

IN THE IOWA COURT OF APPEALS

STATE OF IOWA,

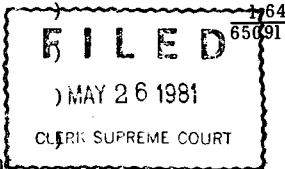
Filed May 26, 1981

Plaintiff-Appellee,

vs.

DAVID KRESS,

Defendant-Appellant



Appeal from Dubuque District Court. Karl Kenline, Judge.

Defendant appeals his conviction of second degree robbery in violation of section 711.3, The Code 1979, contending that the trial court erred in not allowing him to reopen his case to allow a witness to recant her previous testimony. AFFIRMED.

Peter J. Klauer, of Klauer, Stapleton & Ernst, Dubuque, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, acting C. J., Snell, Carter and Johnson, JJ.

Considered en banc.

PER CURIAM

Defendant, David Kress, appeals his conviction of second degree robbery in violation of section 711.3, The Code 1979, contending that the trial court erred in not allowing him to reopen his case to allow a witness to recant her previous testimony. We affirm.

The testimony of Samuel Puccio, the bartender on duty at the Aragon Tavern in Dubuque, Iowa on the night of November 5 and in the early morning of November 6, reveals the following. Defendant, whom Puccio had known for three and one-half years, entered the Aragon Tavern between 12:00 a.m. and 1:00 a.m. on November 6, 1979. Defendant and Puccio chatted. Defendant left the Aragon after having a drink and making a phone call. At about 1:30 a.m. defendant returned wearing a green army-type coat, sat down by Dorothy Hankanson, and spoke with her. Afterwards Hankanson and one other customer left the Aragon, leaving Puccio alone with defendant.

Evidence before the jury emanating from Dorothy Hankanson consisted in her oral trial testimony and a written statement given to the police that was admitted into evidence as exhibit #6. This evidence reveals that Hankanson arrived at the Aragon between 4:00 and 4:30 p.m. on November 5 and stayed until 1:30 a.m.—1:45 a.m. on November 6. Hankanson stated that defendant, a friend of hers, arrived at the Aragon between 10:00 p.m. and 1:00 a.m. and wore a green jacket. Defendant spoke to Hankanson in the Aragon that evening. In her statement to the police Hankanson said that defendant was in the Aragon when she left it at 1:30 a.m. on November 6, but at trial she testified that she was not sure whether defendant remained in the Aragon when she left it.

After defendant and the State rested, defendant moved to reopen the case based on Hankanson's willingness to revise her previous testimony. In an offer of proof Hankanson testified that defendant was not in the Aragon when she left it early on November 6, but that two young men wearing green uniforms remained in the Aragon when she left. The trial court denied defendant's motion on the grounds that Hankanson is not a credible witness and that reopening the record to admit her new testimony would not change the trial's result.

It is within a trial court's discretion to deny a motion to reopen evidence in a criminal trial, State v. Conner, 241 N.W.2d 447, 461 (Iowa 1976). Mere recantation of a

witness on any material matter should not necessitate a new trial if, eliminating such evidence, there is still substantial evidence to support the jury's verdict. State v. Compiano, 261 Iowa 509, 518, 154 N.W.2d 845, 850 (1967). A motion for a new trial based on newly discovered evidence is to be carefully scrutinized and does not necessarily entitle a defendant to a new trial. State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980). The trial court has wide discretion to view the matter in its entirety to determine if the defendant has had a fair trial and if a new trial would likely produce a different result. Taylor, 287 N.W.2d at 578. Additionally, the trial court should not grant the motion unless it is satisfied that the trial testimony was false. Taylor, 287 N.W.2d at 578. Recantation in any event is looked upon with suspicion. Taylor, 287 N.W.2d at 578. The trial court is not required to believe the recantation. Taylor, 287 N.W.2d at 578. We will not interfere with the trial court's decision unless there is a clear abuse of discretion. Taylor, 287 N.W.2d at 578. The term "discretion" itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975). In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. Warner, 229 N.W. 2d at 783.

Given the inconsistencies in Hankanson's testimony, the trial court was entitled to be suspicious of her recantation testimony. Given the trial court's justified doubts in Hankanson's credibility, it did not abuse its discretion in denying the motion to reopen evidence on the ground that defendant had not adequately satisfied it that the recantation testimony was true. Every version of Hankanson's account of events is consistent with defendant's guilt, and the case against defendant is strong no matter which of Hankanson's accounts is believed or even if none of them are believed. Hence, the trial court did not abuse its discretion in denying defendant's motion, because there is no likelihood that the new evidence would have changed the trial's result.

We note that the appendix contains unnecessary matter included by defendant's attorney. We disapprove of the expense unnecessarily incurred.

Costs are assessed against defendant.

AFFIRMED.