

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 26 1984

CLERK SUPREME COURT

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STATE OF IOWA,

)

Filed June 26, 1984

Plaintiff-Appellee,

)

vs.

)

4-158
83-1034

MICHAEL HEMPSTEAD,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Delaware County—T.H. Nelson,
Judge.

Defendant appeals from his conviction for burglary in the second degree and false use of a financial instrument in violation of Iowa Code sections 713.1 and 715.6, asserting that the jury was not adequately instructed on his defense of agency and that he was denied a fair trial due to the individual and cumulative effect of various incidents alleged to constitute prosecutorial misconduct.

AFFIRMED.

John J. Goen of Jenk, Jenk & Goen, Dyersville, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, and Hayden, JJ.

Defendant appeals from his conviction of burglary in the second degree and false use of a financial instrument in violation of Iowa Code section 713.1 and 715.6. We affirm.

I. Scope of Review

Our scope of review is at law and for correction of errors only. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982). However, if basic constitutional safeguards are asserted, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

II. Mistrial

Defendant claims error in the trial court's refusal to grant a mistrial on the ground of prosecutorial misconduct. Defendant first asserts the prosecutor made a comment in his opening statement regarding the defendant's testimony prior to the defendant taking the stand. However, defendant made no objection to that statement. It was the trial court that later admonished the prosecutor in chambers. As such, we find no error was preserved on that issue.

Secondly, defendant argues that the prosecutor in his opening statement stated that Donna Reth was told by several friends that Hempstead was attempting to pass her checks in town and that such was hearsay and prejudicial. The conversation complained of was not made part of the record below. The defendant should have made the opening statements part of the record so as to preserve any error for review. See State v. Stanley, 344 N.W.2d 564, 569 (Iowa Ct. App. 1983). For want of record we have nothing to review. Id. at 569.

We note, however, that even if the alleged error was preserved the same information was admitted later at trial not for the truth of the statement but to explain Donna Reth's subsequent conduct. In view of this fact, defendant has

failed to show he was prejudiced by the statements made. See State v. Gilroy, 313 N.W. 2d 513, 519 (Iowa 1981).

Lastly, defendant contends that the prosecutor acted improperly when he elicited evidence that Donna Reth was presently being represented by defendant's counsel in an unrelated bad check charge and such behavior necessitates a mistrial. We disagree.

Misconduct of a prosecutor is ground for reversal only when it deprives the accused of a fair trial. State v. Wright, 309 N.W.2d 891, 893 (Iowa 1981). To prevail on a claim that defendant has been denied a fair trial by prosecutorial misconduct, defendant must show the misconduct and that defendant was prejudiced by it. Gilroy at 519.

We need not address the issue of whether the prosecutor's action was improper. Even if we assume it amounted to prosecutorial misconduct, we cannot find any resulting prejudice. Defense counsel stated: "It would be terribly unfair to let this jury have this case after that gross misconduct, because it creates a prejudice that I ought to have been able maybe to influence Donna Reth, that she's probably telling the truth, if I couldn't get her to change her testimony." We find this reasoning speculative at best.

For the foregoing reasons we affirm the trial court's denial of defendant's motion for mistrial as defendant has not carried his burden of showing misconduct as well as prejudice.

III. Instructions

Defendant, also, appeals the trial court's failure to instruct the jury on the issue of agency. The defendant's theory of defense was that because of the unique relationship between himself and Donna Reth, he was allowed to write checks for Donna.

A trial court is not required to instruct the jury on any issue which finds no evidentiary support in the record. State v. Lamar, 210 N.W.2d 600, 606 (Iowa 1973). Defendant presented evidence of his relationship with the victim, Donna Reth, in support of an alleged agency defense. Defendant presented evidence that the victim and the defendant were close friends, such that they had a "mother and son" relationship. Defendant also presented evidence that Donna Reth had in the past written checks for him and bought his family things. The evidence presented in no way tended to show authority to sign the checks. Therefore, we find the trial court's refusal to submit that issue to the jury to be proper.

At any rate, the trial court instructed in proposition No. 3, Instruction No. 15 that in order to convict defendant the State must also establish beyond a reasonable doubt "[t]hat, at the time he so used the check, Defendant knew that he was not the person who had the right to so use said check." The jury was adequately instructed that if they found that the defendant reasonably believed he had a right to sign the check, he could not be convicted of false use of a financial instrument. We find the basic substance of the instruction requested by defendant was actually given.

Accordingly, we affirm the trial court's ruling in total.

AFFIRMED.