FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

114

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 20, 1984
vs.	)	
NORMAN H. HOLBY,	)	4-42 / 83-234
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Story County - M. D. Seiser, Judge.

Defendant appeals his conviction of first degree robbery in violation of Iowa Code section 711.2. AFFIRMED.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

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

Defendant appeals his conviction of first-degree robbery in violation of Iowa Code section 711.2. He asserted a defense of intoxication and alleges that the trial court's instruction about his expert's testimony improperly called into question the credibility of defendant's testimony about his alcohol consumption and improperly emphasized the State's theory that he had not been intoxicated. We affirm.

In support of his intoxication defense, defendant presented an expert witness who testified about the likely effects of the amount of alcohol defendant allegedly consumed. The court instructed the jury about expert testimony in general; the challenged portion of that instruction is as follows:

> If you find that an opinion or conclusion given by an expert witness is based upon incorrect or unproven facts, then you do not have to accept that opinion or conclusion as true but may reject it.

Defendant contends this language improperly singled out for scrutiny the credibility of his testimony about his alcohol consumption. He also contends the challenged language improperly emphasized the State's theory that he had not been intoxicated. The latter argument, regarding undue emphasis of the State's theory of the case, was not raised below. We therefore do not consider it here. State v. Mark, 286 N.W.2d 396, 408 (Iowa 1979).

In addition, we find no merit in defendant's claim that the challenged language unfairly singled out the question of his credibility. It is true, of course, that a court "should not single out any witness and burden his testimony with any suggestion which might indicate to the jury that the court believed the witness was likely to testify falsely." State v. Feddersen, 230 N.W.2d 510, 515 (Iowa 1975). In this case, however, the court did not do so. The challenged statement does not at all refer to defendant's credibility regarding his claim of excessive alcohol consumption or in any way lead the jury to disbelieve defendant's testimony. Instead, the statement merely tells the jury that the expert's testimony may be

rejected if the jury concludes that that testimony was not based on an accurate factual background. For example, the jury could accept the expert's testimony if it believed that defendant drank twenty beers as he claimed or it could reject the expert's testimony by relying instead on other witnesses who observed defendant that evening and asserted that he had less than twelve beers and did not appear at all intoxicated. Defendant's allegations of prejudice from this neutral language are speculative at best.

Finding no error, we affirm the judgment of the trial court.

AFFIRMED.

All judges concur, except Schlegel, J., who specially concurs.

SCHLEGEL, J. (specially concurring)

I concur in the result reached by the majority opinion. I write separately to express my views about the propriety of the challenged portion of instruction fourteen.

Instruction fourteen, with the exception of the challenged portion, is II Iowa Uniform Jury Instruction Number 235. The uniform jury instruction fully and fairly sets out the Iowa law on the use of an expert witness in a criminal trial and provides the jury with the tools to determine the weight to be given to an expert's testimony. I believe the additional language included in that instruction by the trial court is cumulative and creates the danger of singling out for scrutiny the expert's testimony. I agree with the majority that the defendant did not suffer undue prejudice as a result of the instruction in this case, but I would not approve the instruction to be given in other cases.