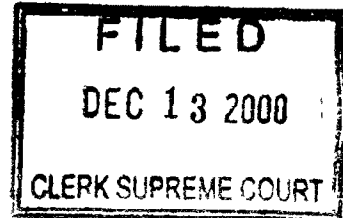


IN THE COURT OF APPEALS OF IOWA

No. 0-612 / 99-1828
Filed December 13, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY VICTOR HERSHBERGER,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, E. Richard Meadows, Jr., Judge.

Jeffrey Victor Hershberger appeals the district court's judgment and sentence entered upon his conviction for two counts of forgery in violation of Iowa Code section 715A.2 (1999), theft in the second degree in violation of Iowa Code section 714.2(2), and being an habitual offender in violation of Iowa Code section 902.8. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Jeffrey Victor Hershberger appeals the district court's judgment and sentence entered upon his conviction for two counts of forgery, theft, and being a habitual offender. He contends he was denied his due process right to a fair trial when the jury was allowed to view a videotaped interview of him in jail garb. We affirm.

I. Factual Background and Proceedings. On July 8, 1999, the State charged Hershberger with two counts of forgery in violation of Iowa Code section 715A.2, theft in the second degree in violation of Iowa Code section 714.2(2), and of being a habitual offender in violation of 902.8. Jury trial commenced on September 14, 1999. During trial, the State introduced a videotaped interview between Hershberger and Officer Troy Boston of the Oskaloosa Police Department. At the time of the interview, Officer Boston was investigating allegations of forged signatures on checks belonging to Ray Jolley. The investigation implicated several people, including Hershberger. During the course of the investigation, Hershberger contacted Officer Boston regarding the checks and asked to meet with him at the Mahaska County jail, where Hershberger was incarcerated. The interview was videotaped with Hershberger wearing a black and white jail uniform.

Defense counsel objected to showing portions of the videotape to the jury. The district court overruled the objection but gave a cautionary instruction directing the jury not to consider evidence of Hershberger's incarceration. The jury returned verdicts of guilty on all counts and Hershberger appeals.

II. Standard of Review. We review the constitutional issues raised by Hershberger *de novo*. See *State v. Cooley*, 608 N.W.2d 9, 13 (Iowa 2000).

III. Merits. Hershberger argues he was denied his right to a fair trial when the videotaped interview with him wearing jail clothing was played to the jury. Defendants are entitled to the indicia of innocence in the presence of the jury. *State v. Wilson*, 406 N.W.2d 442, 448 (Iowa 1987). The state cannot compel a defendant to stand trial in identifiable prison clothing. *Estelle v. Williams*, 425 U.S. 501, 512, 96 S. Ct. 1691, 1697, 48 L. Ed. 2d 126, 135 (1976). Requiring a defendant to appear in prison clothing creates an unacceptable risk the jury may consciously or subconsciously be influenced in their deliberations. *Id.* at 504-05, 96 S. Ct. at 1693, 48 L. Ed. 2d at 131. However, a defendant who appears briefly in jail clothing does not suffer prejudice where the district court gives a cautionary instruction. See *State v. Johnson*, 534 N.W.2d 118, 125-26 (Iowa App. 1995); see also *Wilson*, 406 N.W.2d at 448-49.

Hershberger suffered no prejudice when the jury was allowed to view a videotape picturing him in prison clothing. The videotape was only fifteen minutes long, and the district court gave the jury a cautionary instruction regarding their use of the evidence. In addition, other evidence in the record indicated to the jury Hershberger was in jail following his arrest for theft. He admitted at trial he had been arrested in May of 1999 and was in jail at the time of the interview with Officer Boston. Several witnesses testified Hershberger had an extensive criminal history, including Hershberger himself, and that he had been incarcerated in the past. Jolley, the victim, testified he had begun

corresponding with Hershberger while the latter was in prison both in the Clarinda and Oakdale institutions. Accordingly, we conclude Hershberger suffered no prejudice when the district court allowed the jury to view the videotaped interview depicting him in prison clothing.

AFFIRMED.