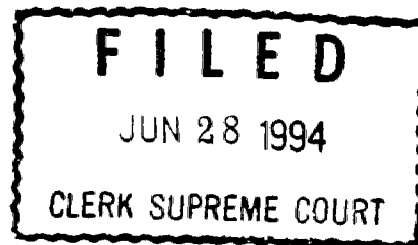


IN THE COURT OF APPEALS OF IOWA

No. 4-095 / 93-0110



STATE OF IOWA,

Plaintiff-Appellee,

vs.

JUAN JOSE ROJAS-CARDONA,
a/k/a PEPE ROJAS-CARDONA,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County,
Kristin L. Hibbs, Judge.

Juan Jose Rojas-Cardona appeals from his convictions,
following a jury trial, for six counts of forgery and one
count of third-degree theft. **AFFIRMED.**

Dean Stowers of the Rosenberg Law Firm, Des Moines, for
appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen,
Assistant Attorney General, J. Patrick White, County
Attorney, and Kelly Raines, Assistant County Attorney, for
appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

Juan Jose Rojas-Cardona appeals from his conviction for six counts of forgery and one count of third-degree theft. He challenges the admission of rebuttal testimony, the denial of his motion for mistrial, and the submission of jury instructions.

In September 1990 Rojas and Dr. Fernandez Barros formed a corporation called APAC-ROMEX. Barros was president, and Rojas was vice-president. The company telemarketed to the Hispanic community, an idea which Rojas and Barros had successfully presented to a firm in Cedar Rapids called APAC. Theodore Schwartz of APAC was the secretary-treasurer of APAC-ROMEX. By January 1991 APAC-ROMEX employed 129 workers. They were paid through the APAC office every two weeks.

In December 1990 six employees did not receive paychecks. The Iowa City Police Department and the Johnson County Attorney's Office became involved. An investigation into APAC-ROMEX revealed that Rojas had, allegedly without authorization, endorsed and cashed the employees' checks and deposited the money into his own bank account. Rojas was charged with forgery and theft in the second degree.

At trial, Rojas testified APAC often sent paychecks which were incorrect in amounts or failed to include bonuses. These errors would not be corrected until the next set of paychecks. Consequently, Rojas claimed he developed a practice of making cash or personal check

advances to employees and obtaining their implied or express consent to deduct those advances from their future pay. He testified he utilized this practice with five of the employees involved in this case at their request. He claimed he deposited one employee's check to be sure it was honored by APAC at a later time. Although a couple of the employees testified they had received advances in pay, all of them stated they had not authorized Rojas to endorse and cash the checks.

Rojas was found guilty of six counts of first-degree forgery and one count of third-degree theft pursuant to Iowa Code sections 715A.2(1)(b) and (c), 715A.2(2)(a), 714.1(1) and 714.2(2) (1991).

Rojas appeals.

I. Presentation of Rebuttal Witnesses

Rojas first contends his right to a fair trial was violated when the State presented ten rebuttal witnesses who he claims did not explain, repel, controvert, or disprove evidence submitted by the defense. He further contends the rebuttal took almost as much time as the State's case-in-chief and resulted in the prejudicial effect of giving rebuttal testimony greater probative weight. Rojas asserts the rebuttal testimony was not responsive to new testimony and merely allowed the State to present its case-in-chief twice. Rojas also asserts the testimony was cumulative and implicated the undue delay,

waste of time, and needless presentation bases for exclusion of evidence pursuant to Iowa Rule of Evidence 403. Finally, Rojas contends one rebuttal witness was improperly permitted to testify in violation of a sequestration order, and the same witness was improperly used to admit an exhibit which had previously been ruled inadmissible.

The trial court has considerable discretion in admitting rebuttal testimony. State v. Mayberry, 411 N.W.2d 677, 685 (Iowa 1987). Its ruling will be disturbed only upon a clear abuse of discretion. State v. Agent, 443 N.W.2d 701, 704 (Iowa 1989).

Rebuttal testimony "explains, repels, controverts, or disproves evidence produced by the other side." Agent, 443 N.W.2d at 703. Competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence introduced by a defendant or brought out on cross examination is considered rebuttal evidence. State v. Nicholson, 402 N.W.2d 463, 466 (Iowa App. 1987).

We have reviewed the rebuttal testimony complained of by Rojas. In each case the proffered testimony either explained or refuted evidence introduced by Rojas or brought out during the examination of defense witnesses and, as such, was proper rebuttal testimony. We conclude the trial court did not abuse its discretion in admitting the proffered testimony.

Rojas also complains rebuttal witness Frank Rubero violated the sequestration order. Rubero was present in the courtroom when his wife, Karen Gavrell, testified during the State's case-in-chief. Rojas contends the district court erred in looking only to the question of whether the witness's testimony was affected by the violation of the sequestration order. He urges that stronger sanctions would be appropriate and complains the district court abused its discretion in allowing Rubero to testify following his violation of the sequestration order.

Whether a witness may testify following a violation of a sequestration order rests within the sound discretion of the trial court. State v. Don, 318 N.W.2d 801, 806 (Iowa 1982). We reverse only upon a clear showing of an abuse of discretion. Id.

In Don, the State called a rebuttal witness who had been present in the courtroom during earlier testimony despite a witness sequestration order. Id. However, the witness did not testify to matters directly covered during earlier testimony. Id. The court also found no basis to conclude the witness's testimony was affected by violation of the order. Id. However, aside from the "affected testimony" standard impliedly adopted in Don, the Iowa courts have not addressed the imposition of available sanctions for the violation of a sequestration order.

Violation of a sequestration order rarely results in the disqualification of a witness or the grant of a new trial. See 75 Am. Jur. 2d Trial § 248, 251 (1991). Prejudice to the complaining party is widely accepted as the key consideration when determining what remedy, if any, is appropriate when a sequestration order is violated. 75 Am. Jur. 2d at § 245. In addition, courts generally consider whether there was involvement or collusion between the parties or their counsel when the witness violated the order. People v. Bell, 809 P.2d 1026, 1032 (Colo. App. 1990). If a witness intentionally violated the court's order, or if counsel was involved, the witness, and counsel if applicable, may be cited for contempt of court. Courts may consider the seriousness of the violation, its impact on the testimony of the witness, and its probable impact on the outcome of the trial. Commw. v. Gibson, 369 A.2d 314, 316 (Pa. Super. 1976).

Some courts also consider other factors when reviewing challenges to witness testimony arising out of sequestration order violations. In several instances, courts have taken special notice that the witness testified only in rebuttal. Rinard v. State, 351 N.E.2d 20, 24 (Ind. 1976); State v. Edwards, 498 P.2d 53, 55 (Kan. 1972). At least one court has held the witness exclusion rule does not apply at all to witnesses in rebuttal. Hughes v. State, 148 S.W. 543, 556 (Tenn. 1912).

In this case, Rubero was present only during his wife's testimony. He testified exclusively as to matters not covered in his wife's testimony during the State's case-in-chief. Also, he testified on rebuttal only. Accordingly, we find no prejudice to Rojas. Furthermore, there was no evidence of an intentional violation or collusion. We affirm the trial court's decision allowing Rubero's testimony.

Finally, Rojas claims the district court abused its discretion in receiving Exhibit 17, a "Statement of Consent," in evidence. On appeal, Rojas claims the admission was in violation of discovery motions. However, at the trial court level, Rojas only objected to the exhibit as improper rebuttal. Rojas is required to make an appropriate objection to the trial court. See Davis v. State, 443 N.W.2d 707 (Iowa 1989). Failure to raise an issue in the trial court constitutes waiver on appeal. Id.

II. Denial of Motion for Mistrial

Rojas next argues the court erred in failing to grant his motion for a mistrial based on the prosecutor's suggestion that a burglary of his business was an "inside job."

A prosecutor's misconduct will not warrant a new trial unless the conduct was "so prejudicial as to deprive the defendant of a fair trial." State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989). In order to prevail on this

assignment, the defendant must demonstrate misconduct occurred and prejudice resulted from it. State v. Barrett, 445 N.W.2d 749, 753 (Iowa 1989). The party claiming prejudice bears the burden of establishing it. Anderson, 448 N.W.2d at 33. Prejudice results from persistent attempts to inject prejudicial matter before the jury. Id. The strength of the evidence against the defendant is a consideration when evaluating whether prejudice occurred. Id.; see also State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). In addition, "it is axiomatic that a trial court is better equipped than appellate courts can be to determine whether prejudice occurs . . . because the trial court is a firsthand observer of both the alleged misconduct and any jury reaction to it." Anderson, 448 N.W.2d at 34.

While we do not condone the conduct of the prosecutor in making this remark, we find no evidence Rojas was prejudiced by it. There was significant evidence against him. Furthermore, when the question was asked and the objection lodged, the district court admonished the jury to disregard the prosecutor's question. The prosecutor made no further remarks. We find no abuse of discretion in the trial court's denial of Rojas' motion for mistrial.

III. Jury Instructions

Finally, Rojas contends the jury instructions were violative of his right to a fair trial.

We will not reverse a conviction for claimed errors in jury instructions unless there is a reasonable basis for finding the jury was confused or the instructions, when viewed as a whole, were so contradictory that the jury may have followed the wrong one. State v. Lee, 494 N.W.2d 706, 707 (Iowa 1993).

We have carefully reviewed contentions regarding the jury instructions. In the first instance, Rojas claims the court erred in failing to give a "claim of right" instruction. We find the "claim of right" instruction given, combined with the instruction on burdens and the instruction on the elements of forgery, fully inform the jury as to the applicable law. A trial court is not required to word the jury instructions in any particular way. See State v. Morrison, 368 N.W.2d 173, 175 (Iowa 1985).

Rojas next claims the reasonable doubt instruction understated the State's burden of proof and misstated the evidence upon which the jury could have found a reasonable doubt. Iowa Uniform Criminal Jury Instruction 100.10 was given. We are reluctant to disapprove of Uniform Instructions. See State v. Doss, 355 N.W.2d 874, 881 (Iowa 1981). We find no merit in Rojas's contention and approve the trial court's submission of this instruction.

Rojas also claims the court erroneously utilized a circumstantial evidence instruction which misidentified that term. The instruction given was Iowa Criminal Jury

Instruction 100.6. Once again, we note our reluctance to disapprove of Uniform Instructions. Doss, 355 N.W.2d at 881. In addition, we find the instruction adequately informed the jury of the applicable law.

Finally, Rojas claims the forgery instructions suggested an alternative theory -- "uttering" -- upon which the jury could find Rojas guilty, which was not based upon any evidence the State presented at trial. Rojas's claim is without merit. Rojas even admitted he signed the payroll checks in question. We find the jury was adequately instructed on the applicable law. See Lee, 494 N.W.2d at 707.

We affirm the trial court on all issues.

AFFIRMED.