FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 26, 1986
vs.	)	
COLIN DEAN KENNARD,	)	5-643 85-296
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Warren County (No. 8665) - James W. Brown, Judge.

Defendant appeals his conviction for second-degree burlgary, asserting that the trial court erred in (1) failing to grant a mistrial on the ground evidence of defendant's prior crimes was erroneously admitted; and (2) failing to grant defendant's motion for a new trial on the ground pretrial publicity denied him a fair trial. **AFFIRMED.**

Robert Stuyvesant of Schooler, Stuyvesant & Benton, Carlisle, for defendant-appellant.

Thomas J. Miller, Attorney General; Valencia Voyd McCown, Assistant Attorney General; and John W. Criswell, Warren County Attorney, for plaintiff-appellee.

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

On July 23, 1984, Mark Davitt of Indianola, Iowa, filed a complaint indicating that he was awakened when defendant Colin Dean Kennard came through the front door of the Davitt apartment at approximately 5:20 A.M. Mr. Davitt indicated that Kennard immediately turned and left the apartment with Mr. Davitt in pursuit. Mr. Davitt did eventually confront Kennard, who stated that he was told there was a party at this particular apartment complex and that the apartment where the party was would have a light on and the door would be unlocked. After this meeting, Kennard got in his car and left. Mr. Davitt called the police.

Kennard was arrested on July 23, 1984, by Indianola police officers and charged with second-degree burglary pursuant to Iowa Code sections 713.1 and 713.5. At trial one arresting officer testified to the circumstances of the arrest. Kennard concealed himself in a bedroom of his girlfriend's apartment when police came to the apartment in the course of their investigation. When his girlfriend answered the door, she told the police that Kennard was not there but he did live with her. The officers thanked her and returned to their car, but then decided to ask the girlfriend about the whereabouts of her car on July 23. The girlfriend answered the door again and allowed the officers to enter the apartment. While the officers questioned her, her child went towards another room and started to talk with someone. When the child tried to enter the room, he was pushed out. The officers then ordered Kennard to come out of the room. When Kennard came out, he explained his reluctance to the officers. The officer testified, "Colin right away explained that he was scared and that he had been in trouble with the law before."

Defense counsel did not object to this testimony and move for a mistrial immediately, but rather waited until the close of all the officer's testimony.

The trial court ruled that the motion was not timely made and that the testimony was not so prejudicial as to warrant a mistrial. Because no reference was made to the nature of any difficulty Kennard had with the law, the court ruled any prejudice could be overcome by a cautionary jury instruction. No instruction was given because defense counsel decided not to draw further attention to the officer's remarks.

The jury returned a verdict of guilty. After the jury was excused, defense counsel became aware of a newspaper article printed the morning that the jury began deliberation. On the front page of the local paper it referred to an individual who had broken into fifty-five homes by looking for unlocked doors and walking in. Kennard likewise had opened an unlocked apartment door.

Defense counsel immediately brought the matter to the attention of the court. Upon investigation, defense counsel determined at least two jurors had seen the article after the conclusion of the evidence but prior to beginning deliberation on Kennard's case. Kennard moved for a new trial on the ground of prejudice. Defense counsel admitted at the hearing on the motion that neither juror who admitted to reading the article said that the article influenced the verdict. The defense presented no testimony by affidavit or otherwise to support the motion. The trial court denied the motion.

On appeal, Kennard asserts that the trial court erred in failing to grant a mistrial on the ground that evidence that Kennard had been in trouble with the law before was erroneously admitted. Kennard also contends that the court erred in failing to grant his motion for a new trial on the ground that the newspaper publicity regarding similar crimes denied him a fair trial.

Motion for Mistrial. Kennard contends that the trial court abused its discretion in denying his motion for mistrial. During the direct examination of the arresting officer by the prosecution, the following exchange occurred:

> Q. You have established that Colin Kennard was, in fact, in the apartment? A. Yes, sir.
> Q. What happened then, Don? A. Colin right away explained that he was scared and that he had been in trouble with the law before.

Kennard argues that the officer's rendition of Kennard's statement constituted impermissible prior crimes evidence under Iowa R. Evid. 404(b).

The trial court has broad discretion in ruling on a motion for mistrial because ordinarily it is in the best position to determine when a mistrial is justified. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983); State v. Washington, 308 N.W.2d 422, 424 (Iowa 1981); State v. Garren, 220 N.W.2d 898, 901 (Iowa 1974). The defendant bears the burden of demonstrating that the trial court's denial of his motion was an abuse of discretion. State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976). To do so, he must show that he was prejudiced by the circumstances which he asserts as grounds for the mistrial. State v. Dalgliesh, 223 N.W.2d 627, 628 (Iowa 1974). "Defendant is entitled to a new trial only where it is manifest that the prejudicial effect remained with the jury." State v. Burrell, 255 N.W.2d 119, 122 (Iowa 1977). The general rule is that improper testimony "is not unduly prejudicial if the court admonishes the jury." Id. "Only in those exceptional cases in which the prejudicial effect of such a comment cannot be eliminated will an admonition of the court be found insufficient." State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982).

The officer's reference to Kennard's prior "trouble with the law" was brief, indirect, and did not detail specific prior criminal activity by Kennard. The testimony reiterated what Kennard himself volunteered during the arrest process. From the reference it is not clear whether any "trouble" Kennard had with the law even involved arrest, incarceration, or a crime. Furthermore, Kennard's girlfriend testified without objection that any trouble Kennard may have had

with the law involved his failure to pay child support, and she thought that was why the police came to her apartment on July 23 looking for him.

In this case, the trial court was in a better position than we to gauge the effect of the officer's volunteered response on the jury. The court was willing to admonish the jury, but defense counsel made a tactical decision not to bring the statement to the jury's attention again. The defense cannot voluntarily waive the avenue available for dispelling prejudice and then claim error on appeal.

Kennard has not persuaded us that the officer's answer was prejudicial. Accordingly, we find that the trial court did not abuse its discretion in denying the motion for mistrial.

Motion for New Trial. Kennard next argues that the trial court erred in failing to grant his motion for a new trial. Kennard's motion was based on the fact that on the morning of the day that deliberation began at least two jurors saw the newspaper article in the Record Herald and Indianola Tribune about crimes similar to the one which Kennard was alleged to have committed.

The front page newspaper article published on November 28, 1984, was entitled "Simple Precautionary Measures Would Help Deter Thieves, Burglars." The article began by referring to an individual who committed at least fifty-five home burglaries in Indianola simply by going door to door until he found an unlocked one. The article continued to discuss car theft, self-defense techniques, and other simple precautions that people can take to avoid crime.

Where juror exposure to publicity is shown, defendant will be granted a mistrial if he can demonstrate that actual prejudice resulted or that the publicity was so pervasive or inflammatory that prejudice must be presumed. State v. Marr, 316 N.W.2d 176, 180 (Iowa 1982); State v. Bigley, 202 N.W.2d 56, 58 (Iowa 1972). "As a general rule, this court will not reverse a trial court's ruling

on a mistrial motion based on juror exposure to potentially prejudicial materials absent error amounting to an abuse of discretion." Marr, 316 N.W.2d at 181. Media accounts which are factual and informative in nature are not presumed prejudicial. State v. Spargo, 364 N.W.2d 203, 208 (Iowa 1985) (concerning publicity's effect on motion for change of venue). An impartial jury does not require "complete juror ignorance of issues and events." United States v. Garza, 664 F.2d 135, 138 (7th Cir. 1981).

In this case, the newspaper article did not refer to Kennard nor was it directed toward his trial. The article did not even dwell upon burglaries. The portion challenged consists of two sentences.

We conclude that Kennard failed to establish that jury exposure to this newspaper article resulted in actual prejudice. Neither does the article rise to the level of being presumptively inflammatory. We, therefore, affirm the trial court's denial of the motion for new trial.

AFFIRMED.