IN THE COURT OF APPEALS OF IOWA

No. 3-346 / 92-0557

FILED
JAN 25 1994
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

GREGORY ALLEN HASTINGS,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Roger F. Peterson, Judge.

The defendant appeals the district court's judgment and sentence, following a jury trial, finding him guilty of two counts of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Ray Walton, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

The defendant, Gregory Allen Hastings, appeals the district court's judgment and sentence, following a jury trial, finding him guilty of two counts of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1991). Hastings argues the trial court abused its discretion in permitting only a portion of a witness's direct testimony to be read to the jury during deliberations where the cross-examination of the witness's testimony was not read at that time.

Hastings was charged by trial information with two counts of first-degree robbery. The charges stem from two separate incidents which occurred on February 6, 1988. At approximately 4:45 p.m. on February 6, Patricia Moore, a clerk at Schoepske's Third Street Market, noticed a man enter the store. The man told her to open up the cash register and brandished a gun in her face. Moore gave him the money. She described the man as wearing a green army jacket, a dark blue or black stocking hat, olive colored gloves, and a scarf. Moore testified at defendant's trial that she did not get a good look at the robber because he had a scarf over his face. Moore testified that she believed the gun used in the robbery to be real.

A second robbery took place on the same day at Wolter's Mini Mart. Linda Meyers, a clerk at the store, testified that at approximately 7:15 p.m. a man walked through the front door holding a scarf to his face. She stated the man

pulled a gun out of his pocket and told her to open the cash drawer. The robber took the money and walked out the door, stating "Thanks, have a nice night." Meyers stated she was unable to see the man's face because his hat was pulled down to his eyes.

A number of witnesses testified that they were at or near Schoepske's market at the time of the robbery there. Michelle Hahn testified she noticed a man buying cigarettes when she was at the store. Hahn testified she noticed the same man sitting on the steps outside the store. Hahn stated the man was wearing a green jacket, a beige hat, and a beige scarf. Hahn later identified Hastings from a police photo lineup as the man she saw that evening. Roy Jones also testified he was at the store with Hahn. Jones also identified Hastings as the man he saw at the store.

Robert Hansen, an acquaintance of Hastings, testified that he stopped at the Winning Edge bar on the night in question and saw Hastings at the bar. Hastings testified that as he was driving through the parking lot of the bar, he noticed a man wearing a green army jacket standing next to Hastings' car. The owner of the Winning Edge testified that Hastings was at the bar on the night in question. The owner stated Hastings left on two occasions but returned fifteen or twenty minutes later at approximately 7:30 p.m.

The police discovered a green army jacket and a dark colored scarf in a dumpster located at the Winning Edge bar. They also found a pair of green gloves tucked behind

the dumpster and a blue stocking cap about forty to fifty feet away from the dumpster. The police tested for fingerprints and shoeprints found at the crime scenes, but the evidence was inconclusive. A search of Hastings' home revealed matchbooks that were similar to those found in the green army jacket from the dumpster. The matchbooks, however, were negative for fingerprints. Hair found on the hat was similar to Hastings' hair, but was inconclusive. A cigarette butt found outside the door of Schoepske's revealed that the person who smoked it was a secretor with a blood type of O. Hastings had type O blood.

In his defense, Hastings presented numerous witnesses who testified that they saw him at the Winning Edge bar on the night in question. Julie Martinson testified she was working at the Winning Edge on the night of February 6. Martinson testified Hastings was in the bar on the night of the robbery at Wolter's. She stated that when they found out that Wolter's had been robbed, a number of people stood at the window to look out at the store, including Hastings. Eric Pederson, a friend of Hastings, testified that he saw Hastings at the Winning Edge at 5 p.m. Hastings stated Pederson had asked Hastings if Pederson could borrow $175 from him, which Hastings agreed to. John Miller testified he saw Hastings at the bar around 5 to 5:30 p.m. Miller testified he saw Hastings wearing a silver or light grey jacket.

Hastings testified he was at the Winning Edge on the night in question. Hastings admitted he owned a gun, but stated it was a dull grey gun, not a shiny silver one as described by Moore. Hastings also admitted he threw the gun into the river because he was afraid the police were looking for him.

The jury returned a verdict finding Hastings guilty as charged. The jury also found Hastings had used a dangerous weapon in the commission of the robberies. The district court sentenced Hastings to a term of imprisonment not to exceed twenty-five years on both counts and ordered that the sentences run concurrently. Hastings was also sentenced to serve a minimum of five years due to the use of a dangerous weapon in the commission of the crime. Hastings appeals. We affirm.

Hastings argues the district court abused its discretion when it allowed the court reporter to read Scott Morgensen's testimony to the jury during jury deliberations. Hastings maintains that reading only the direct examination overemphasized the State's case and impinged upon his right to cross-examine. Hastings contends the district court should have ordered the court reporter to read the cross-examination to the jury as well.

We review for an abuse of discretion. State v. Baumann, 236 N.W.2d 361, 366 (Iowa 1975). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons

clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

Iowa Rule of Criminal Procedure 18(5)(g) permits a trial court, in its discretion, to have testimony read to the jury during deliberations. The rule provides:

> g. Report for Information. 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 shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

Iowa R. Crim. P. 18(5)(g).

In addition, the supreme court has stated, "a reasonable and specific request by the jury directed to the court to have a portion of the testimony read to it after it has started its deliberation, is permissible and proper." Baumann, 236 N.W.2d at 366 (citing Hutchinson v. Fort Des Moines Community Serv., 252 Iowa 536, 545-46, 107 N.W.2d 567, 573 (1961)). In the present case, the jury sent a note to the court during deliberations, inquiring:

> Scott Morgensen testimony regarding times to when Greg appeared and what time Greg's wife arrived. Cab times we believe are 6:31 to 6:50. Can we review Scott's testimony regarding his recollection of the timing of the events?

John Miller's testimony. He specifically commented as to having loaned money to blank. Eric Pederson or Greg Hastings? But that person had not repaid that money for over one year. Which person owed John Miller money? Was it Greg or Eric?

The trial court granted the jury's request stating:

It's my understanding of the law that testimony can be read back by the court reporter. However, the jury is in complete control of the testimony -- the amount of testimony to be read back and counsel for the parties don't have any right to request additional testimony to be offered nor can they argue to the jury at this particular time.

* * *

Ladies and gentlemen of the jury, I've received two questions from you. They pertain to the testimony of Scott Morgensen and I think the general thrust of that question is that you want to know some times with respect to whether the defendant and the defendant's wife appeared. Further they've asked for some additional information from John Miller's testimony concerning loaning money.

The only way that we can go through this is to have the court reporter read the notes back to you. The attorneys and I have reviewed those questions and it's my recollection, and the attorneys supported this, that the timing situation was scattered through Scott Morgensen's testimony. So I'm going to have Ms. Gordon read the entire testimony of Scott Morgensen back to you.

* * *

The jury does have the right to ask for other testimony to be read back. I'm going to ask the foreman simply to indicate to Ms. Gordon with respect to Mr. Morgensen's testimony when that amount of -- when she's read enough of it to satisfy your -- your questions.

Defense counsel objected to reading witness Morgensen's testimony, but did not object to reading witness Miller's

testimony. The defendant argues the trial court abused its discretion in two respects by reading to the jury witness Morgensen's testimony. Hastings contends reading the direct examination overemphasized the State's case and impinged on the defendant's right to cross-examine. We find both of these contentions to be without merit.

Reading witness Morgensen's testimony concerning the timing of events did not overemphasize the State's case. The trial court limited what was to be "re-read" to the jury to information sought by the jury about the timing of events. The fact that the trial court permitted the jury to control the amount of relevant testimony to be heard does not constitute an abuse of discretion. The trial court, in exercising its discretion to permit the jury to hear the relevant testimony, merely permitted the jury to determine how much of witness Morgensen's testimony was necessary to satisfactorily answer their questions. We cannot condemn the trial court's action as being clearly untenable or clearly unreasonable.

Furthermore, we do not agree with the defendant's contention that his right to cross-examine was restricted as a result of not reading witness Morgensen's cross-examination to the jury. In this case, the defendant fully confronted and cross-examined witness Morgensen. Our review of the transcript reveals that the cross-examination portion of witness Morgensen's testimony did not address the questions posed by the jury. Accordingly, there was no need to read the cross-examination to the jury.

For the reasons stated above, we affirm the defendant's convictions and sentences.

AFFIRMED.