

IN THE COURT OF APPEALS OF IOWA

No. 0-485 / 89-1056

FILED

OCT 23 1990

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

BRETT DELANEY,

Appellant.

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Appeal from the Iowa District Court for Dubuque County,
Alan L. Pearson and Robert S. Mahan, Judges.

The defendant appeals from his conviction, following a
jury trial, for the crime of escape from custody.
AFFIRMED.

Raymond E. Rogers, State Appellate Defender, and B.
John Burns, Assistant State Appellate Defender, for
appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats,
Assistant Attorney General; Fred McCaw, County Attorney;
and Christine O. Corken, Assistant County Attorney, for
appellee.

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

HABHAB, J.

The defendant appeals from his conviction, following a jury trial, for the crime of escape from custody. We affirm.

The defendant escaped from the Dubuque County jail while awaiting sentencing on a burglary conviction. He was apprehended when he approached a stranger in a mall parking lot, clad only in prison trousers and a T-shirt, and asked the stranger to purchase clothing for him.

The defendant was charged with the crime of escape from custody. At his jury trial he testified in his own behalf that he felt compelled to escape because of conditions in the Dubuque County jail. On cross-examination, the prosecutor asked the defendant several questions about his activities following the escape and about the circumstances of his recapture. In one of these questions the prosecutor asked the defendant to explain the source of certain money which was in his possession when he was recaptured. After conferring with both attorneys at the bench, the district court required the defendant to answer the question. The defendant then stated the money was stolen.

I.

The defendant appeals from the resulting conviction. He first contends the trial court denied his fifth amendment right to avoid self-incrimination and violated Iowa Rule of Evidence 404(b) by requiring him to testify that he had been in possession of stolen money when

apprehended. He argues the district court compelled him to admit to a crime other than the crime charged. The State responds, among other things, that the defendant failed to preserve error on this issue.

We have examined carefully the questions and answers that preceded the objectionable matter and we are unable to find that the defendant claimed the protection of the fifth amendment. It is axiomatic that if a witness desires the protection of the fifth amendment, he is required to claim it.

Without a complete record, it is difficult for us to determine what took place during the bench conference immediately prior to the defendant being directed by the court to answer the question in issue. Even if we were to assume the conversation that took place at the bench may have alerted the court the defendant wanted to exercise his fifth amendment right, and that the court erred in directing him to answer the question, we are unable to find the defendant was prejudiced by his response. We reach this result when we note the rather overwhelming evidence that the defendant, by his own admission during the course of the trial, intentionally escaped from the Dubuque County jail. We are unable to find that the defendant was prejudiced by the objectionable evidence. In this respect, prejudice must be shown before any such error will require reversal. State v. Cole, 295 N.W.2d 29, 40 (Iowa 1980). Accordingly, we affirm on this ground.

II.

The defendant also contends the trial court erroneously denied his constitutional right to waive counsel and proceed pro se. This issue arose from the dispute between the defendant and his attorney concerning the defense based on allegedly intolerable conditions. The attorney proposed to present this defense with only the defendant's testimony, while the defendant desired to call other witnesses. The court appointed attorney moved to withdraw on the basis of this attorney-client dispute, but the district court declined his request.

We have reviewed the record and find this assignment of error to be lacking in merit. The defendant has a sixth amendment right to have counsel appointed for him. Gidion v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799, 805 (1963). The right to appointed counsel necessarily includes a corresponding right to proceed without counsel. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975). However, a defendant who fails to make an unequivocal request to act as his own attorney waived his right to proceed pro se. State v. Smith, 215 N.W.2d 225, 226 (Iowa 1974); State v. McCray, 231 N.W.2d 579, 580 (1975).

It is clear from the record that the defendant failed to make the required request to proceed pro se. Factually it appears the court asked the defendant whether he desired to proceed on his own. The defendant's reply hardly rises

to a level of a request to act as his own attorney. We think the following statement from State v. McKee, 223 N.W.2d 204, 205 (Iowa 1974), is instructive:

Ordinarily the accused must either conduct his own defense or be represented by counsel and cannot combine both; accused has no right to be heard both in person and by attorney; where he is conducting his own defense, he has no right to have an attorney speak for him and he is not entitled to speak for himself where he is represented by counsel.

We affirm the trial court on this issue.

AFFIRMED.