

IN THE COURT OF APPEALS OF IOWA

No. 2-211 / 91-484

FILED

JUN 25 1992

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

TONY GRIDER,

Appellant.

1190

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Tony Grider appeals the judgment and sentence imposed for his conviction, following a jury trial, of second-degree burglary and his conviction, following a guilty plea, of several other unrelated charges. **AFFIRMED.**

Mark E. Mershon of Reed-Merner & Mershon, Snow & Knock, Cedar Falls, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Peter Newell, Assistant County Attorney, for appellee.

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

HAYDEN, J.

This case involves numerous charges filed by the State against Tony Grider. On November 30, 1989, the State charged Grider with theft in the third degree. Grider was released on bond. A second charge was filed on December 28, 1989. The State alleged Grider was driving a motor vehicle while barred as an habitual offender. Grider was again released on bond. On February 5, 1991, Grider was charged with burglary in the second degree. Grider filed a waiver of right to speedy trial for the crimes of burglary, theft, and driving while barred as an habitual offender. Grider was again released on bond. While on release, he was arrested on April 22, 1990. The State charged Grider with operating a motor vehicle while intoxicated; driving while barred; driving while license was revoked; driving while license was suspended; and possession of a controlled substance. Grider was also charged with operating a motor vehicle without the owner's consent.

Both the State and Grider were granted several motions for continuance. Grider subsequently filed a motion renewing his demand for a speedy trial on August 20, 1990.

A trial on the charge of second-degree burglary began on September 25, 1990. The jury found Grider guilty of burglary in the second degree.

Grider eventually pled guilty to the charges of possession of a controlled substance, driving a motor vehicle while his license was barred as an habitual

offender, operating a vehicle without the owner's consent, and theft in the third degree. Grider agreed to plead guilty in return for the State's recommendation the sentences run concurrently to his burglary sentence. The State also agreed to dismiss the other charges against Grider.

The district court sentenced Grider to ten years for the crime of burglary in the second degree. The court also ordered the sentence run consecutive to any other sentences. This appeal followed. We affirm.

Grider raises several claims on appeal. First, Grider contends his constitutional right to speedy trial was violated. Second, the jury verdict is invalid because the jury was not sworn in prior to being impaneled. Third, the district court erred in submitting jury instruction number twenty requiring the jury to "find the truth and do justice." Fourth, Grider maintains he was denied effective assistance of trial counsel. Fifth, the district court erred by failing to grant a mistrial because of the prosecutor's improper closing argument. Sixth, Grider's sentence should be set aside because it is in violation of the plea agreement. Seventh, the district court erred by failing to treat Grider's letter dated October 11, 1990, as a request for a new trial. Eighth, the district court erred by failing to treat Grider's letter dated November 19, 1990, as a request for a new trial or a motion in arrest of judgment.

We turn first to Grider's claim his right to speedy trial was violated. On March 28, 1990, Grider waived his right to speedy trial on the charges of burglary in the second degree, theft in the third degree, and driving while barred. Grider was subsequently arrested on April 22, 1990. Grider claims this later arrest reinstated his right to speedy trial to the earlier charges. Grider maintains he had a right to be tried on the earlier charges within ninety days of the alleged reinstatement.

At trial, Grider moved to dismiss the charges against him, alleging his right to speedy trial had been violated. We note, however, Grider did not assert the argument before the district court he asserts here. Grider asserted his renewed request for speedy trial reinstated the ninety days in which the matter had to be brought to trial. Grider did not argue his later arrest reinstated his right to speedy trial to the earlier charges. Grider cannot now raise an argument he failed to raise at trial. State v. Wagner, 410 N.W.2d 207, 215 (Iowa 1985).

Grider also claims his right to speedy trial was violated when his attorney's requests for several continuances were granted without obtaining defendant's personal consent to the continuances. Our supreme court has expressly rejected this argument. State v. LeFlore, 308 N.W.2d 39, 41 (Iowa 1981) ("Defense counsel acting within the scope of his or her authority may waive [defendant's right to speedy trial] on the defendant's

behalf without the defendant's express consent"). This claim is without merit.

Grider next claims his conviction is invalid because the jury was not properly sworn in. Grider fails to indicate, and we are unable to find, where this issue was preserved for review. Failing to preserve the issue precludes this court from reviewing it.

Grider next contends the district court erred by submitting the jury instruction which informed the jury "your sole duty is to find the truth and do justice." Grider claims the instruction tended to relieve the State of its burden to prove its case beyond a reasonable doubt. We disagree. Jury instructions must be read together, not in piecemeal or isolation. E.g., State v. Sauls, 356 N.W.2d 516, 520 (Iowa 1984). Here the district court told the jury in six other instructions the State had the burden to prove defendant's guilt beyond a reasonable doubt. We affirm on this issue.

Grider next contends he was denied effective assistance of trial counsel. Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to

adjudicate defendant's claim without counsel's explanation for his or her conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

Grider next argues the prosecutor made a statement to the jury during closing arguments inferring defendant failed to testify. Closing arguments were not reported; however, a record was made in chambers after the alleged improper comment was made. The record shows the prosecutor began a sentence: "The defendant is not telling you" The prosecutor was then interrupted by defense counsel.

"The federal constitution prohibits a prosecutor from commenting on a defendant's failure to testify in his or her own behalf." State v. Bishop, 387 N.W.2d 554, 562 (Iowa 1986) (citing Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106, 110 (1965)).

Whether a statement constitutes an improper reference on a defendant's silence at trial depends on whether (1) the prosecutor manifestly intended to refer to the defendant's failure to testify, or (2) the jury would naturally and necessarily interpret the statement to be a reference to the defendant's silence. The court will not find that the prosecutor manifestly intended to comment on a defendant's right to remain silent when an equally plausible explanation exists for his or her statement. A prosecutor's statements are not viewed in isolation, but in the context they were made.

Van Hoff v. State, 447 N.W.2d 665, 675 (Iowa App. 1989) (citations omitted).

The prosecutor's statement was made in the context of whether Grider had a right, license, or privilege to be in the building which was the subject of the burglary. Out of the presence of the jury, the prosecutor explained had he been allowed to complete his sentence he would have said: "[T]he defendant's not telling you that he has a right to be in that building. His comment or his statement to the police officers in this matter was that it [sic] was not there. That he didn't commit this." In overruling defendant's motion for a mistrial, the district court found the statement was a "fair comment upon the statements made by the defendant at the time that he was apprehended by the officers. . . ." The district court concluded there was no inference to Grider's failure to testify.

We give considerable weight to the district court's determination because that court was present to hear the remark and observe the jury. Bishop, 387 N.W.2d at 564. While we consider the prosecutor's statement to be near the bounds of permissibility, we cannot say the prosecutor's words demonstrate a manifest intent to comment on defendant's constitutional right to remain silent, nor is the statement one the jury would "naturally and necessarily" interpret as a comment on defendant's failure to testify. We hold the prosecutor's statement in closing arguments did not violate defendant's constitutional rights.

Grider next claims his sentence should be set aside because the prosecutor violated the plea agreement between defendant and the State when recommending sentencing. Grider alleges the prosecutor violated the plea agreement by asking the sentencing court to impose the "maximum sentence." Grider argues the prosecutor's words constitute a call for consecutive sentences rather than concurrent sentences which was the agreement reached between Grider and the State.

We reject defendant's argument. Our review of the record reveals this argument was not presented to the sentencing court. Therefore, Grider is precluded from raising the argument here. Wagner, 410 N.W.2d at 215. The obvious reason this argument was not made before the sentencing court is because the prosecutor's sentencing recommendation was consistent with the plea agreement. The prosecutor explicitly stated, "We would simply ask the Court to run all of those sentences concurrently and place Mr. Grider in prison." Defendant's argument is totally without merit.

Finally, Grider contends the district court erred in interpreting a letter he wrote to the court on October 11, 1990, as a notice of appeal rather than a motion for a new trial based on alleged ineffective assistance of counsel. Grider raises a similar claim with respect to a letter he wrote to the court dated November 19, 1990. With respect to the November letter, however, Grider claims the court

erred in failing to treat the letter as a motion for a new trial or a motion in arrest of judgment.

Grider has not preserved either claim for review. In treating the October letter as a notice of appeal, the district court observed the notice was premature and overruled the motion. Grider neither excepted to the court's ruling nor objected to the court's interpretation of his letter. With respect to the November letter, the record reveals the court never ruled on, or took any action in response to the alleged motion. At Grider's sentencing, he did not ask the court to rule on the motion. In fact, both Grider's counsel and Grider stated they knew of no reason why judgment could not be pronounced. Because Grider failed to call the district court's attention to the alleged error or demand a ruling on his purported motion, he has failed to preserve the alleged errors.

We have considered all issues raised by defendant. We affirm the district court in all respects.

AFFIRMED.