

FILED

AUG 26 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

Filed August 26, 1980

GLENN B. BIRD,)

Defendant-Appellant.)

0-157
63699

Appeal from Lee District Court - Harlan B. Bainter, Judge.

Defendant appeals conviction of second degree burglary in violation of section 713.3, The Code 1979. - AFFIRMED.

Gordon Liles, Fort Madison, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Douglas F. Staskal, Assistant Attorney General, and Michael P. Short, Lee County Attorney, for plaintiff-appellee.

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

Defendant appeals from his conviction of second degree burglary in violation of section 713.3, The Code 1979. Defendant contends the trial court erred in allowing the State to cross-examine him with regard to matters allegedly not raised on direct examination, and by allowing the State to introduce rebuttal testimony with regard to those allegedly impermissible matters raised on cross-examination. Defendant also contends the trial court erred in not granting his motion for a mistrial after a State's witness made an allegedly impermissible comment on defendant's exercise of his right to remain silent. Finally, defendant asserts the trial court erred in not granting his motion for mistrial based on the prosecutor's alleged misconduct during closing arguments. We affirm.

At approximately 11:30 p.m. on the night of February 11, 1979, Keokuk police officers were called to the Calvary Baptist Church in response to a report of a break-in. Defendant was discovered inside the chapel standing behind the entrance door with two church tape recorders stacked on the floor near where defendant was standing. Defendant was arrested and subsequently charged with second degree burglary. A jury trial was held and the jury found the defendant guilty as charged.

I. At trial, on cross-examination of defendant, the following colloquy took place:

Q. Mr. Bird, do you remember saying to Officer Dobson in that chapel area before you were arrested that he was a small time cop, and you could have blown him away when he was coming up the walk?

MR. LILES: I would object to the relevancy and materiality of that question. Beyond the scope of direct examination, and it's irrelevant and immaterial, and I would like to make a motion, if I could.

MR. DENNIS: Your Honor, I believe that is within the res gestae of this crime.

THE COURT: The objection will be overruled. Do you want to make a motion now or at recess?

MR. LILES: Recess would be fine, Your Honor.

THE COURT: The objection will be overruled. You may answer.

A. No, sir.

Q. You don't remember saying that?

A. No, sir.

Thereafter, the State recalled one of the arresting officers as a rebuttal witness to give the following pertinent testimony:

Q. Did Mr. Bird volunteer any statements to you or Mr. Dobson that you heard in that chapel area?

MR. LILES: I would object Your Honor. That is not raising new matters. Improper rebuttal testimony. I believe the witness has already testified that defendant did not immediately respond to whether there were other persons, and the defendant testified to the best of his knowledge there wasn't. Therefore, no new matters were raised and improper rebuttal testimony.

THE COURT: Overruled. You may answer.

A. The defendant offered a comment towards Officer Dobson. It was something along the order — he indicated you are just a small time cop —

MR. LILES: Excuse me, Your Honor. I would object to that testimony as being irrelevant and immaterial, no benefit or usage in this case. That would be the extent of my motion.

THE COURT: Overruled. You may answer.

A. He said something along the order towards Officer Dobson he was just a small time cop and in a small time town, and if he wanted to, he could have blew him away 50 times or something similar to that.

Thereafter, the State rested and defendant moved for mistrial based on the same grounds asserted in his objections to the above-quoted testimony. The trial court overruled the motion for mistrial.

Defendant asserts a two-fold attack on the above-quoted testimony contending that the cross-examination was impermissibly beyond the scope of defendant's direct testimony, and that the matter raised on cross-examination and rebuttal was irrelevant and immaterial to any issues raised in the case. We disagree. Iowa R. Crim. P. 19(1) requires that the State's cross-examination of the defendant be strictly confined to matters testified to on direct examination. The scope and extent of cross-examination are matters within the trial court's discretion. State v. Ege, 274 N.W.2d 350, 357 (Iowa 1979). "Cross-examination of a defendant is not restricted to a 'mere categorical review of the matters stated in the direct examination, but may cover any matter referred to, or within the fair purview of, direct examination.'" State v. Monroe, 236 N.W.2d 24, 29 (Iowa 1975) (citing State v. Jensen, 189 N.W.2d 919, 924 (Iowa 1971) (quoting 98 C.J.S. Witnesses § 395, at 175 (1957))).

Defendant testified on direct examination that he and his wife had been arguing,

that the argument put him in a state of emotional depression, and that he went to the church to pray in an effort to bring himself out of his emotionally depressed state of mind. Defendant testified he told the police officers who arrested him that that was the reason he was in the church. Defendant testified he was still in a state of emotional depression after the arrest.

The matters of defendant's state of mind prior to and after his arrest as well as any statements he made to the police officers at the time of the arrest that reflected on his state of mind were raised on direct examination. The challenged inquiry on cross-examination concerned a statement allegedly made by defendant to the officers at the time of his arrest that reflected on his state of mind at that time. We do not think the trial court abused its discretion in determining that the inquiry on cross-examination was within the purview of matters raised on direct examination.

We also think the trial court did not abuse its discretion in determining that defendant's alleged statement was relevant and material. While the statement was not relevant or material to the actual commission of the crime charged, it was sufficiently relevant and material to defendant's state of mind — a matter put into issue by defendant in his direct testimony — to be admissible. In his direct testimony, defendant attempted to explain his presence in the church as being for an innocent purpose. He described his state of mind in a way that reflected an absence of mens rea. The alleged statement by defendant that he could have blown the police officer away fifty times is wholly inconsistent with a state of mind reflecting an absence of mens rea. The statement was a relevant and material contradiction to defendant's testimony regarding his purpose for being in the church and his state of mind at that time. Consequently, we conclude the trial court did not abuse its discretion in allowing the State to inquire into the alleged statement on the cross-examination of defendant or in allowing the State to present rebuttal testimony contradicting defendant's denial of making the statement.

II. Defendant contends the trial court erred in overruling his motion for a new trial after an allegedly impermissible reference to defendant's exercise of his right to silence. The relevant testimony was as follows:

Q. Okay. After you had taken the defendant to the police station, did you have any further contact with him that night?

A. Yes, I did.

Q. And what was that?

A. Okay. Do you mean before he was placed — before he was incarcerated?

Q. Yes, uh-huh.

A. Okay, I did go through my normal paper work with the subject. He was read his rights. He refused to sign the rights waiver. He was asked if he wanted to make any statements.

At that point, defendant moved for mistrial. Defendant did not make a motion to strike the testimony.

When a question has been asked and answered, a motion to strike the testimony is the proper method to preserve the error of allowing the testimony to be heard. State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978); State v. Shimon, 182 N.W.2d 113, 115 (Iowa 1970). Defendant would likely argue, however, that a motion to strike would be futile in light of the highly prejudicial effect of a comment on defendant's exercise of his right to silence, and that defendant's only remedy was a mistrial. Regardless, we find that the error, if any, of admitting the testimony was harmless.

The State made no use of, nor emphasized in any way the reference to defendant's exercise of his right to silence. No comment along those lines followed the above-quoted testimony. Under the circumstances here, we think it appears beyond a reasonable doubt that the error did not affect defendant's right to a fair trial. See State v. Porter, 283 N.W.2d 351, 353 (Iowa 1979). The trial court did not commit reversible error in overruling defendant's motion for a new trial on this ground.

III. Defendant contends the trial court erred in overruling his motion for a new trial on grounds of alleged prosecutorial misconduct during closing argument. The closing arguments were not reported or transcribed. A bill of exceptions, apparently agreed to by the defense counsel and the prosecutor, appears in the appendix. The bill of exceptions was apparently not filed with the clerk since it is not included in the record, nor was it signed by the trial judge.¹ Since the bill of exceptions was not filed with the clerk of the trial court, it has not become part of the record we can review on appeal. See Iowa R. App. P. 10(c). With nothing to review, we cannot review defendant's claim of error. The trial court's ruling on defendant's motion for a new trial based on alleged prosecutorial misconduct during closing argument is consequently affirmed.

AFFIRMED.

¹ This case was appealed before July 1, 1979, the effective date of Iowa R. Crim. P. 23.1, which requires that a bill of exceptions be signed by the trial judge or filed with the clerk of the trial court. Consequently, that rule is not applicable to the case at bar.