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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

HOWARD Q. DAVIS,) 8-676
87-1455

Defendant-Appellant.)

Appeal from the Iowa District Court for Pottawattamie County (No. 20447), Glen M. McGee, Judge.

Defendant appeals his conviction by a jury of first-degree robbery and carrying a weapon. **REVERSED AND REMANDED.**

William L. Wegman, State Public Defender, and Raymond E. Rogers, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Drew Kouris and Timothy I. Market, Assistant Pottawattamie County Attorneys, for plaintiff-appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, P.J.

Defendant Howard Q. Davis was convicted, by jury trial, of the crimes of first-degree robbery and carrying a weapon. He appeals these convictions. We reverse and remand for new trial.

A Council Bluffs pharmacy was robbed at gunpoint by two men wearing nylon stockings over their heads to mask their identities. The robbers were observed leaving the scene in a Ford van. Later, the police spotted the Ford van that had been used in the escape parked at the Heartland Inn and, upon investigation, concluded that the robbers were in room 140 of the Heartland Inn. Because the robbers had been armed and had discharged their weapons upon leaving the pharmacy, the police set out to evacuate the motel of all persons who were not involved in the incident in order to protect them from potential harm. In the process of that evacuation, the officers knocked at room 137 and, receiving no response, used a pass key to enter the room and search for any persons who might be there. In the process of that search, one of the officers kicked under the bed and, hearing something, pulled back the bedspread and looked under it. There, they saw a red duffel bag, a police scanner, a key to room 140 of the Heartland Inn, and numerous drug bottles. The officers did not move these items, but left room 137, locking the door behind them.

About six or seven hours later, the police officers returned to room 137 with an identification technician to conduct a further search of that room and to collect evidence. The police did not obtain a search warrant to conduct that search. Davis filed a motion to suppress that evidence. The motion was overruled, and numerous items obtained from room 137 were introduced at trial. Davis appeals the court's order overruling his motion to suppress the evidence seized from room 137 on the ground that it was unconstitutionally obtained as a result of a warrantless search.

Davis further contends that the trial court erred in denying his motion for a mistrial on the basis of erroneously admitted prejudicial hearsay.

I. Warrantless Search. Davis acknowledges that the initial police entry into room 137 was justified by exigent circumstances. He claims, however, that the search under the bed exceeded the scope of the exigency and constituted an illegal search. He also contends that even if the initial search, including the search under the bed, was justified on the basis of emergency, the subsequent entry and search of room 137 and the seizure of evidence therefrom was without a warrant and was clearly unconstitutional.

On this constitutional issue, we make an independent evaluation of the totality of the circumstances. State v.

Campbell, 326 N.W.2d 350, 352 (Iowa 1982). A warrantless search and seizure is per se unreasonable, and evidence thereby obtained is inadmissible unless the State proves by a preponderance of the evidence that a recognized exception to the warrant requirement applies. State v. Folkens, 281 N.W.2d 1, 3 (Iowa 1979). There are three recognized exceptions to this rule: (1) the search is incident to an arrest; (2) the search is consented to; or (3) exigent circumstances require an immediate search. Id. at 3. Davis doesn't dispute the entry into room 137 qualifies as an exception because of exigent circumstances. He does, however, contend that the search under the bed was beyond the scope of the exigency. We disagree.

Davis relies upon Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 1152, 94 L. Ed. 2d 347, 353 (1987), to support his argument. We believe the facts of this case clearly distinguish it from Hicks. In Hicks, it is clear that the police officers were seeking the identity of certain personal property to compare with that of property that had been stolen. In the present case, the officers had a legitimate interest in securing the safety of motel patrons. When the officers were searching room 137, they heard a noise which led them to believe someone was under the bed. They then withdrew their guns to confront this person, but instead, upon moving the bed, discovered the challenged evidence on the floor. Under these

circumstances, we hold that the officers' look under the bed did not exceed the exigency.

The officers' return to room 137 six or seven hours later to collect the property that had been discovered is a different situation. If Davis had a reasonable expectation of privacy in room 137, the re-entry of the officers into that room to conduct a warrantless search and a seizure of the evidence seized would not be admissible in Davis's trial. However, we conclude from the totality of the circumstances that Davis had no reasonable expectation of privacy in room 137 or its contents. Davis, then, was without standing to raise the illegal search and seizure issue.

The Iowa rule on standing was enunciated by the supreme court in State v. Henderson, 313 N.W.2d 564, 565 (Iowa 1981), as follows:

> [S]tanding to assert a Fourth Amendment violation will stand or fall on a defendant's ability to show a substantive violation, which in turn is based on a showing of a legitimate expectation of privacy in the particular area searched or the particular objects seized. (citation omitted).

From the record, it is impossible to find that Davis was at any time in or near room 137. It does not appear that he was even at the motel. We do not find that he had an interest in room 137. Were Davis to claim a proprietary interest in the property seized, he would have standing to complain of its seizure. We cannot find, nor presume that Davis had such an interest, since he failed to allege a

possessory interest in the goods seized from room 137. See State v. Osborn, 200 N.W.2d 798, 805 (Iowa 1972). To be sure, the State introduced the evidence obtained from that room to show property that was taken from the pharmacy, and other evidence showed that Davis was a part of that hold-up. On the basis of the constitutionality of obtaining the evidence from that room, however, Davis does not have standing to object to the search and seizure involving room 137 since the record fails to show that he had any interest in the room, even though his traveling companions and probable accomplices did in fact check in.

We hold that the court did not commit error in denying Davis's motion to suppress.

II. Prejudicial Hearsay Evidence. Davis also claims the court erred in failing to declare a mistrial because of the admission of prejudicial hearsay evidence. He seeks a reversal of his convictions because of this error.

Prior to his trial, Davis filed a motion in limine seeking to exclude a statement made by Carol J. Shamblin, one of the alleged accomplices to the crime charged, on the grounds that its introduction would violate the defendant's right to confrontation under article I, section 10 of the Iowa Constitution and the sixth amendment to the United States Constitution. The trial court sustained the motion. At the subsequent trial, over the defendant's hearsay objection to the State's attempt to introduce

statements made by Shamblin, the court overruled the objection and allowed the evidence to be introduced. Subsequently, upon a record made out of the jury's presence, the court reversed its ruling. The defendant also moved for a mistrial on the ground that "the statements are so prejudicial and so inflammatory that there is no way that they could possible be overcome by any instruction by the court to the jury to disregard them." In reversing itself, the court held the statements to be hearsay and improper and gave the jury the following admonition:

> Members of the jury, yesterday afternoon we heard testimony from Officer Alvin Edmunds. During that testimony he related some conversation with a Mrs. Shamblin at Motel 6. I now direct you to totally disregard and ignore any testimony by Officer Edmunds relating to that conversation. I'm striking from the record any and all of the testimony from that officer as to his conversation with Mrs. Shamblin and her statements, so you should pay no attention whatever, if you recall any of it, as to what that testimony was. Totally disregard it.

The defendant subsequently renewed his motion for mistrial, and it was again overruled. Davis claims that the trial court erred in overruling that motion for mistrial.

Davis claims that the court's admonition to the jury was insufficient to remove the prejudice of the inadmissible evidence and that the jurors' exposure to the inadmissible testimony was especially egregious since the defendant had filed a pretrial motion in limine with regard to "this very evidence." That claim is not totally

accurate, since the evidence that was admitted was not the statement given by Shamblin which was the subject of the motion in limine. The motion in limine, however, should have acted as a warning to avoid the admission of improper evidence in the form of statements made by Shamblin. The question that brought out the objectionable testimony was:

> Q. All right. After she identified herself what happened then?

Defendant objected at that point, stating:

> Your Honor, I'm going to object now to anything that was said at that time as being hearsay. I think that he can testify as to what happened, but I don't think he can testify as to what was said, if anything.

There followed an off-the-record side-bar discussion, after which the court overruled the objection. Following that, the officer witness testified:

> . . . And she looked at me, and she stated, you're the tall blond-haired cop that was outside the room looking at my van. And she said -- at that time she stated, and Howard said it's time to get the hell out of here, because where there's one . . . there is more of them.

Counsel for defendant did not make any objection at that time, but the record indicates that during the side-bar discussion, counsel for defendant had asked the court to grant a standing objection as to any further testimony relating to comments or statements of Shamblin. The court granted a standing objection.

The general rule with respect to the curative effects of a court's admonition to the jury to disregard testimony is as follows:

> Generally, trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice. A defendant who asserts these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of the trial court. (citation omitted).

State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986). In extreme instances, the prejudicial effect may remain to influence the verdict despite its exclusion. State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974).

In Jensen, evidence of defendant's remarks about a blood test and evidence that he took a breath test were admitted. No written request for a blood test was made, although required before the officer could request a breath or urine test. The State did not offer the results of the breath test, although it claimed it was laying a foundation for its offer. A motion in limine was filed, and, although it was overruled, the supreme court stated:

> It is of controlling importance defendant filed a pretrial motion in limine seeking to exclude all evidence relating to the breath test. With the red flag waving the trial court should have prohibited disclosure, not only of the results of the breath test, but also the fact one had been taken.
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> * * *
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> We believe the present case presents one of the "extreme instances." It arises not so much from the inherent prejudice of the subject matter as from the dogged efforts of counsel. To excuse the error here by an admonition to disregard would destroy any effectiveness of a motion in limine. Counsel must have a way to keep prejudicial and inadmissible evidence from the ears of the jury.

> Under these circumstances "remaining prejudicial effect" was shown.

While recognizing the sufficiency of cautionary instructions in most situations and acknowledging that they are deemed insufficient only in extreme cases, our court held in State v. Belieu, 288 N.W.2d 895 (Iowa 1980), that no way existed at trial for defendant to protect himself against the prejudicial impact of the evidence of his prior criminal activity which was erroneously admitted in the testimony. Id. at 901 (citing Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)). In State v. Johnson, 367 N.W.2d 319, 322 (Iowa App. 1985), we held that evidence offered to show defendant's knowledge which was improperly admitted into evidence could not be overcome by the court's admonition to the jury to disregard such evidence.

In this case, we must assume that counsel for defendant objected to the testimony in a timely fashion, since the court allowed him a standing objection to the further testimony, and that he preserved defendant's right to move for mistrial at a later time pursuant to his request and the court's agreement. The trial court, in ruling upon defendant's renewed objection, stated:

> The court was equally surprised, as was defense counsel, when the officer reported a statement made spontaneously by Mrs. Shamblin, the codefendant, that Defendant Howard Davis had said, at the Heartland Inn, as they looked out the window, that they observed the officers, and they had better get out of there.

> Had the court been aware that that was the next testimony coming from the officer, and had defense counsel at that time made a motion to strike the testimony and admonish the jury, the Court would have done so, because the court is of the very definite opinion that is objectionable, and should not properly have come to the attention of the jury.

In the side-bar discussion engaged in before the testimony came in, defense counsel requested that his objection apply on the same basis as that requested in his motion in limine. In view of the court's surprise and reaction to the testimony, it would not have been unreasonable for the court, in pursuance of the standing objection by defendant, to strike the testimony on its own motion, and to immediately admonish the jury to disregard it. Even so, it is not a certainty that with the prejudicial effect of the evidence, such an admonition would have cured the error of admitting that evidence.

The defendant's theory of defense in this case was that he was not involved in the robbery as a part of the group arrested by the police. Shamblin's statements connected him to the robbery. It is not likely that an admonition to the jury could remove that connection. We believe that this is one of those exceptional cases where, in spite of the court's admonition, prejudice remains.

We reverse the defendant's conviction and remand this matter to the district court for new trial.

REVERSED AND REMANDED.

Hayden, J., concurs; Habhab, J., dissents.

HABHAB, J. (concurring in part, dissenting in part)

I concur with division I of the majority opinion, but dissent as to division II for the reasons which follow.

The problem before us came into being when Officer Edmunds testified as to certain statements made to him by Carol Shamblin, one of the alleged accomplices in the crime charged. The officer testified:

> . . . And she [Shamblin] looked at me, and she stated, you're the tall blonde-haired cop that was outside the room looking at my van. And she said -- at that time she stated, and Howard said it's time to get the hell out of here, because where there's one . . . there is more of them.

After this testimony came in, a record was made outside of the jury's presence. The court determined that the last sentence of the above-quoted testimony was hearsay, so it struck that testimony and gave the jury the following admonition:

> Members of the Jury, yesterday afternoon we heard testimony from Officer Alvin Edmunds. During that testimony, he related some conversation with a Mrs. Shamblin at Motel 6. I now direct you to totally disregard and ignore any testimony by Officer Edmunds relating to that conversation. I am striking from the record any and all of the testimony from that officer as to his conversation with Mrs. Shamblin and her statements, so you should pay no attention whatever, if you recall any of it, as to what that testimony was. Totally disregard it.

During the course of the in-chamber hearing, the defendant moved for a mistrial on the ground that the statements made by the officer were "so prejudicial and so inflammatory that there was no way that they could possibly

be overcome by any instruction by the court to the jury to disregard them." The trial court overruled the mistrial motion, and I concur with that decision.

As the majority points out, the general rule with respect to the curative effects of a court's admonition to the jury to disregard testimony is as follows:

> Generally, trial courts quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice. A defendant who asserts these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of the trial court. [citation omitted].

State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986).

I do not believe that the defendant has carried "the heavy burden of demonstrating a clear abuse of discretion on the part of the trial court," id., nor do I believe that any prejudicial effect remained after the admonition to the jury that would influence the verdict. I reach this conclusion for several reasons.

When considering whether prejudice results from an improper response that is later stricken, the court should first determine whether the objectionable response is relevant to an issue in the cae. If relevancy is determined, the court should then consider whether its caution to the jury to disregard the response presents any prejudice that might flow from it. In this respect, when determining the question of prejudice, the court, of

necessity, must then weigh the objectionable testimony against all of the other testimony that has or will during the course of the trial touch on the subject alluded to in the improper response. Certainly, if other testimony has or will implicate the defendant to the crime with the same or greater force than the objectionable testimony, it is difficult for me to conclude that prejudice exists, or if prejudice does exist, that it is not cured by an admonition to the jury.

Thus, in the case before us, the hearsay testimony was relevant for it was inculpatory. But the other evidence implicating the defendant to the crime charged far outweighs any prejudicial effect the hearsay testimony might have. When I couple the admonition given by the court with the other testimony that demonstrates the defendant's participation in the robbery which consists of (1) the three forms of identification of the defendant found in the "getaway" van, i.e., defendant's social security card, his Salvation Army identification card, his driver's license; (2) parts of a map found on his person that matched a torn map found in the van; (3) a gun found on the defendant when he was arrested was identified at trial as being consistent with the type of gun used to shoot at the cash register and the bullets from his gun were consistent with fragments taken from the cash register; (4) that a witness testified the defendant

purchased a pair of black knee-high nylons in a store near where the robbery occurred were consistent with those used in the robbery; (5) that defendant's right shoe left the shoeprint in the mud in the parking lot where the robbery occurred; and (6) that the defendant had the same clothes, height, build, race, and color of hair as one of the masked men; I am able to find that prejudice did not result from the disputed testimony and if it did, it was overcome by the admonition given by the trial court.

I would affirm the trial court.