FILED
SEP 24 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-250 / 90-787

STATE OF IOWA,

Appellee,

vs.

ROY ALAN FINCH,

Appellant.

505

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Defendant appeals his first-degree murder conviction. **AFFIRMED.**

John P. Messina, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Julie Ann Halligan, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant County Attorney, for appellee.

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

SCHLEGEL, J.

Roy Finch appeals his conviction, following a jury trial, for first-degree murder. Finch first contends he should have been granted a mistrial because prejudicial testimony entered the record. The testimony came from a police officer who had spoken with Finch's brother. The police officer testified the brother "suspicioned that this alleged crime was true from what he had heard." The district court struck this testimony from the record and admonished the jury to disregard it. Finch argues, however, the testimony was so prejudicial that these remedies were inadequate.

Because the trial court has the ability to gauge the impact of the subject of the motion upon the trial, it has considerable discretion in ruling on motions for mistrial. State v. Lewis, 391 N.W.2d 726, 730 (Iowa App. 1986) (citing State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976). We reverse only upon a showing that discretion was abused. A defendant is entitled to a new trial where it is shown that the prejudicial effect of a prosecutor's actions remained with the jury. State v. Peterson, 189 N.W.2d 891, 906 (Iowa 1971).

We agree with the trial court's denial of the mistrial motion. "Prejudice is presumed if hearsay is admitted, unless the contrary is affirmatively established." State v. Sowder, 394 N.W.2d 368, 372 (Iowa 1986) (citations omitted). We find the statement by the officer was not

hearsay as it was not offered for the truth of the matter asserted. The statement was in response to a question about Finch's brother's emotional condition. The officer replied "he was very upset because he suspicioned that this alleged crime was true from what he had heard."

In addition, the brother, Jim Finch, had testified earlier in the trial and had stated several times that the defendant had told him repeatedly he had committed the murder. Jim testified: "I kept asking him, 'Are you sure you done it? Are you sure there was no one else in there?' He kept saying, 'Man, I done it. I know I done it.'" When the police officer testified there was already substantially similar evidence in the record. See State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979); State v. Curry, 436 N.W.2d 371, 373 (Iowa App. 1988).

Finally, the trial court struck the officer's testimony about the suspicion and admonished the jury. This action is sufficient to remove any possible error. See State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986); State v. Brotherton, 384 N.W.2d 375, 381 (Iowa 1986); State v. Coffee, 182 N.W.2d 390, 392 (Iowa 1970). A defendant who asserts these acts were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of the trial court. Brown, 397 N.W.2d at 699. We find an abuse of discretion only when the defendant shows prejudice which prevents him from having a fair trial. See State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977). We conclude there

was no prejudice and no abuse of discretion by the trial court in not granting defendant's motion for mistrial. For the above reasons, we affirm the trial court's denial of the mistrial motion.

Finch also contends the district court should have imposed sanctions on the State for its alleged failure to comply with pretrial discovery orders. The orders directed the State to perform laboratory tests on a variety of items from the victim's apartment, apparently to determine whether there were biological markers (such as blood or hair) tending to identify the assailant. The State did perform laboratory tests on several items, but Finch alleges the State did not test all the items from the apartment in a timely fashion. Finch asserts that as a discovery sanction, the district court should have either dismissed the case or excluded the testimony of the State's criminologist. The State responds, among other things, that Finch can show no prejudice from the alleged discovery omission because the six unexamined items were insignificant and had little or no probative value.

We point out to the State that it is the State who has the burden of proving harmlessness beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710-711 (1967); State v. Boley, 456 N.W.2d 674, 678 (Iowa 1990). Prejudice must be shown before any error will require reversal. State v. Cole, 295 N.W.2d 29, 40 (Iowa 1980). After a thorough examination of

the record, we conclude the trial court did not commit any error in failing to strike the evidence of the criminologist or to dismiss the case. We agree with the court that

> [t]here's nothing that would seem to persuade me that the evidence that was not examined would have tipped the scale in Mr. Finch's favor. It was not examined as the Court ordered. To that degree, there is no ability to solve that problem. It was simply not done as the Court ordered, but it is not felt by this Court, based on the record as I heard it, that the ultimate examination of those items would have changed the jury's verdict based on the inculpatory evidence that the jury heard in regard to Mr. Finch's actions after he left the county.

Remedies under Iowa Rule of Criminal Procedure 13(6)(c) are discretionary in nature and will be reversed only if the trial court abuses its discretion. State v. Brown, 397 N.W.2d 689, 698 (Iowa 1987).

Once the prosecutor realized six items had not been analyzed, she suggested a brief continuance to allow the criminologist to examine them that day. Defense counsel declined. After the evidence was closed the six items were analyzed and nothing significant or exculpatory was discovered. We believe these items were not probative enough to have changed the jury's verdict and, therefore, not prejudicial. We affirm the conviction.

AFFIRMED.