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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
THOMAS NEIL HENDRICKSON, JR.) 8-677 / 87-1526
Defendant-Appellant.)

Appeal from the Iowa District Court for Webster County (No. 15247), Ronald H. Schechtman, Judge.

The defendant appeals his conviction by a jury of willful injury and first-degree robbery. **REVERSED AND REMANDED FOR A NEW TRIAL.**

Raymond E. Rogers, Acting Chief Appellate Defender and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Julie A. Halligan, Assistant Attorney General; and James Koll and Cynthia Goins, Assistant County Attorneys, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ. Habhab, J., takes no part.

SACKETT, J.

In this appeal from defendant-appellant Thomas Neil Hendrickson, Jr.'s conviction of willful injury in violation of Iowa Code section 708.4 (1987) and first-degree robbery in violation of Iowa Code section 711.1 and 711.2 (1987) we must determine whether the trial court's refusal to instruct the jury a witness's guilty plea cannot be considered evidence of defendant's guilt constitutes reversible error. We find under this record it does. We reverse and remand for a new trial.

Defendant was charged following an altercation with Robin Olson. At trial, the principal witnesses for the State were the victim, Olson and Mr. Black. Black was with defendant at the time. Black was charged but pled guilty pursuant to a plea agreement.

Defendant testified in his own behalf. The uncontested testimony was Olson, the victim, was left by friends in Fort Dodge and needed a ride back to his home in Eagle Grove. The only money Olson had was a $40 cashier's check. Olson got a ride in the bed of a pickup truck. Defendant was a passenger in the front of the truck. Dean Summers and Black were also in the front of the pickup. The truck stopped at a golf course near the Des Moines River in Webster County where Olson was involved in the altercation. Olson received substantial injuries.

At trial Olson testified when the four men got out of the pickup at the golf course defendant punched him and knocked him to the ground. Olson said he struggled with defendant for a few minutes and then ran. He said then Summers tackled him from behind and said he wanted his billfold. Olson said defendant and Black were on each side and kicked him. He said after his wallet was taken he was kicked in the head and ribs. He claimed he then jumped in the river and swam to the other side where police were called.

Defendant said when the truck stopped Olson approached him and recognized him as having been in a fight with one of Olson's friends. Defendant testified Olson punched him in the face and knocked him down. Defendant said he then got up and punched Olson. Defendant claimed Olson then yelled something that made Summers angry and Summers jumped Olson and beat him up. Defendant said he and Black pulled Summers off Olson. Defendant said he never saw Olson's wallet.

Papers from Olson's wallet, including the certified check, were found on the river bank.

Black testified when they were driving in the pickup defendant said something about robbing Olson and beating him up. He said when they stopped defendant went to the back of the truck and fought with Olson and when Olson ran away Summers tackled him. Black said he and defendant

pulled Summers off Olson at defendant's request. He said Olson was unconscious and he drug him from the road to the grass. He said he saw defendant pick up Olson's wallet and open it and pitch it in the river.

Black's testimony was damaging to defendant because it established defendant manifested an intent to beat up and rob Olson prior to the pickup stopping. Defendant denied ever making such a statement. Additionally, Black's testimony pointed to defendant as the original aggressor in the altercation when defendant claimed Olson had started the fight.

Black testified he had been charged with first degree kidnapping, first degree robbery and first degree theft following the incident. He further testified pursuant to a plea agreement he pled guilty to first degree theft and the other charges were dismissed. As part of the agreement, Black also was to provide a statement and testify truthfully.

I.

Defendant objects to the trial court's failure to give an instruction Black's plea pursuant to a plea agreement could not be considered as evidence of defendant's guilt but could only be used to determine Black's credibility. The trial court refused the requested instruction. The trial court should have given the requested instruction.

One person's guilty plea or conviction may not be used as substantive evidence of the guilt of another. United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir. 1981); United States v. Wiesle, 542 F.2d 61, 62 (8th Cir. 1976); Baker v. United States, 393 F.2d 604, 614 (9th Cir.) cert. denied, 393 U.S. 836, 89 S.Ct. 110, 21 L.Ed. 106 (1968). It may, however, be considered by the jury in evaluating a witness's credibility. Wiesle, 542 F.2d at 62. And it may be utilized to impeach a witness or show the witness's acknowledgment of participation in the offense. Id.

While recognizing the legitimate uses that may be made of the guilty plea evidence, courts have a responsibility to be sensitive to the possibility of prejudice, and both trial and reviewing courts have responsibility to insure evidence of the plea is being offered by the prosecutor and used by the jury only for a permissible purpose. See United States v. Halbert, 640 F.2d at 1005.

Evidence of a guilty plea is amenable to misuse. Halbert, 640 F.2d at 1006. Without instructions, it is possible the jury could use the plea as evidence of defendant's guilt. Id. This danger may be averted only by cautionary instructions that make it clear to nonlawyers the plea cannot be considered as evidence of defendant's guilt. See Halbert at 1006-1007. It is suggested the best practice is to instruct the jury when evidence of the plea is admitted and again in final instructions. Halbert, 640

F.2d at 1006. See also United States v. Whitehead, 618 F.2d 523, 529-30 (4th Cir. 1980); United State v. Bryza, 522 F.2d 414, 424-25 (7th Cir. 1975).

While agreeing with defendant Black's plea cannot be used as evidence of his guilt, the State contends the refusal to give the instruction does not require reversal because (1) the instruction given on credibility of witnesses was sufficient, (2) the State did not stress the plea or suggest to the jury it could infer defendant's guilt from Black's plea, and (3) the record contains overwhelming evidence of defendant's guilt.

The State claims the following instruction given by the trial court was sufficient. The trial court instructed the jury:

> You are the sole judges of the weight of the evidence, the credibility of the witnesses, and the conclusions to be drawn from the facts and circumstances proved.
>
> If the testimony or any part thereof is conflicting, you will reconcile it if you can, so that it may all have weight and effect, but if you cannot, you will then give credit to that testimony and to those witnesses that to you are fair-minded men and women deem most entitled thereto.
>
> In passing on the credibility of the witnesses and weighing their testimony, you may and should consider their appearances and conduct on the witness stand, their age, intelligence, strength of memory, and means of knowledge of matters of which they speak, the remoteness of events about which they testify, their interest or lack of interest in the result of the trial, the motives, if any, actuating them as witnesses, their candor, fairness, bias or prejudice, the reasonableness and probability of their statements or the want thereof, whether their testimony is corroborated or contradicted by other witnesses or facts proven, and from all of these and all other facts and circumstances proven upon the trial, determine

> where to give credit and where to withhold the same, and give to the testimony of each witness the weight to which you believe it is fairly entitled.

The instruction given addressed only the issue of assessing the credibility of witnesses. Nothing in the instruction addressed the purpose for which the evidence of the plea could be considered. The instruction given contained no direction to the jury to exclude the guilty plea as evidence of defendant's guilt. The instruction given was not sufficient. See Halbert, 640 F.2d at 1007.

The State contends we should not reverse because it did not stress the plea or suggest to the jury it could infer Black's guilt from the plea. The State directs us to United States v. Wiesle, 542 F.2d at 63, where the court discussed the fact the record did not show the government had stressed the plea of a codefendant or suggested to the jury it could infer defendant's guilt from their guilty pleas. We find it unnecessary to analyze whether the State stressed Black's plea or suggested it could infer guilt because in Wiesle at 63, the court affirming the guilty verdict noted the defendant had not requested an instruction and there was overwhelming evidence of guilt. Defendant here requested an instruction and we reject the State's contention there is overwhelming evidence of defendant's guilt.

It is very clear an altercation occurred and Olson was injured. However, there is conflicting evidence on who

started the fight, whether there was an intent to rob and whether a robbery actually occurred. The failure to give the requested instruction was error. A clear and strong cautionary instruction should have been given. See United States v. Baete, 414 F.2d 782, 784 (5th Cir. 1969). The failure to do so was reversible error.

II.

Defendant next contends the trial court abused its discretion in not granting a mistrial because one juror allegedly had not been truthful on voir dire about his acquaintanceship with Summers. Summers, the fourth person in the truck, also was charged. Summers did not testify at defendant's trial. On voir dire the prospective jurors had been asked collectively to indicate if they knew a series of persons, including Dean Summers. The juror in question did not acknowledge he knew Summers.

Defendant's attorney during trial called to the court's attention a note he received indicating the sitting juror's son was the boyfriend of Summer's sister and the juror had animosity toward codefendant Summers. Defendant's attorney did not request relief at this point. However, before submission, defendant's attorney told the court he had verified the relationship and the animosity. He asked the court to interview the juror and to replace him with an alternate.

The State's attorney verified he had been told the juror knew Summers and he had so informed defendant's attorney. The State's attorney said he did not resist the court inquiring of the juror as to his knowledge of Summers to determine if he could set the knowledge aside and what he had told other jurors. The State's attorney said, based on information received from questioning the juror, the court could rule on whether or not he was a proper juror. Despite the State's acquiescence in the request for the court to examine the juror, the court overruled the motion. Defendant contends he is entitled to a new trial on this ground.

Other jurisdictions have addressed issues of a juror's lack of candor or of supplying incorrect information on voir dire, and have determined under certain circumstances it can justify the granting of a new trial or other relief. See People v. Bastardo, 191 Colo. 521, 554 P.2d 297, 301 (1976); Baker v. Keller, 15 Ohio Misc. 215, 44 Ohio Op.2d 432, 436, 237 N.E.2d 629, 634 (1968); Hot Springs St. Ry. Co. v. Adams, 226 S.W.2d 354, 355 (Ark. 1950); People v. Borrelli, 624 P.2d 900, 903 (Colo. App. 1980); State v. Tresvant, 359 So.2d 524, 526 (Fla. Dist. Ct. App. 1978).

On juror impartiality, the Iowa Supreme Court has said:

> Confidence in the fairness and impartiality of each member of a jury, which shall be sworn to try a man on a charge involving his life or liberty, is of the greatest importance to the welfare of the state. Indeed, it is of such paramount importance to every citizen that the time and expense necessary to secure jurors as to whom no doubt may rightly exist is an insignificant consideration.

State v. Beckwith, 242 Iowa 228, 238-39, 46 N.W.2d 20, 26 (1951). See also State v. Woodyard, 414 N.W.2d 654, 657 (Iowa App. 1987).

When defendant asked the court to question the juror there was evidence the juror had given incorrect information on voir dire. An alternate juror was available to serve if a showing was made the juror had not been truthful with his answers and a further inquiry had exhibited he could not serve impartially. If the juror felt his response to questions on voir dire had not been properly interpreted or he had no knowledge of Summers, these reasons would have been of record so as a reviewing court we could properly assess the issue. However, because of our holding, we need not address the issue of a new trial on this ground.

III.

Defendant filed pro se after filing deadlines an additional brief. He challenged certain instructions and contended his trial counsel was ineffective and he was denied certain constitutional safeguards. Because we have reversed his conviction on other grounds, we find it unnecessary to determine whether we should address the issues raised in his brief.

REVERSED AND REMANDED FOR A NEW TRIAL.

Oxberger, C.J., concurs; Donielson, J., dissents.

DONIELSON, J. (dissenting)

It has been stated that a cautionary instruction should be given when evidence of a guilty plea is used. United States v. Wiesle, 542 F.2d 61, 62 (8th Cir. 1976). However, the failure to give a special instruction does not always constitute reversible error.

It is significant in Hendrickson's case, as it was in Wiesle, that the government did not stress the fact that the accomplice had pled guilty or suggest to the jury that it could infer the defendant's guilt from the witness's guilty plea. 542 F.2d at 63. Both parties discussed Black's plea in terms of its permissible use for credibility. The instruction given on credibility was sufficient to protect the rights of the defendant.

An additional instruction would be redundant. As the majority pointed out, Black testified that he pled guilty to first-degree theft and pursuant to a plea agreement, the other charges were dismissed. As a part of the agreement, Black was to provide a statement and to testify truthfully. Black's testimony was to be weighed by the jury when assessing his credibility. The instruction given directed the jury's attention to the witness's "interest or lack of interest in the result of the trial, the motives, if any actuating them as witnesses, . . . whether their testimony is corroborated or contradicted by other witnesses or facts proven, ..." The instruction given

sufficiently guided the jury on the issue of Black's credibility.

It is the jury's role to choose between conflicting testimony. Where defendant's and Black's testimony contradicted each other, it is up to the jury to decide which witness is more credible based on the factors listed in the instruction. Black's guilty plea and the surrounding circumstances are elements of Black's credibility. The jury was adequately instructed on credibility. The failure to give the special instruction did not unduly prejudice defendant.