FILED
FEB 14 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA, )
Appellee, ) Filed February 14, 1977
v. )
KENNETH CRAIG MEYERDIRK, ) 35
Appellant. ) 58970
)

Appeal from Osceola District Court - Richard W. Cooper, Judge

Appeal from conviction of receiving and concealing property. Affirmed.

Mayer Kanter, of Sioux City, for appellant.

Richard C. Turner, Attorney General, Mark S. Beckman, Assistant Attorney General, and Donald E. Skiver, Osceola County Attorney, for appellee.

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

ALLBEE, C.J.

In this case Kenneth Meyerdirk appeals his conviction of receiving and concealing nine stolen Duroc pigs in violation of section 712.1, The Code, and his resulting sentence of five years in the penitentiary. Finding no reversible error, we affirm his conviction and sentence.

Viewing the evidence in the light most favorable to the State, the jury could find that during the summer of 1975 the defendant, his brother, Dennis Meyerdirk, and his brother's wife, LaVonne Meyerdirk, stole some suckling Duroc pigs from the Leonard Hintze farm in Jackson County, Minnesota. The pigs were kept on defendant's farm near Round Tree, Minnesota until August 9th, 1975. On that date, Dennis Meyerdirk and defendant hauled the pigs to a sale barn in Sibley, Osceola County, Iowa, in Dennis' pickup. While at the sale barn, defendant helped water and bed the animals. At no time during the sale did defendant warn anyone that the animals had been stolen, however, only Dennis actively asserted ownership to the pigs and received the proceeds from their sale. After the sale, Leonard Hintze identified the pigs as his based upon their manner of walking on their toes and also their "exceptionally" broad chests. Errors asserted and briefed are discussed in order of assignment.

*I. Sufficiency of evidence.*

At trial defendant moved for directed verdict on grounds that the State had failed to show the pigs sold at Sibley were the same as stolen from Leonard Hintze and that his acts did not amount to receiving and concealing the pigs at the sale barn. He reasserts these grounds on appeal. Our standard of review is summarized in State v. McClelland, 162 N.W.2d 457, 461 (Iowa 1968).

The identity issue is frivolous - Hintze testified at trial that the pigs sold at Sibley were his - the weight of this evidence is for the jury, not an appellate court. State v. McClelland, supra; See also, State v. Gray, 239 N.W.2d 584, 586 (Iowa 1976).

In his second point, defendant relies heavily on the statement from State v. Upton, 167 N.W.2d 625, 627 (Iowa 1969): "It is quite obvious a thief cannot buy property from himself, nor can he receive it from himself, but he can conceal it or aid in doing so." Hence, defendant argues that his acts at Sibley were not sufficient to show he aided in concealing the pigs when viewed in light of the fact that the sale was by public auction. For the purposes of this case, we accept defendant's statement from *Upton* at face value and will assume it applies to this situation. But see, State v. Davis, 212 Iowa 582, 234 N.W. 858, (1931). Nevertheless, a jury issue was generated as to the defendant's aiding in concealing the pigs.

Concealment of stolen goods can occur if the defendant merely commits acts which make the discovery of the property more difficult for the owner. State v. Sheffey, 234 N.W.2d 92, 96 (Iowa 1975). We believe the taking of stolen pigs across state lines, placing them in an outlet of interstate commerce, the Sibley sale barn, where they were commingled with other pigs, and thus may be transported anywhere in the United States are acts sufficient to render their discovery more difficult to Hintze, the out-of-state owner. While it is true that defendant may not be convicted of receiving and concealing in Iowa solely on the basis of the larceny in Minnesota, defendant's acts in watering and bedding the pigs at Sibley combined with his knowledge that they were stolen

is sufficient evidence to support the jury verdict. It is more than mere presence at the scene of a crime. See State v. Barnes, 204 N.W.2d 827 (Iowa 1972).

*II. Objection to testimony of LaVonne Meyerdirk.*

Defendant contends trial court erred in permitting LaVonne Meyerdirk to testify that on June 29, 1975, she, her husband, and defendant stole some pigs from a farm near Okabena, Minnesota and took them to defendant's farm. Objection was made on grounds of the husband and wife communication privilege and competency. Section 622.7, The Code, is cited in support of the objection. We conclude, however, trial court properly overruled the objection as LaVonne's husband was not on trial. Her testimony was not against him, but his brother, nor was she examined as to any communication by him to her. State v. Rainsbarger, 71 Iowa 746, 747-748, 31 N.W. 865 (1887); § 622.9, The Code.

*III. Motion for continuance.*

Prejudicial abuse of discretion is asserted in that trial court denied defendant's motion for continuance made on the day of trial. Defendant claimed that because plea bargaining had broken down just four days before trial, additional time was needed to prepare for trial and to contact a witness in Minneapolis. We have examined the record pertinent to this assignment, and, without reciting the events and maneuvers disclosed, suffice it to say we do not find abuse of discretion. State v. Youngbear, 229 N.W.2d 728, 734 (Iowa 1975). Moreover, defendant's motion for continuance did not comply with rule 183(b), Rules of Civil Procedure. See § 780.2, The Code; State v. Cowman, 212 N.W.2d 420, 422-423 (Iowa 1973).

*IV. Trial court remarks to Dennis Meyerdirk.*

Defendant also complains of trial court's remarks during the testimony of a defense witness, Dennis Meyerdirk. The witness had been testifying in long, meandering narrative answers which were hardly responsive to counsel's questions. The prosecution previously had objected to this style of testimony and the objection was properly sustained. The actual remarks which defendant characterizes as unwarranted and revealing irritation and hostility toward the defense follow:

> "MR. SKIVER: I am getting awfully disgusted with this, Judge. A lot of insinuations and a lot of statements he is making that I can't even interpose an objection on. Quite a ways off the direct examination. Let's get back to the question-and-answer system if we can.
>
> "THE COURT: That is what I suggested once and I am going to suggest it more firmly now; and I don't think that this is doing this witness any good to run off on these long narrations as far as the jury is concerned."

Defendant made no objection to the court's comment, nor was the matter raised in a motion for a new trial. Consequently, there is a substantial question whether the claimed error is preserved for appellate review. See State v. Larmand, 244 N.W.2d 233, 236-237 (Iowa 1976). Nevertheless, remarks by a trial judge made while ruling on objections concerning the admissibility of evidence are usually not reversible error, provided they are not unfair and prejudicial to the accused. State v. O'Kelly, 211 N.W.2d 589, 597 (Iowa 1973); State v. Fiedler, 260 Iowa 1198, 1203, 152 N.W.2d 236 (1967). Yet a trial judge must be exceedingly cautious in his actions and statements in the presence of the jury. See State v. Kimball, 176 N.W.2d 864, 867 (Iowa 1970). Judicial conduct from

which the jury could infer bias, or that reveals feelings toward a witness which might influence the jury more than the evidence, must be avoided. State v. Larmand, supra at 236. Our study of the entire transcript reveals that overall Judge Cooper acted patiently, fairly, and impartially in these lengthy proceedings. Furthermore, his instructions told the jury:

> "The Court has not by its instructions or by any ruling made, or by any act done, or by anything said during the trial, intended or attempted to give any intimation or opinion as to what the facts are or what are not the facts, what the proof is or what it is not, nor what your verdict should be."

Judge Cooper's isolated comment in response to an objection, particularly in light of the earlier objection, was not prejudicial.

*V. Incompetence of trial counsel and prosecutorial misconduct.*

Finally, defendant alleges that incompetence of his trial counsel coupled with prosecutorial misconduct denied him a fair trial. Appellate counsel points to trial counsel's failure to object to (1) leading questions; (2) hearsay; (3) illegally seized evidence; (4) testimony about other irrelevant crimes of the defendant; (5) gross misconduct of the Osceola County Attorney.

*A.* In Iowa, an accused is entitled to effective counsel, that is, counsel's performance must be within the range of normal competency under the circumstances. Ogden v. State, 215 N.W.2d 335, 337-338 (Iowa 1974); State v. Williams, 207 N.W.2d 98, 104 (Iowa 1973). An affirmative factual basis demonstrating counsel's inadequacy of representation is prerequisite to the establishment of incompetency. State v.

Massey, 207 N.W.2d 777, 780 (Iowa 1973). But examination of the transcript fails to show such an affirmative basis.

Permitting leading questions and hearsay testimony regarding collateral matters are, in this case, too insignificant to rise to incompetence of counsel. As to the contention that illegally seized evidence was not suppressed, we find nothing in the record to support this claim. In fact, the State's physical evidence consisted exclusively of receipts from the Sibley sale barn and the Sioux City stockyards. We are, however, troubled by trial counsel's failure to object to testimony of LaVonne Meyerdirk concerning several other larcenies involving defendant in both Iowa and Minnesota. While there is no doubt the evidence prejudiced defendant, we cannot say it unfairly strengthened the State's case or unduly weakened his defense, particularly in light of the substantial evidence supporting the charged offense. Moreover, such inadvertence may well have been due to the confusing manner in which the evidence was adduced. In fact, trial counsel belatedly objected once to this class of evidence on grounds of revelancy which was overruled. No motion to strike earlier testimony describing other crimes was made. Any error in the ruling was neither assigned nor briefed by appellate counsel and only tangentially referred to during oral argument. We decline to assume an advocate's role to determine if any error was preserved and if so, whether the ruling is reversible. See State v. Thomas, 190 N.W.2d 463, 464 (Iowa 1971); State v. Critelli, 237 Iowa 1271, 1281, 24 N.W.2d 113, 119 (1946).

Improvident trial strategy, miscalculated tactics, and even mistakes, do not necessarily amount to ineffective assistance of counsel. Parsons v. Brewer, 202 N.W.2d 49, 53-54 (Iowa 1972). The record considered in its totality does not convince us that defendant's trial counsel was ineffective.

*B.* Defendant makes a stronger point concerning prosecutorial misconduct denying him a fair trial. The comments ranged from the inflammatory - "I think this jury has an obligation to serve notice on people like the defendant here that Osceola County prosecutes and convicts people that violate our state laws" - to attempts to ingratiate himself with the jury as evidenced by this comment made while LaVonne Meyerdirk was testifying - "Can you speak up so Mr. Knock (juror) can hear you . . . He is very interested in what you are saying." - to personal opinions concerning the defendant's guilt - "I think the defendant and his brother had been ripping off Northwest Iowa for a long time." The record discloses an unduly large number of instances of such misconduct occurring during final argument. In sum, the prosecutor repeatedly violated our legal standards prescribing counsel's conduct and our ethical canons. See State v. Monroe, 236 N.W.2d 24, 29-31 (Iowa 1975); State v. Vickroy, 205 N.W.2d 748 (Iowa 1973); Canon DR7-106, Iowa Code of Professional Responsibility for Lawyers, (1975); ABA Standards Relating to the Prosecution Function and the Defense Function § 5.8 (1971).

During this barrage of misconduct, defense counsel neither objected nor moved for a mistrial. Consequently, the errors are not preserved for review. State v. Phillips,

226 N.W.2d 16, 18-19 (Iowa 1975). As already noted, defendant cites this as another example of incompetence of counsel. We are satisfied, however, this could have been a tactical ploy on the part of defense counsel. State v. Fields, 199 N.W.2d 144, 146 (Iowa 1972).

We will consider this conduct in connection with the issue of whether the defendant received a fair trial. See State v. Levy, 160 N.W.2d 460, 466-468 (Iowa 1968). Improper comments during final argument classified as misconduct are not necessarily prejudicial. Misconduct on the part of counsel will be regarded as harmless unless it results in depriving an accused of a fair trial or a miscarriage of justice. See State v. Monroe, supra. The fact that virtually all of the prosecutor's misconduct occurred during final argument, rather than in the taking of testimony, weighs against the defendant's claim. See State v. Levy, supra.

We are convinced the evidence convicted defendant, not the prosecutor's misconduct. The conviction hereby is affirmed.

SNELL, OXBERGER and CARTER, J.J., concur. DONIELSON, J., concurs except for division *V (B)* in which he concurs in result only.