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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed February 28, 1978
vs.)
ROSIE BERNICE RICHARDSON,) 399/59722
Appellant.)

Appeal from Marshall District Court - Russell J. Hill, Judge.

Defendant appeals conviction of operating a motor vehicle while under the influence of an alcoholic beverage, second offense, asserting a mistrial should have been declared due to the county attorney's statement during closing argument and error in giving an instruction on flight. - Affirmed.

William L. Springer, Marshalltown, for Appellant.

Richard C. Turner, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Carl D. Baker, Marshall County Attorney, for Appellee.

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

PER CURIAM

Defendant Rosie Bernice Richardson appeals her conviction of operating a motor vehicle while under the influence of an alcoholic beverage, second offense, in violation of § 321.281, The Code. In support of her claim for reversal and new trial, defendant claims a statement made by the county attorney during closing argument was so prejudicial that it was incapable of being cured by an admonition from the trial court and a mistrial should have been granted. Defendant also alleges there was insufficient evidence to support an instruction on flight and further, it was error not to require the State to prove flight beyond a reasonable doubt.

Defendant's first assignment of error concerns a statement made by the county attorney during his closing argument. Although closing argument itself was not recorded, a record was made after the jury was instructed and while it was deliberating. During his rebuttal argument, the county attorney stated in substance that if medication and alcohol working together produced an effect that would cause the conduct in question, then defendant was under the influence of alcohol, and the trial court would so instruct. Defense counsel immediately objected stating the prosecution's remarks were an incorrect statement of the law and contrary to the final instructions. The objection was sustained.

Defendant's argument is that the mistatement of the law and the final instruction were so prejudicial as to entitle her to a mistrial.

A criminal defendant is entitled to a fair trial but not a perfect one. State v. Kelsey, 201 N.W.2d 921, 927 (Iowa 1972). Prosecutor misconduct alone is not a sufficient basis for setting aside a conviction. State v. Swallom, 244 N.W.2d 321, 325 (Iowa 1976). It is not the prosecutor's misconduct which entitles a defendant to a new trial; it is the prejudice which results therefrom and which denies the defendant a fair trial. State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976); **Swallom**, supra.

The trial court is vested with broad discretion in determining whether prosecutorial misconduct was sufficient to deprive a defendant of a fair trial and justify the granting of a mistrial and an appellate court will interfere only where

such discretion has been abused. **Swallom**, supra. Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Trudo, 253 N.W.2d 101, 107 (Iowa 1977).

In the instant case, the trial court was in the courtroom watching the jury while final arguments were in process. The court heard the prosecutor's statement relating to the proposed instructions on the combined effect of alcohol and medication. In its ruling on defendant's motion for mistrial, the trial court noted the statement was brief, that defendant was very quick with his objection, that it was sustained and that the prosecutor did not return to the objectional area. The court said it saw nothing to indicate or hear that it was but a technical nicety and it could not say the statement was intentional. Finally, the trial court was of the opinion there was no prejudice shown with the submission of written instructions to the jury and their being taken into the jury room where they could be read and considered in detail.

Without deciding the point which is unnecessary to determine on this appeal, we are not convinced the prosecutor's statement was a mistatement of the law. Section 321.281, The Code. See also 7 Am. Jur. 2d Automobiles and Highway Traffic, § 258 at 811-12, "Nevertheless, one may be convicted of a violation of such statutes even though he was required to take the drugs for medicinal purposes, where he also consumed intoxicating liquor, the drugs making him more susceptible to the influence of the liquor." Even if it was, from a review of the record we find the trial court did not abuse its discretion in overruling defendant's motion for mistrial. This was not a case where the prosecutor attempted to inflame the jury during rebuttal. See State v. Monroe, 236 N.W.2d 24, 29-30 (Iowa 1975); State v. Vickroy, 205 N.W.2d 748, 751 (Iowa 1973). Neither is this a case where prejudice occurred through prosecutorial persistence. State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974); State v. Wright, 203 N.W.2d 247 (Iowa 1972). Defendant was not denied a fair trial. See State v. Lyons, 210 N.W.2d 543, 548-49 (Iowa 1973).

Defendant's second contention on appeal is there was insufficient evidence to justify the trial court giving an instruction on flight. Evidence of flight may be

considered in determining guilt or innocence. State v. Ash, 244 N.W.2d 812, 816 (Iowa 1976). However, the giving of an instruction for which there is no factual basis is generally prejudicial. State v. Horstman, 222 N.W.2d 427, 431 (Iowa 1974); State v. Mays, 204 N.W.2d 862, 865 (Iowa 1973).

In the instant case the testimony is uncontradicted that defendant left the scene of the accident and drove to her residence a block and a half away before the police officer arrived. Defendant claims she told the other driver she was going home to get her medicine. She parked her car in her driveway in plain view. However, the other driver did not remember her alleged statement to him, did not see her leave and could not find her car immediately afterwards when he drove around looking for it. Further, he did not know her name but had noted her license number. The police then located her car from that information.

An instruction on flight may be proper even though there is no direct evidence the accused fled to avoid arrest. State v. Galvan, 181 N.W.2d 147, 152 (Iowa 1970). It was for the jury to say, under all the circumstances, whether she departed because of her consciousness of her guilt. **Galvan,** supra at 151; State v. Thrasher, 175 N.W.2d 397, 402-03 (Iowa 1970). The trial court did not err in giving the instruction.

Defendant also argues that it was error not to require the State to prove flight beyond a reasonable doubt. The elements necessary to establish the crime of operating a motor vehicle under the influence of alcohol are contained in § 321.281, The Code. Flight is not one of the elements of the offense. Rather, flight, as a kind of conduct of an accused person following the commission of an alleged crime, is relevant to both the commission of the acts charged and the intent and purpose with which those acts were committed. **Thrasher,** supra.

We also note the court's instruction on flight required the jury to find the offense charged was committed before flight could be considered in determining guilt or innocence. Since defendant is the only person who could have committed the offense charged, if one was committed, the consideration of the circumstance of flight in the sequence as instructed added nothing. Before considering it, the jury was required to have already found the defendant guilty. The instruction could not have been prejudicial.

AFFIRMED.