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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 30, 1983
vs.	)	3-218 / 68965
HARLAN J. MOTT, JR.,	)	
Defendant-Appellant.	)	

Appeal from Polk District Court, James W. Brown, Judge.

Defendant appeals from his conviction of robbery in the second degree, Iowa Code sections 711.1 and 711.3 (1981), challenging the admissibility of part of the testimony of one witness. AFFIRMED.

Luann White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Michael K. Jordan, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

PER CURIAM

Defendant, Harlan J. Mott, Jr., and another man attempted to snatch a night deposit bag from the hands of a retail store clerk at about 8:30 p.m. on March 19, 1981. The clerk and a companion were about to deposit the money at a night depository in Des Moines. The deposit bag contained $720. When the man identified as defendant ran up to her and attempted to grab the bag, the clerk held onto it and struggled with him over its possession. This struggle went on for some time, and at some point the clerk fell to the ground. The clerk's companion also joined in the fracas, jumping on the back of the assailant's companion. The robbers eventually succeeded in detaching the clerk from the bag and fled with it.

Two police showed the witnesses a photo array of suspects; neither could positively identify defendant, although they narrowed the possible suspects down. The police then presented a one-on-one showup at which the clerk identified defendant after seeing him turn and move. The identification was apparently based to a considerable extent on his build and manner of moving. The identifications at trial were quite certain.

Defendant was found guilty and sentenced to a term of imprisonment of up to ten years. On appeal, defendant challenges the admissibility of certain testimony, the discretion of the trial court in not allowing two alibi witnesses to testify, the sufficiency of the evidence in regard to the identification of defendant, and the effectiveness of defendant's trial counsel.

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

I. Denial of Mistrial

At trial, the defendant's accomplice testified for the State. The prosecutor asked him why he was willing to testify and the accomplice answered: "Because he robbed me." The defendant then moved for a mistrial and the court and

counsel engaged in considerable discussion of the matter outside the presence of the jury. The court noted that the word "robbed" as used in the testimony might have meant something other than a "robbery" in legal terms—that is, it might have been a colloquial reference to some other form of injury allegedly done the accomplice. The court decided to overrule the motion for mistrial, and admonished the jury to disregard the reference. The prosecutor and defense counsel also agreed that the jury would be informed that the county attorney's office had declined to prosecute the alleged robbery of the accomplice.

Defendant argues that the trial court should have granted his motion for mistrial on the ground that a witness's reference to the defendant's having "robbed" the witness (an incident other than the one in the present case) was a reference to "other crimes," was inadmissible, and was so prejudicial that prejudice could not be cured by sustaining an objection and admonishing the jury.

We agree with the trial court that the word "robbed," when used in ordinary conversation, does not necessarily imply the technical legal meaning of the word. The jury could have interpreted the statement in many ways. A trial court has discretion in ruling upon a motion for mistrial. State v. Cage, 218 N.W.2d 582, 586 (Iowa 1974). In a case similar to this one, in which defense counsel moved for mistrial on the ground that certain testimony improperly referred to a charge for which the defendant was not then on trial, the Iowa Supreme Court ruled that the trial court had not exceeded the limits of its discretion by overruling the motion and admonishing the jury to disregard the challenged testimony. State v. Collins, 236 N.W.2d 376, 378 (Iowa 1975). In the instant case, it was not apparent that the statement, made in the presence of the jury, was prejudicial to defendant, particularly because the court admonished the jury as follows:

> The State and the defendant stipulate and agree that Mr. Jasper [the witness] complained to authorities that the defendant had taken money from Mr. Jasper; the Polk County Attorney's Office refused to file or prosecute that charge.
>
> Now, ladies and gentlemen, I further am going to instruct you at this time that you are admonished and instructed to disregard the witness Jasper's remark that the defendant "robbed" him. You are instructed that the defendant is on trial here for the crime with which he is charged and none other. You are to disregard the reference to the word "robbed."
>
> You are to judge the defendant as to his innocence or guilt of the offense charged only, and you should not consider or speculate on any other allegation of wrongdoing.

Defendant has not demonstrated to us that the trial court abused its discretion; the ruling was not "clearly against the logic and effect of facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." See State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982).

II. Refusal of Alibi Witnesses

On the second day of trial the defendant informed the State and the court that he wanted to call his mother and brother as alibi witnesses. No previous notice of alibi witnesses had been filed as is required by Iowa Rule of Criminal Procedure 10(10)(a)(1981). The court declined to allow the witnesses to testify on the ground that defendant had known the testimony of these witnesses would be relevant for months but had taken no steps to secure their testimony. Defendant contended that no notice of alibi testimony had been filed because the witnesses had not been willing to testify before that day. The court noted that the witnesses could have been subpoenaed. The defendant took the stand in his own defense and testified that at the time of the crime, he was with his mother and step-brother.

Defendant asserts on appeal that the trial court abused its discretion by not allowing the defendant to present his mother and brother as alibi witnesses.

Defendant correctly refers us to Iowa Rule of Criminal Procedure 10(10)(a)(2)(1981), which prohibits the defendant from offering evidence on the issue of alibi "without leave of court for good cause shown." Id. The trial court has the discretion of determining whether the defendant has sufficiently shown good cause to allow the alibi evidence. State v. Christensen, 323 N.W.2d 219, 222-23 (Iowa 1982). "We will not find an abuse of discretion unless it is shown that 'such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.' " Id. at 222 (quoting State v. Morrison at 256).

The supreme court in Christensen determined that good cause was not shown by defendant after inspecting: (1) the extent to which lack of notice would prejudice the State; (2) the defendant's reason for failure to give notice; and (3) the strength of the evidence against the defendant. Id. at 223-24. We feel the State would have been prejudiced by allowing the two witnesses to give alibi testimony because, as the State points out, even though the prosecution questioned the witnesses before the trial proceeded further, the lack of notice would not have allowed the prosecution to investigate the witnesses' proposed testimony through other sources or to find other witnesses to rebut the alibi defense.

Furthermore, defendant's reason for failure to give notice was inadequate. The defendant knew of the existence of the witnesses for quite a while before trial. If the witnesses were unwilling to testify, they could have been subpoenaed. The strength of the other evidence against defendant was sufficient to convict defendant. Therefore we do not find the trial court to have been clearly unreasonable in disallowing the alibi testimony of the two witnesses.

III. Sufficiency of the Evidence

Defendant contends that there was not sufficient evidence to submit the case to the jury, in particular because the identifications of the defendant

allegedly were uncertain. The standard of review in challenging the sufficiency of the evidence is well established. See State v. Welton, 300 N.W.2d 157, 159-60 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). We will uphold a verdict if there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

Keeping in mind the principle that the credibility of witnesses and the weight to be given their testimony is a function of the factfinder, Robinson at 341, we find "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." Robinson at 339. Defendant cannot challenge the identification procedures because any error was not preserved for review at trial. The witnesses appeared quite certain of the defendant's identification at trial. Their testimony, combined with all of the other evidence which was presented at trial, provided sufficient evidence to submit the case to the jury. No error was commited by the trial court.

IV. Effective Assistance of Counsel

We do not reach the merits of defendant's claim of ineffective assistance of counsel because defense counsel did not have a chance to testify regarding the matter. Thus, the record on the issue is inadequate to support a decision; any conclusion as to defense counsel's motives would be speculation.

AFFIRMED.