FILED
JAN 26 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

123

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BYRON GRIFFIN,

Defendant-Appellant.

Filed January 26, 1982

1-352
65125

Appeal from Polk District Court, Joel D. Novak, Judge.

Defendant appeals from his conviction of burglary in the first degree and robbery in the second degree. AFFIRMED.

Gary B. Garrison, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

The defendant appeals from his conviction of burglary in the first degree and robbery in the second degree. We affirm.

Testimony was conflicting as to the events which led to the defendant's arrest and trial. During the trial, the judge allowed in evidence of the defendant's prior conviction for breaking and entering, which was offered for the purpose of impeaching the defendant's testimony.

About three and one-half hours after the jury began deliberating, the jury foreman sent a note to the judge which read: "What is the definition of physical injury as stated in instruction number 11 item 6? And how does it differ from the definition of assault as given in Instruction number 19?" The trial judge, outside the presence of the defendant and the prosecutor, sent back this response: "You will have to define terms from the language given you in the instructions and reconcile any definitions as best you can by reading the instructions. Judge Novak." The defendant moved for a new trial on the ground that the judge had violated Iowa R. Crim. P. 18(7)(g) and 25(1). The judge denied the motion, and the defendant appealed from his conviction.

I. The Communication between Judge and Jury.

The defendant argues that the trial judge erred by failing to grant a new trial after he communicated with the jury during its deliberation outside the presence of the defendant. We disagree.

The trial judge denied the defendant's motion for a new trial on the ground that Rule 18 requires the defendant's presence only when additional instruction is given to the jury and, in this case, no instruction was given.

The Iowa Supreme Court in State v. Baumann, 236 N.W.2d 361 (Iowa 1975), interpreted the statute [then Code § 784.2] to require defense counsel's presence only where information is given to the jury. However, the legislature has changed

the law since Baumann was decided. The statute at that time stated, "After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court and, upon its being brought in, the information required [emphasis added] must be given as provided by law, in the presence of or after oral notice to the county attorney and defendant's counsel."

The Code was changed in 1979. The current rule 18(7)(g) reads "After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court and, upon its being brought in, the information required may be given, in the discretion of the trial court. Where further information as to the testimony which was given at trial is taken by the jury, this shall be accomplished by the court reporter or other appropriate official reading from the reporter's notes. Where the court gives the jury additional instructions, this shall appear of record. Provided that the procedures described in this section [emphasis added] shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived."

The defendant argues that the legislature meant to change the old rule, since it changed the language of the statute. The plain language of the new statute provides that all the procedures described in the section will take place in the defendant's presence. It is not limited to when information is given to the jury as under the old statute.

The defendant says he should have been present in order to have the opportunity to persuade the judge to give instructions which are favorable to his defense. He also says he should have been present so that he could have objected to the decision of the court whether to provide additional information or not.

We are bound by the supreme court's ruling in State v. Dreessen, 305 N.W.2d 438 (Iowa 1981). Although the court based its decision on cases which were decided prior to the change in statutory language, the court must have considered the change in the language of the statute as the change was then in effect.

Therefore, the trial judge did not err by failing to grant a new trial.

II. The Evidence of Defendant's Prior Conviction.

The defendant next argues the trial judge erred by allowing in evidence of defendant's prior felony conviction for impeachment purposes and by giving an impeachment instruction. The defendant's prior conviction was for breaking and entering. State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974), allows such impeachment evidence only if the felony involved dishonesty or false statement. The defendant argues that breaking and entering does not involve dishonesty or false statement and therefore it was error to allow in the prior conviction to impeach his testimony. We disagree. Although the Iowa Supreme Court has not specifically held that a breaking and entering conviction may be used to impeach, support for the proposition may be found in State v. Cuevas, 282 N.W.2d 74 (Iowa 1979). The trial court allowed in evidence of a breaking and entering conviction to impeach the testimony of a witness. The Supreme Court was asked to rule on the correctness of the trial court's refusal to allow in evidence of two other felony convictions. The court upheld the trial court's ruling that only the breaking and entering conviction could be used. We think this is persuasive and hold that breaking and entering convictions may be used to impeach so long as the other Martin criteria are met. The trial court did not err in ruling that the defendant's prior conviction could be used for the purpose of impeachment and did not err by giving an impeachment instruction.

AFFIRMED.