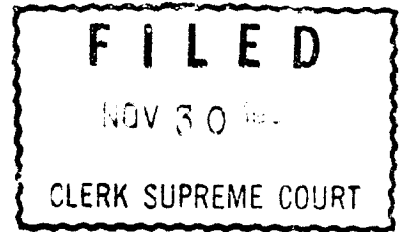


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 30, 1987

vs.

)

331

DENNIS LAMAR,

)

7-267
86-1044

Defendant-Appellant.

)

Appeal from the Iowa District Court for Jasper County (S-511), Michael J. Streit, Judge.

Defendant appeals his convictions for one count of first-degree murder and three counts of first-degree robbery. **AFFIRMED.**

Robert J. Kromminga, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.**332**

The defendant appeals his convictions for one count of first-degree murder and three counts of first-degree robbery. The defendant contends he should have been convicted of only one robbery count because he committed only one robbery, even though he assaulted three people in the course of that one robbery. He argues that conviction of three counts violated the fifth amendment privilege against double punishment for the same offense. In addition, the defendant challenges several evidentiary rulings. We affirm.

In September 1985 a Hy-Vee store in Newton was robbed. Daniel McPherren, one of several Newton police officers who responded to the robbery call, was shot and killed in the aftermath of the robbery. The defendant, Dennis Lamar, was one of two persons implicated in the robbery and murder. The State's theory is that Lamar entered the store, assaulted three store employees, and took money while his companion, Lawrence Gladson, remained outside the store. When Lamar emerged from the store and was confronted by officers, the State alleges, Gladson shot and killed Officer McPherren to facilitate Lamar's escape. Lamar acknowledges robbing the Hy-Vee, store but denies that he and Gladson were acting in concert or that Gladson's fatal shot can render Lamar guilty of murder under the felony-murder rule. Lamar alleges that Gladson was merely riding with him, that Gladson disapproved of the robbery plan and did not participate in the robbery, but that when the robbery went awry and Lamar was confronted by police officers, Gladson panicked and shot a police officer to avoid Gladson's own arrest.

Lamar was eventually charged with three counts of first-degree robbery and one count of first-degree murder. In charging three counts of robbery, the State's theory was that Lamar had committed a separate robbery on each

of the three store employees he assaulted. A jury found Lamar guilty of all the crimes charged.

I. Robbery. Lamar contends that his conviction and punishment for three separate robbery counts violated the fifth amendment protection against double punishment for the same offense. He contends that he committed only a single robbery—the robbery of the Hy-Vee store—and that his assaults on three different Hy-Vee employees were simply acts in furtherance of the single robbery. We find no Iowa case directly on point factually to this case. A similar fact pattern, however, was addressed in the Florida case of Brown v. State, 413 So. 2d 1273 (Fla. Dist. Ct. App. 1982), aff'd, 430 So. 2d 446 (Fla. 1983). In that case, the defendant was convicted of two counts of armed robbery for demanding money at gunpoint from one store employee and then from another. The Florida Court of Appeals held that adjudicating a defendant guilty of two counts of armed robbery was not error on the ground that the offense constituted a single criminal transaction where the defendant took two separate quantities of money that were in the custody of two separate individuals. 413 So. 2d at 1274. The appeals court noted that separate charges were proper in light of the fact that each taking of money was accompanied by force, violence, assault, or putting in fear each individual involved. Id. The Supreme Court of Florida affirmed the case noting that the dispositive factor regarding whether multiple robberies had been committed was whether there had been "successive and distinct forceful takings with a separate and independent intent for each transaction." 430 So. 2d at 447. We adopt the rationale of the Brown case. In the instant case, Lamar took three separate quantities of money from three separate sources—each source having a different custodian. Each taking of money was distinct and forceful and therefore, we hold that the defendant's conviction and punishment for three separate robbery counts was proper.

II. Scope of Trial Information. The defendant also asserts that the district court erred by permitting a police officer to testify that a certain hole in the Hy-Vee store wall had lead tracings which indicated it was a bullet hole. The hole in question was directly behind the place where a police officer had been standing. The testimony was apparently offered to suggest that shots had been fired toward police officers in addition to the fatal shot fired by Gladson. Such testimony was intended to buttress the State's theory that Lamar and Gladson were acting in concert and that Lamar could be held responsible under the felony-murder rule for the fatal shot fired by Gladson. The defendant contends that the testimony should have been excluded because it was outside the minutes of testimony as reflected in the trial information.

The State is required to provide the following regarding its minutes of proposed evidence:

3. Witness names and minutes. The prosecuting attorney shall, at the time of filing such information, also file the minutes of evidence of the witnesses which shall consist of a notice in writing stating the name, place of residence and occupation of each witness upon whose expected testimony the information is based, and a full and fair statement of the witness' expected testimony.

Iowa R. Crim. P. 5(3). The Iowa Supreme Court has held that the minutes need not detail every expected aspect of the testimony. State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983). Rather, the minute "need only be sufficient 'to alert defendant generally to the source and nature of the evidence against him.'" Id. (citation omitted). The court in Lord noted that a minute should serve to put a defendant "on notice of the necessity of further investigation of the witness' probable testimony." Id. In the instant case, we hold that the minutes were sufficient to alert the defendant generally that the police officer would testify regarding the exchange of gunfire following the robbery. The minutes noted that the police officer would testify about the various persons involved in the shooting,

how the exchange of gunfire transpired, where the various individuals were positioned, and the assistance he gave in searching the area where the gunfire had taken place. Although the minutes did not specifically detail that the police officer would testify that a hole found in the grocery store wall contained lead tracings which indicated that it was a bullet hole, this challenged testimony was consistent with the overall nature of the police officer's testimony regarding the gunfire exchange.

III. Hearsay Evidence. Lamar's final contention is that the district court abused its discretion by excluding as hearsay certain testimony offered by the defense. Specifically, the testimony dealt with (1) misgivings expressed by Gladson when he first heard of Lamar's robbery proposal, (2) Gladson's desire to have the names of individuals who might purchase stolen firearms from him, and (3) Lamar's intent or motivation in going to Newton on the night of the robbery. Each specific portion of testimony will be discussed separately.

A. The defendant argues that the district court erroneously excluded as hearsay, proposed testimony about Gladson's misgivings in participating in the robbery. After examining the record, we conclude that the trial court did not exclude this testimony as being hearsay. Rather, the record shows that the State's hearsay objection was, in fact, overruled. Therefore, we hold that the defendant has no alleged error regarding this testimony to complain of on appeal.

B. Lamar also claims that the district court erred in excluding as hearsay, testimony regarding Gladson's desire to have the names of individuals who might purchase stolen firearms from him. The record does not reveal any definitive ruling by the district court regarding the State's hearsay objection. The court and attorneys discussed the hearsay issue off the record. Following that discussion the court directed the defense counsel to ask another question.

From the record before us, we are not able to find that the district court ruled against the defendant regarding this testimony. Even assuming that the defendant was ruled against on this proposed evidence, any error in such a ruling has not been preserved due to the defendant's failure to make an offer of proof. See Iowa R. Evid. 103(a)(2). We therefore find no basis upon which to reverse regarding this evidence.

C. The defendant's final allegation of error is that the district court improperly excluded as hearsay, testimony concerning Lamar's intent or motivation in going to Newton on the night of the robbery. The testimony objected to by the State dealt with a telephone conversation that the defense witness, Donald Novak, had with Lamar. The substance of the conversation was that Lamar would pick up Gladson and they would attempt to sell some jewelry and guns. We believe that the district court properly excluded this testimony as hearsay. Hearsay is a statement, other than one made by a declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. State v. Maniccia, 355 N.W.2d 256, 260 (Iowa App. 1984). We look to a statement's purpose in deciding whether it is hearsay. State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). In the instant case, the proposed testimony was meant to show what Lamar's intent in going to Newton was. The testimony was offered to prove that Lamar was intending to sell guns and jewelry and therefore, it was designed to establish the truth of the alleged conversation. Thus, it is hearsay and the district court did not err.

AFFIRMED.