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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,
Appellee,
v.
TONI RAE COLE,
Appellant.

Filed March 29, 1978

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60579

Appeal from Muscatine District Court - R. K. Stohr and Max R. Werling, Judges.

Defendant appeals from conviction upon a plea of guilty claiming that she did not understand the charge, and that there was no factual basis for the plea. Affirmed.

John J. Wolfe, Jr., Clinton, for appellant.

Richard C. Turner, Attorney General, and David Newell, Muscatine County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Toni Rae Cole appeals her conviction for false uttering of a check over $20 in violation of § 713.3, The Code. The conviction was based upon a plea of guilty. She contends the record fails to disclose that she had an understanding of the charge, or that there was a factual basis for the plea. Both complaints focus on the intent element of the crime charged. Defendant argues that in fact she believed that her estranged husband had placed sufficient funds in their joint bank account to cover the $959.78 check which is the basis for her prosecution.

The record contains adequate support for trial court's conclusion that the plea was entered understandingly. The court's initial statement to defendant of the charge included this element: "knowing at the time that you did not have sufficient funds. . . ." (X. 11, ll. 24-26.) Trial court then read § 713.3, The Code, to defendant. Finally, trial court, in enumerating the elements which the State would be required to prove included this:

> 5. That at the time of delivery of the check you knowingly had no arrangement or understanding with such bank, or funds therein sufficient to meet or pay the check. (X. 14, ll 30-34 to 15, l. 1.)

After each of these recitations, defendant acknowledged her understanding. Cf. Hoskins v. State, 246 N.W.2d 266, 268 (Iowa 1976).

The record also shows that trial court was familiar with the information, and elicited a response from defendant which indicated that the facts asserted therein were correct. (X. 17, ll. 13-34.) This segment of the colloquy, although controverted by defendant's version in the presentence investigation report, provided an adequate factual basis. See State v. Lemburg, 257 N.W.2d 39, 43 (Iowa 1977); Brainard v. State, 222 N.W.2d 711, 722 (Iowa 1974).

AFFIRMED.

DONIELSON, J. (dissenting)

I dissent. I find no basis for reversal in the remarks made by either the trial judge or the prosecutor during closing argument. In the context of objections regarding the admissibility of evidence, the supreme court has held that remarks made by a trial judge while ruling on such objections only constitute reversible error if they are unfair and prejudicial to the accused. State v. O'Kelly, 211 N.W.2d 589, 597 (Iowa 1973), cert. denied, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240, reh. denied, 419 U.S. 887, 95 S.Ct. 160, 42 L.Ed.2d 131 (1974); State v. McCarty, 179 N.W.2d 548, 553 (Iowa 1970); State v. Jensen, 245 Iowa 1363, 1368-1369, 66 N.W.2d 480 (1954); see State v. Fiedler, 260 Iowa 1198, 1203, 152 N.W2d 236 (1967). This same rule would appear to be equally applicable in the situation where a trial judge makes a comment either to or in the presence of the jury after the reception of all the evidence as well. See State v. Heeron, 208 Iowa 1151, 1153, 226 N.W. 30 (1929); State v. Grgurich, 253 N.W.2d 605, 606 (Iowa 1977); 75 Am.Jur.2d Trial § 95 (1974).

In the instant case, the statement made by the trial court found objectionable by the majority was an inadvertent one which, in my view, neither prejudiced the defendant nor emasculated his attorney's argument. In State v. Miller, 254 Iowa 545, 556, 117 N.W.2d 447 (1962), defendant objected to a comment made by the trial court while defendant was attempting to identify a picture of his car for use as an exhibit. In response to an objection by the prosecutor, the court said "I don't think that is very important. I am going to let him answer it." The picture was admitted into evidence and defendant claimed that the court's remark disparaged the exhibit. In holding that the comment did not prejudice the defendant, the supreme court indicated that the remark was a rather innocuous one which was directed at the State's objection and not at the probative value of defendant's evidence. In my view, Miller is analogous to the situation in the instant case. Furthermore, I do not believe that the comment made by the trial judge prejudiced the defendant. A criminal defendant is entitled to a fair trial, not a perfect one. State v. Kelsey, 201 N.W.2d 921, 927 (Iowa 1972).

I also conclude that the comments made by the prosecutor do not warrant a new trial. If, indeed, the remarks rise to the level of misconduct, and I am not satisfied that they do, the law is settled that misconduct of the prosecuting attorney in argument does not require granting a new trial unless it appears to have been so prejudicial as to

deprive defendant of a fair trial. State v. Lyons, 210 N.W.2d 543, 549 (Iowa 1973); State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). The resolution of this question lies in the sound discretion of the trial court. Id.; State v. Vickroy, 205 N.W.2d 748, 750-751 (Iowa 1973); State v. Swallom, 244 N.W.2d 321, 325 (Iowa 1976). 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). On the basis of the record in the instant case, I cannot say that the trial court abused its discretion in failing to grant a mistrial or admonish the jury as a result of the prosecutor's comments. Consequently, I would affirm the judgment below.