

IN THE COURT OF APPEALS OF IOWA

No. 1-372 / 89-1301

FILED

OCT 29 1991

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

585

RAYMOND F. NEUBAUER,

Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury
County, Cameron B. Arnold, District Associate Judge.

Neubauer appeals from his conviction, following a jury
trial, for fourth-degree theft. **AFFIRMED.**

Timothy W. Shuminsky of Shuminsky, Shuminsky & Molstad,
Sioux City, for appellant.

Bonnie J. Campbell, Attorney General, Thomas Fisher,
Assistant Attorney General, and Thomas S. Mullin, County
Attorney, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Raymond Neubauer appeals from his conviction, following a jury trial, for fourth-degree theft. Defendant was charged with removing a computer program from a Sears store in Sioux City, Iowa. The incident was recorded by two video cameras set up in the store. The videotapes were exhibits at trial and were shown to the jury during the trial. The defendant contends the trial court abused its discretion in allowing two store employees to testify regarding their opinion of what computer software program was depicted in the tape, and the trial court erred in the manner it provided for the jury to view the tapes during deliberations. The defendant also contends he was denied an impartial jury. We affirm.

On December 24, 1988, defendant purchased a "Personal Newsletter" computer software program from the Sears store. Defendant returned to the store on December 26, 1988, with the "Personal Newsletter" program and his computer. He talked to a store employee about repairing the computer and to find out how the programs worked. The State claims as the defendant was leaving he took a software program called "Quintet." Defendant claims he picked up a program he had previously purchased called a "Personal Newsletter" from a shelf where it was put while he discussed it with the store employee. Defendant's act of picking up a computer program from a shelf was captured on videotape by the store's security camera.

Store employee and department manager Cason testified she was familiar with a computer program known as "Quintet," and on December 26, 1988, the store had one copy of that particular program in stock. Cason further testified she had last seen the "Quintet" program on the store shelf on December 26, 1988 at about 2:00 p.m. Cason testified on the morning of December 27, 1988, she looked at a portion of the videotape and was asked to determine the name and value of the missing program, and she determined the missing program was "Quintet."

A store employee Jeffords testified between the time defendant arrived at the computer department and videotaping began, the software programs the defendant brought with him were not moved except from a shopping cart to a service counter. Over objection, the videotape was shown during the Jeffords' testimony and he commented on the events, and expressed his opinions as to the name of the software program the video showed defendant taking.

The defendant testified while exchanging the defective computer, he and Jeffords made at least two trips to the shelf where the software programs were stored, and eventually all of the programs he had brought back to the store with him were returned to the shelf. Defendant further testified these events occurred between his arrival in the computer department and the time when videotaping started.

The first question is whether the trial court abused its discretion in allowing the two Sears' employees to testify the computer program depicted in the videotape resembled a program called "Quintet."

The Quintet program the State claims was taken was not found, and the store did not have and was not able to obtain a like copy. The State advances the employees were properly allowed to give their opinions of the program depicted in the videotape because (1) they had knowledge of what was offered for sale in their department, (2) they could give a description of the software boxes and their location, (3) they were familiar with the "Quintet" program, and (4) they had seen the program in that location the day before, and they knew the size, shape, and the design of the box. The State contends it was not necessary that identity be an absolute. The admission of opinion testimony is within the discretion of the trial court. Leeway is given because the trier of fact is free to reject the opinion. See Bengford v. Carlem Corp., 156 N.W.2d 855, 865-66 (Iowa 1968). Iowa is committed to a liberal rule on the admission of opinion testimony. See State v. Hummell, 228 N.W.2d 77, 82 (Iowa 1975). The trial court did not abuse its discretion.

The defendant's next contention is the trial court did not properly handle a request by the jury to view the videotape after deliberations had commenced. We have

reviewed the record, and find it does not support the defendant's statement as to how the viewing was handled. Our review of the record that was made convinces us the trial court properly handled this matter. We find no error here.

Defendant's last contention is he did not have a fair and impartial jury. The defendant was a police officer. An attorney in Sioux City visited with one of the jurors after he had been chosen but before the case was decided. According to the attorney, the juror told her he was on the jury, and then said, "Your're not supposed to have any preconceived notions, but it's hard not to. He knew the law." The juror denied making this statement. The trial court has broad discretion in determining if alleged jury misconduct is prejudicial. State v. Smith, 240 N.W.2d 693, 696 (Iowa 1976). A juror's false response during voir dire does not invalidate a verdict if the incorrect information only indicates a remote or speculative influence on the verdict. See State v. Hendrickson, 444 N.W.2d 468, 472 (Iowa 1989). We affirm.

AFFIRMED.