

IN THE COURT OF APPEALS OF IOWA

No. 3-434 / 92-1765

FILED

OCT 05 1993

CLERK SUPREME COURT

000629

STATE OF IOWA,

Appellee,

vs.

KEITH JEFFERSON,

Appellant.

Appeal from the Iowa District Court for Polk County,
Ray A. Fenton, Judge.

Keith Jefferson appeals the judgment and sentence entered, following a jury trial, upon his conviction of first degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender's Office.

Bonnie J. Campbell, Attorney General; Robert P. Ewald, Assistant Attorney General; John P. Sarcone, County Attorney; and James Ramey, Assistant County Attorney, for appellee.

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

000030

DONIELSON, P.J.

On June 18, 1992, the State filed a trial information charging Keith Jefferson and David Colton with robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2 (1991).

The State alleged that on May 11, 1992, Jefferson and Colton entered a convenience store where Jefferson had worked several months earlier. Colton bought beer and went outside. Jefferson came to the side of the cashier's cage and asked for money. When the cashier refused to give him the cash, Jefferson pulled out a gun. The cashier then gave Jefferson the money from the register and a green money bag from the drawer under the register.

A police officer driving by the store observed the car, driven by Colton, leaving the parking lot at a high rate of speed with its headlights and taillights off. While the officer was pursuing the car, he received a radio report of the robbery. When the officer stopped the car, Colton, the driver, was arrested, but Jefferson fled on foot. The officer found a loaded gun under the front seat of the car, a green money bag with case, and a billfold containing numerous documents identifying Jefferson. The car was registered to Jefferson's girlfriend, Traci Johnson. Jefferson was later arrested at Johnson's apartment.

Jefferson and Colton were tried together. Johnson testified that Jefferson went out with Colton on the night of the robbery. The prosecutor asked Johnson if Jefferson

000631

had admitted that he and Colton had committed this robbery. Counsel for Colton moved to strike Johnson's reply as being outside of the minutes of testimony and moved for a mistrial. Jefferson's attorney also moved to strike Johnson's reply and moved for a mistrial. The district court sustained Colton's motion for mistrial. In addition, the district court sustained Jefferson's motion to strike and admonished the jury to disregard Johnson's reply.

The jury returned a verdict finding Jefferson guilty as charged and finding that he was armed with a firearm or displayed a firearm in a threatening manner. Jefferson filed a motion for new trial which the district court overruled. The district court entered judgment on the conviction and sentenced Jefferson to serve a term of imprisonment not to exceed twenty-five years and a minimum of five years pursuant to Iowa Code section 902.7. Jefferson appeals.

First, Jefferson argues the trial court abused its discretion in refusing to sustain his mistrial motion. Second, Jefferson contends he was denied effective assistance of counsel when his attorney failed to object to instances of prosecutorial misconduct. Jefferson complains that his counsel should have objected to the prosecutor's request to have the "peanut gallery" remain quiet. Allegedly, members of the audience voiced their opinions during testimony and the prosecutor responded. In

addition, Jefferson contends his counsel was ineffective in failing to object and move for mistrial when the prosecutor posed questions concerning gang membership.

I. Appellant first asserts the trial court erred in not granting a mistrial. We review such claims for an abuse of discretion. State v. LaDouceur, 366 N.W.2d 174, 177-78 (Iowa 1985); State v. Dalglish, 223 N.W.2d 627, 628 (Iowa 1974). We will reverse a ruling only on a showing of an abuse of discretion. State v. Pletka, 310 N.W.2d 525, 529 (Iowa 1981). There is a presumption that the trial court properly exercised its discretion. LaDouceur, 366 N.W.2d at 178 (citing 24 C.J.S. Criminal Law § 1422 at 12 (1961)).

The trial court properly severed the trials because of the testimony of appellant's girlfriend concerning appellant's admissions about the robbery. See United States v. Bruton, 391 U.S. 123, 135-37, 88 S. Ct. 1620, 1627-28, 20 L. Ed. 2d 476, 484-85 (1968). The trial court informed the jury of the severance and admonished them to disregard the last portion of Johnson's testimony. We determine the trial court did not abuse its discretion by refusing to grant a mistrial. Simply telling the jury the trials were severed and this trial would proceed did not prejudice appellant. The court's statement in no way conveyed to the jury that the evidence against Jackson was stronger than that against Colton. Appellant admitted he committed the robbery, but relied on an intoxication

defense. Nor is admonishing the jury to disregard or forget Johnson's testimony about appellant's statements sufficient basis for a mistrial. Even if the evidence had been improperly admitted, it was cumulative and only confirmed appellant's testimony at trial.

II. Appellant next argues he was denied effective assistance of counsel because his attorney failed to object promptly to prosecutorial misconduct. Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32. The standard by which we measure counsel's performance is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. In order to show prejudice, appellant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Id. 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Concerning counsel's conduct, we do not believe he erred by not objecting to the prosecutor's remarks. The "peanut gallery" comment, although inappropriate, did not require an objection by defense counsel. The "black gang" remark could have been the source for an objection, but we do not believe the lack of objection falls outside the wide bounds of professional competence.

Even if we were to determine that counsel failed to perform an essential duty, we still would affirm the trial court because appellant has failed to show prejudice. Appellant testified he robbed the store. The store clerk and two police officers testified concerning appellant's use of a gun in the robbery. We do not believe the result would have been different if defense counsel had objected to the remarks. We do not believe the result would have been different even if the remarks had not been made. Appellant has failed to carry his burden of showing prejudice.

AFFIRMED.