



270

IN THE COURT OF APPEALS OF IOWA SUPREME COURT

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 19, 1979
vs.	)	
MICHAEL PHILLIP HOWARD,	)	<u>246</u>
Defendant-Appellant.	)	62550

Appeal from Johnson District Court - Harold Swailes, Judge.

Defendant appeals from conviction of sexual abuse in the third degree, in violation of section 709.4, supplement to the Code 1977. - AFFIRMED.

L. Vern Robinson, of Robinson & Stein, Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Paul C. Peglow, Assistant Johnson County Attorney, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals from his conviction of sexual abuse in the third degree in violation of section 709.4, supplement to the Code 1977. We affirm.

I. Defendant contends that he was denied his constitutional right to a speedy trial by being forced to ask for a continuance setting the trial date beyond ninety days from the date of indictment to be able to examine evidence to be introduced by the State. Defendant conceded that he raised this constitutional issue for the first time on appeal. This is not permissible and we do not review this issue for the reason that defendant has failed to properly preserve error. State v. Holmes, 276 N.W.2d 823, 828 (Iowa 1979); State v. Fish, 265 N.W.2d 737, 739 (Iowa 1978).

II. In a related matter, defendant contends that the evidence consisting of criminalistics laboratory reports, which the State notified defendant it would introduce pursuant to section 691.4, supplement to the Code 1977,¹ should have been ruled inadmissible because of the State's failure to file the reports with the court until four days after the date it notified defendant that the reports would be available. The express language of the statute, however, indicates that a continuance and not suppression of the evidence is the proper remedy for the delay in filing the reports. State v. Givens, 248 N.W.2d 86, 88 (Iowa 1976); section 691.4, supplement to the Code 1977. Defendant was granted a continuance in this case and the trial court properly overruled defendant's motion to suppress the evidence.

III. Defendant next contends that his underwear was improperly admitted into evidence, asserting that since the individual who signed the return receipt card for the underwear when it was returned to the police department from the criminalistics laboratory did not testify at trial, and since no one testified that the underwear was in substantially the same condition as when it was sent to the laboratory, a chain of custody was not adequately established. However, the State is only required to show circumstances that make it reasonably probable that the evidence was not subjected to

¹ In his brief, defendant cited section 749A.4, The Code 1977 as being the applicable section. However, at the time of the trial, section 691.4, supplement to the Code 1977 was in effect. This error is inconsequential since the sections are identical except for a typographical error that has been corrected in section 691.4, The Code 1979.

tampering, substitution, or alteration to establish an adequate chain of custody. State v. Jeffs, 246 N.W.2d 913, 915 (Iowa 1976); State v. Branch, 222 N.W.2d 423, 426 (Iowa 1974) (quoting State v. Lunsford, 204 N.W.2d 613, 617 (Iowa 1973)). The absence of the testimony of the individual who signed the return receipt card for the underwear does not sufficiently diminish the reasonable probability of the absence of tampering, substitution, or alteration established by the State with regard to this evidence to render it inadmissible. Regardless, the failure to account for undisturbed possession of solid objects not easily susceptible to undetected alteration such as the underwear in this case generally goes to the weight rather than the admissibility of the evidence. State v. Ubben, 186 N.W.2d 625, 627 (Iowa 1971) (quoting State v. Limerick, 169 N.W.2d 538, 541 (Iowa 1969)). We conclude that the defendant's underwear was properly admitted into evidence over defendant's objection.

IV. Lastly, defendant contends that certain statements made by the prosecutor during closing argument constituted prosecutorial misconduct. Two of the three statements on which defendant bases his contention were not objected to during the closing argument or prior to the submission of the case to the jury. Unless the statements were so inflammatory or prejudicial that a timely objection would be of no consequence, failure to object to statements made during closing argument prior to submission of the case to the jury constitutes failure to preserve the error of the statements. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978); State v. Phillips, 226 N.W.2d 16, 18-19 (Iowa 1975). Since the two statements that were not objected to prior to submitting the case to the jury were not so inflammatory or prejudicial that a correcting instruction could not have cured their effect, we conclude that defendant has failed to preserve error on those statements. See Johnson, 272 N.W.2d at 484.

Defendant did make a timely objection to one of the prosecutor's statements in closing argument, the context of which was as follows:

Mr. Robinson says, well, why didn't she yell and scream or why didn't she raise a commotion so that these three other people up in the Hope House would have heard? What good would that have done, ladies and gentlemen? Bonnie Culp was down on a couch, she was bound, for part of it she was gagged. There were three people up there who were probably friends of the Defendant.

MR. ROBINSON: Objection, Your Honor, this is improper argument. There is nothing supported by the record in this.

THE COURT: There is no indication that any other inmate of the Hope House was a friend of the Defendant, as far as I know. I do think that's beyond the record.

MR. PEGLOW: All right. There were three people up there who were also convicted felons --

MR. ROBINSON: Same objection, Your Honor, it's improper argument.

MR. PEGLOW: Your Honor, we discussed what the Hope House is.

THE COURT: We have, and I believe that argument could be inferred from the statement of what the Hope House was, what the residents of Hope House are doing there.

While counsel is not permitted to create evidence during argument in a criminal proceeding, State v. Pepples, 250 N.W.2d 390, 396 (Iowa 1977); Phillips, 226 N.W.2d at 19, reasonable conclusions and permissible inferences that flow from evidence admitted at trial may be pointed out with reasonable latitude. State v. Fryer, 243 N.W.2d 1, 7 (Iowa 1976); Phillips, 226 N.W.2d at 19. The statement that the people upstairs were probably friends of defendant was an improper creation of evidence by the prosecutor and the objection to that statement was properly sustained by the trial court. However, the statement that the people upstairs were convicted felons could properly be inferred from the evidence previously introduced at trial that Hope House was a halfway house for inmates of the prisons before they are paroled. There was nothing objectionable in pointing out that reasonable conclusion to the jury. Consequently, the trial court did not err in overruling defendant's objection to that statement.

Defendant's conviction of sexual abuse in the third degree, in violation of section 709.4, supplement to the Code 1977 is affirmed.

AFFIRMED.