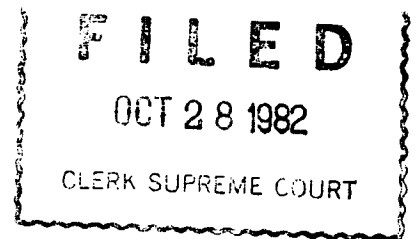


IN THE COURT OF APPEALS OF IOWA



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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed October 28, 1982
vs.	)	<u>2-305</u>
DAVID ALLEN DREWS,	)	67610
Defendant-Appellant.	)	

Appeal from Clinton District Court, A. J. Van Zee, Judge.

Defendant appeals from his conviction, after trial to a jury of OMVUI, Iowa Code § 321.281. On appeal, defendant asserts that (1) a Clinton police officer instructed the jury in operation of a video tape machine and suggested to them in general terms how to ask the court to allow them to view a video tape, that this unduly emphasized the importance of the video tape as evidence, denied defendant a fair trial, and was presumptively prejudicial; and (2) that the trial court imposed a harsher sentence upon defendant than was given in a number of OMVUI cases in which defendants had entered guilty pleas, thereby allegedly showing that the defendant's harsh sentence was imposed as a result of his demanding a jury trial. AFFIRMED.

A. John Frey, Jr., of Jurgemeyer, Frey & Haufe, Clinton, for defendant-appellant.

Thomas J. Miller, Attorney General, Attorney General, and Joseph P. Weeg Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, and Johnson, JJ.

Defendant appeals from his conviction, after trial to a jury, of OMVUI, Iowa Code § 321.281 (1981). On appeal, defendant asserts that (1) a Clinton police officer instructed the jury in operation of a video tape machine and suggested to them in general terms how to ask the court to allow them to view a video tape, that this unduly emphasized the importance of the video tape as evidence, denied defendant a fair trial, and was presumptively prejudicial; and (2) that the trial court imposed a harsher sentence upon defendant than was given in a number of OMVUI cases in which defendants had entered guilty pleas, thereby allegedly showing that the defendant's harsh sentence was imposed as a result of his demanding a jury trial. We affirm.

I. Communication with the Jurors.

Before the trial court submitted instructions to the jury and before closing arguments, defendant moved for a mistrial because of allegedly improper contact between the jurors and Clinton police officer Charles Klaes. At the direction of the assistant county attorney, Klaes and the bailiff had brought into the jury room equipment to play a video tape that had been admitted into evidence and played at the trial. Klaes set up the video equipment and explained to the jurors how to run it. In addition, he responded to questions by members of the jury as to when they would be allowed to view the video tape and the procedure for getting the tape from the court. He did not discuss the substance of the tape, but merely gave the jury instructions as to the mechanics of operating the equipment. Nor did he volunteer information about the procedure for obtaining the tape. The trial court gave the jury the opportunity to view the tape during its deliberations, but limited the jury to one viewing in the courtroom.

After finding that the contact between the jury and Officer Klaes was not prejudicial, the trial court denied defendant's motion for a mistrial. Drews claims that the State did not prove that the contact was harmless.

Citing Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954) and Turner v. Louisiana, 379 U.S. 456, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965), Drews argues that in a criminal case, any private communication, contact, or tampering with a juror during trial about the matter pending is presumptively prejudicial if not made in pursuance of known rules of the court and instruction and directions of the court made during trial with full knowledge of the parties. In Turner, the United States Supreme Court held that a contact between the jurors and two deputy sheriffs who were key prosecution witnesses was extremely prejudicial. Drews contends that the burden is on the State to show that the contact was harmless, that the State has not met this burden, and that the court erred in not granting Drews's mistrial motion.

A trial court has wide discretion as to whether to grant or deny a motion for mistrial, State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977). On review, we will find that the trial court abused its discretion "only when it is demonstrated that such discretion was exercised on grounds or for reason clearly untenable or to an extent clearly unreasonable." Id.

Remmer differs from the instant case because Remmer is limited to contacts involving a matter pending before the jury, while instructions about the operation of video equipment and the procedure to request the video tape from the court were not issues at trial and have nothing to do with the guilt or innocence of the defendant. They were not "matters pending before the jury." See United States v. Bufalino, 576 F.2d 446, (451 2d Cir. 1978), cert. denied, 439 U.S. 928, 99 S. Ct. 314, 58 L. Ed. 2d 321 (1978).

In this case, the trial court held a hearing as required by Remmer, and found that the contact was not prejudicial. The jury deliberations had not yet begun at the time of the contact, the actual contact by Officer Klaes with the jury was brief, Officer Klaes was not a witness at the trial, and the content of the communications did not pertain to issues involved in the case itself. The trial court did not abuse its discretion because it did not act "on grounds or for reasons clearly untenable or to an extent clearly unreasonable" in denying the defendant's motion. See United States v. Florea, 541 F.2d 558, 571 (6th Cir. 1976), cert. denied, 430 U.S. 945, 97 S. Ct. 1579, 15 L. Ed. 2d 792 (1977); United States v. Brown, 605 F.2d 389, 397 (8th Cir. 1979), cert. denied, 444 U.S. 972, 100 S. Ct. 456, 62 L. Ed. 2d 387 (1979); State v. Gartin, 271 N.W.2d 902, 913 (Iowa 1978); State v. Bruno, 204 N.W.2d 879, 885 (Iowa 1973).

II. The Penalty.

Drews argues that the penalty imposed upon him was unusually severe and that the severity of the sentence can be explained by his refusal to plead guilty to the offense charged.

The court sentenced the defendant to incarceration for five days and a fine of \$750, plus court costs, and required defendant to attend a driver improvement course in lieu of loss of his license.

Sentencing is within the sentencing court's discretion, and if the sentence is within the statutory maximum, it will be set aside only if there is an abuse of discretion. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979). If the court had considered an impermissible factor such as the defendant's refusal to plead guilty, that would have constituted abuse of discretion. State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981).

We find, however, that there is no convincing evidence that the court did consider any such impermissible factor.

We find the defendant's arguments to be without merit, and therefore affirm.