

IN THE COURT OF APPEALS OF IOWA

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FILED

JAN 28 1987

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MIKEL K. MYERS,

Defendant-Appellant.

Filed January 28, 1987

6-441
86-264

Appeal from the Iowa District Court for Linn County (No. CRF 9461) -
Paul J. Kilburg, Judge.

Defendant appeals from convictions for burglary and sexual abuse.
AFFIRMED.

Charles Harrington, Appellate Defender, and B. John Burns, Assistant
Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney
General; and Harold L. Denton, Assistant Linn County Attorney, for the
plaintiff-appellee.

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

SACKETT, J.

Defendant Mikel L. Myers was charged with first degree burglary and sexual abuse in the second degree in violation of Iowa Code §§713.1, 713.3, 709.1 and 709.3 (1985). He was convicted by a jury on both counts. Defendant appeals contending the trial court abused its discretion in failing to grant him a new trial because of certain comments made by the trial court in closing argument. We affirm his conviction.

Defendant allegedly robbed the victim at knife point and then forced her to engage in various sexual acts. Defendant did not testify at trial. In his closing summation the county attorney said:

When you take every one of those things and add them up, there is no question what the crime is. It's Burglary in the First Degree and became so when that intruder broke that window and got into the house, went up to her and demanded the money; injured her; threatened her; and demanded the money. That then became First Degree. There is nothing in the record that contradicts any of that.

There is nothing in this record to indicate there is anything untruthful about [the victim's] version of what happened; nothing.

Defendant objected to the statements and moved for a mistrial contending the prosecutor had impermissibly commented on defendant's failure to testify. The trial court overruled defendant's motion.

In reviewing a motion for mistrial we will not reverse unless the trial court has abused its discretion. State v. Trudo, 253 N.W.2d 101, 106 (Iowa), cert denied, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 187 (1977).

Trial courts have considerable discretion in determining whether closing arguments transgress the bounds of propriety in particular cases and whether unfair prejudice has occurred. State v. Taylor, 336 N.W.2d 721, 727 (Iowa 1983). The federal constitution prohibits a prosecutor from commenting on a defendant's

failure to testify in his or her own defense. Griffin v. California, 380 U.S. 609, 615, 855 S.Ct. 1229, 1233, 14 L.Ed.2d 106, 110 (1965). The rule against commenting on an accused's silence is violated if the language used by the prosecutor, in context, would "naturally and necessarily" be understood by a jury to be a comment on the failure. Taylor, 336 N.W.2d at 727. Both direct and indirect comments on the accused's silence are prohibited. State v. Bishop, 387 N.W.2d 554, 562 (Iowa 1986).

In the instant case the question is whether the county attorney's statement in closing argument, taken in context, would be understood by the jury as a comment on the defendant's failure to testify. Id. We view the statements not in isolation but in the context they were made. Bishop, 387 N.W.2d at 563. The statements made by the prosecutor can well be interpreted as a proper comment on the overall evidence of the case. They do not naturally and necessarily suggest defendant failed to testify. State v. Atwood, 342 N.W.2d 474, 476 (Iowa 1984). In addition, they do not suggest defendant was withholding anything. Id. We do not find the prosecutor manifestly intended to comment on defendant's right to remain silent when an equally plausible explanation exists for his or her statements. Bishop, 387 N.W.2d at 563.

We fail to find an abuse of discretion. The trial court is affirmed.

AFFIRMED.