had already gone through extensive efforts to impeach Ms. Harmon and that the letter was irrelevant to any issue in the case.

Defendant has not made either of the letters at issue a part of the record on appeal. "It is defendant's obligation to provide this court with a record which affirmatively discloses the error upon which he relies." State v. Bakker, 262 N.W.2d 538, 544 (Iowa 1978). See also State v. Mark, 286 N.W.2d 396, 402-03 (Iowa 1980); City of Des Moines v. Huff, 232 N.W.2d 574, 576 (Iowa 1975). In State v. Wilmoth, 63 Iowa 380, 382, 19 N.W. 249, 250 (1884), the supreme court said:

The abstract upon which the case is submitted to us fails to clearly present the evidence. We cannot indulge presumptions of errors on the ground of the confusion in the abstract. Errors must be shown with sufficient clearness, and presumptions must be exercised supporting the rulings of the court.

We conclude, therefore, that with respect to these exhibits, there was no reversible error.

III. The Hearsay Objection

On second redirect examination, the prosecution asked Officer Sink whether the black man who had gone into the room at the Twin Torch Motel represented that he was with security. Defense counsel objected on the ground that any answer would constitute hearsay. The court overruled the objection.

Defendant argues that the evidence elicited by the State was hearsay and was prejudicial to the defendant since it tended to show that he had been involved in other behavior the same night using the same modus operandi.

Officer Sink had not been involved in the investigation of the Twin Torch incident, since it had occurred in the city of Waterloo. Any information he had concerning the Waterloo incident had to have been derived from reports he received from officers who had investigated. It could not have been firsthand.

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Hearsay is "'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981), quoting State v. Fingert, 298 N.W.2d 249, 251 (Iowa 1980).

"Generally, the erroneous admission of hearsay evidence must be presumed to be prejudicial unless the contrary is affirmatively established." Webb at 411.

The State argues that Officer Sink's testimony was not offered to prove the truth of the matter asserted, but merely demonstrated what information he had gained during the course of investigation without reference to the truth or falsity of the matter asserted. The State also contends that since Virginia Harmon's testimony regarding the Twin Torch incident and defendant's involvement in it established the same facts, admission of the hearsay evidence was nonprejudicial, citing State v. Jurgenson, 225 N.W.2d 310, 312 (Iowa 1975), which holds that where any independent source of the same line of testimony has come into the record without objection, admission of hearsay evidence is not prejudicial.

The purpose of the question was clearly to establish the truth of the proposition that Mr. Wright had participated in a similar burglary in Waterloo using a tactic identical to that employed by the assailant who entered Mr. Brennan's hotel room. Officer Sink's information regarding this matter was derived, not from his own observations, but from reports he received from others. This corresponds precisely with the classical definition of hearsay. The court therefore erred in overruling the defendant's objection.

However, we agree with the State's contention that this testimony was rendered nonprejudicial by virtue of the fact that other evidence independent of Sink's testimony regarding the Twin Torch incident and defendant's involvement therein had already been admitted without objection by the defense counsel. Jurgenson, 225 N.W.2d at 312.

IV. Competence of Defense Counsel

The issue of the competence of defense counsel is preserved pending any application by the defendant for postconviction relief.

In view of the failure of the defendant to demonstrate that the trial court committed prejudicial error, we affirm.

AFFIRMED.