

IN THE COURT OF APPEALS OF IOWA

No. 8-404 / 97-0877

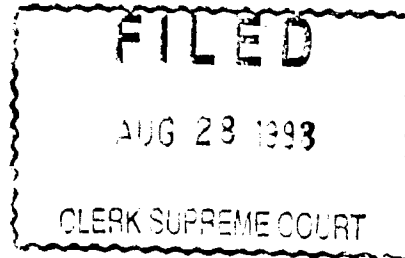
STATE OF IOWA,

Plaintiff-Appellee,

vs.

DEROME MARION ROBERTSON,

Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, L. Vern Robinson,
Judge.

Defendant appeals the judgment and sentence entered upon his conviction of first-degree robbery and possession of an offensive weapon in violation of Iowa Code sections 711.1, 711.2, 724.3, and 902.7 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

PER CURIAM.

Defendant-appellant Derome Marion Robertson appeals the judgment and sentence entered upon his conviction of first-degree robbery and possession of an offensive weapon in violation of Iowa Code sections 711.1, 711.2, 724.3, and 902.7 (1995). Defendant contends: (1) the trial court should not have denied his motion to suppress evidence; and (2) the trial court incorrectly instructed the jury on reasonable doubt. We affirm.

The Kum & Go on Mt. Vernon Road in Cedar Rapids was robbed at about 4 a.m. on November 14, 1996. The clerk was threatened with a sawed-off shotgun. The clerk claimed there were two robbers. She identified them as African American men wearing masks. She further alleged they left the store on foot going in opposite directions.

Police officers in the area of the convenience store arrived within minutes of the robbery report. There was no sign of the robbers in the immediate area. The officers began to drive the streets. A short distance from the store, police talked to a girl delivering papers who told the officers she had not seen anyone on foot, but had recently seen a car come from the direction of the convenience store, turn around, and park. She had not seen anyone leave the car. The car was parked about three or four blocks from the store.

Police surrounded the car. They saw two black men peering over the dashboard. Defendant was the driver of the car; Christopher Kibler was the

passenger. A young girl was in the back seat. The occupants were ordered out of the car. Police were able to see a stocking cap, latex gloves, and dark clothing inside the car. When the police asked to search the car, they were told they could not. Without the benefit of a warrant, the car was searched and police found dark clothing, a dark ski mask, a stocking cap with eye holes cut out of it, latex gloves, a sawed-off shotgun, and \$82 cash consisting of one \$10 bill, eleven \$5 bills, and seventeen \$1 bills.

Defendant and Kibler were arrested and charged with first-degree robbery and possession of an offensive weapon. Defendant filed a motion to suppress the evidence obtained as a result of the stop and search. He contends the police did not have reasonable suspicion to stop and search his car. The district court denied the motion.

The case was tried to a jury, and the jury received the following instruction on reasonable doubt:

A reasonable doubt is one that fairly and naturally arises from the evidence or lack of evidence produced by the State. It is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all doubt.

The court's instruction differed from the uniform jury instruction and defendant objected, stating the instruction did not tell the jury to consider all the evidence. The court overruled the objection.

The jury found defendant guilty as charged. The court sentenced defendant to a term of imprisonment not to exceed twenty-five years on the robbery offense and up to five years on the possession offense; sentences to run concurrently.

Defendant maintains there was no reasonable suspicion to justify the stop of his vehicle and, therefore, the district court erred in denying his motion to suppress. This is a constitutional challenge. We review de novo considering all the circumstances. *See State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997).

At the time of the stop, the officers were investigating a specific crime within minutes of the event. *See State v. Lamp*, 322 N.W.2d 48, 51 (Iowa 1982); *State v. Varvel*, 436 N.W.2d 649, 651 (Iowa App. 1988). They found no other people or activity in the area. It was 4 a.m. There were no other cars or people moving on the streets. The men the officers observed in the car were of the same race and number as the men allegedly having robbed the store. The newspaper carrier related the car came from the area of the robbery. The officers can rely on information provided by another. *State v. Markus*, 478 N.W.2d 405, 407 (Iowa App. 1991). These were sufficient facts to support a reasonable belief that criminal activity may have occurred. *Lamp*, 322 N.W.2d at 51. The officers therefore made a valid investigatory stop and were entitled to seize incriminating evidence in plain view. *See State v. Chrisman*, 514 N.W.2d 57, 60 (Iowa 1994). We affirm on this issue.

Defendant next contends the trial court erred in instructing the jury on reasonable doubt because: (1) the court failed to tell the jury it must consider all the

evidence to determine whether defendant was guilty; and (2) the court failed to tell the jury it only needed to consider the evidence or lack of evidence presented by the State in order to find reasonable doubt and therefore find defendant not guilty.

The State argues, among other things, the court's instructions to the jury in their entirety adequately instructed the jury to consider all evidence, and if the evidence or lack of evidence produced by the State did not convince them defendant was guilty beyond a reasonable doubt, they should acquit. The State also contends defendant did not preserve the second argument regarding the instruction because he did not raise it below.

Defendant's first claim was preserved for review; the second was not. *See State v. Hepperle*, 530 N.W.2d 735, 738-39 (Iowa 1995). The instruction given adequately covered defendant's first complaint. The fact the requested instruction may have been clearer is not sufficient for reversal as long as the instruction given correctly covered the subject matter. *See State v. Uthe*, 542 N.W.2d 810, 815 (Iowa 1996); *State v. Doss*, 355 N.W.2d 874, 881 (Iowa 1984). We determine the instruction given did properly consider the subject matter. We affirm.

AFFIRMED.