FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

406

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed May 28, 1985
vs.	)	
ELTON OREN BISHOP,	)	5-150 84-900
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County - Gene L. Needles, Judge.

Defendant appeals from his conviction on six counts of fraudulent practices in violation of Iowa Code sections 422.25(5) and 714.8(10). AFFIRMED.

Charles L. Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

The defendant in this action, Elton Bishop, was convicted on six counts of fraudulent practices in violation of Iowa Code sections 422.25(5) and 714.8(10). The charges and resulting convictions were based on his failure to file various required documents concerning personal income taxes and his concrete business withholding taxes for the years 1980 and 1981. On appeal, the defendant asserts 1) that certain bank records should not have been admitted, and 2) that a mistrial should have been granted due to prosecutorial comment on his failure to testify. We affirm.

I.

At trial, the court admitted into evidence microfilmed copies of signature cards, checks, deposit slips, and bank statements concerning accounts held by the defendant. The defendant objected that the documents were hearsay. The court overruled the objections and admitted the evidence under the business records exception to the hearsay rule. The defendant claims that this was in error and that the foundation for admission under this exception had not been adequately established.

Iowa Code section 622.28 sets forth the foundation for admission of business records:

> Any writing or record, whether in the form of an entry in a book, or otherwise, including electronic means and interpretations thereof, offered as memoranda or records of acts, conditions or events to prove the facts stated therein, shall be admissible as evidence if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness, and if the judge finds that they are not excludable as evidence because of any rule of admissibility of evidence other than the hearsay rule.

With respect to the checks, deposit slips, and signature cards, defendant argues that the statutory requirements are not met since they were not prepared by any

of the bank employees. Certainly, this claim is correct with respect to the original documents. However, it is apparent from the record that microfilms of the originals were prepared by bank employees and kept in the regular course of business. Darwin D. Webster, operations control officer at Norwest Bank, was called to lay the foundation for the documents. He testified he was in charge of record information and had "access and control" over the bank records. It was within the trial court's discretion to permit the offered documents to be verified by Mr. Webster who as supervising officer could testify that the records were regularly kept by the bank at his direction.

As we view it, the crucial problem with all the records in question is essentially one of "double hearsay." Although the foundation for the business records exception was met, this only justifies admitting the out-of-court declarations of the maker of the bank records as to what he said from his own personal knowledge. The records, however, contain assertions by someone other than the bank employees, namely the defendant. The fact that the business records exception was met does not justify admitting the declarations of the defendant contained in the records. While the defendant points this problem out on appeal, his argument concerning double hearsay is limited to the bank statements. He does not raise the issue with respect to microfilmed copies of the checks, deposit slips, or signature cards. Since our review is on assigned error, our analysis of the double hearsay issue will necessarily be limited to a discussion of the bank statements.

As defendant points out, the difficulty with the bank statements is that the facts contained within them were based on checks and deposit slips drafted by Bishop. The question then is whether this would violate the rule excluding double hearsay in business records.

In Union Story Trust & Sav. Bank v. Sayer, 332 N.W.2d 316 (Iowa 1983), the supreme court addressed a similar issue. There the court considered whether the

trial court erred in excluding from evidence, as hearsay, microfilmed copies of cancelled checks drawn on Sayer's account at the plaintiff bank. Id. at 320. While the supreme court held that the documents were properly excluded, it is apparent from its reasoning this was not intended to be a blanket exclusion:

> We believe that to the extent these microfilmed copies are records of the bank made in the ordinary course of its business, their method of preparation only evidences that upon presentation of these negotiable items, Sayer's account was debited in an amount corresponding to the face amount of the check. The filming by the bank was not the recordation of any information known by the bank concerning (a) Sayer's business purpose in issuing the checks or (b) whether the proceeds were in fact disbursed to the payees named in the instrument. Sayer would be the declarant as to such facts. We believe that if the checks were to be admitted for purposes of proving these facts, this would violate the rule excluding "double hearsay" contained in business records.

Id. at 321. The Sayer court held that the microfilmed documents were inadmissible hearsay only because they were offered to show the business purpose of the checks and whether the proceeds were disbursed to the payees, both factors outside the personal knowledge of bank employees.

In the case before this court, the precise purpose for offering the bank statements into evidence is not clear from the record. It is clear, however, that the purpose went beyond merely showing fluctuations in the defendant's account due to issuing checks and depositing money. Victor Lamb, an auditor for the Iowa Department of Revenue, testified that he used the bank statements as well as the other bank records to determine the defendant's tax liability. In conducting the audit, Mr. Lamb listed all the deposits and subtracted all non-taxable income. He determined which deposits represented non-taxable income by contacting individuals who wrote the checks which were deposited in Mr. Bishop's account.

Thus, it is apparent that the testimony relating to the bank statements went well beyond matters within the knowledge of bank employees who kept the records in the ordinary course of business. We therefore conclude that the bank

statements violated the double hearsay rule and should not have been admitted. Our conclusion in this respect, however, does not lead us to grant the defendant a new trial. A careful review of the record reveals that the defendant's tax liability was established through the testimony of several witnesses. The bank statements merely constituted cumulative evidence in this respect and thus did not prejudice the defendant. In essence, although the documents were improperly admitted, it does not constitute reversible error.

II.

The defendant's second assignment of error is that the trial court abused its discretion in failing to grant a mistrial due to prosecutorial comment on his failure to testify.

The trial court has broad discretion in granting or denying a motion for mistrial. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977). We interfere with this discretion only when it is exercised on grounds or for reasons clearly untenable or to an extent that is clearly unreasonable. Id. In the case before this court, we cannot say that the trial court's discretion has been abused.

The record reveals that the defendant chose not to testify and presented no evidence at trial. However, during closing arguments defendant, acting pro se, testified to matters outside the record and stated that he had not "tried to intentionally defraud or cheat anybody."

Counsel for the State began his rebuttal by stating:

> Ladies and gentlemen of the jury, first I would like to say that the Judge will instruct you that, or at least he did talk a little bit about it already, in terms of the statements that was made by Mr. Bishop. Mr. Bishop decided that he did not testify in this case. Therefore —

At this point, defendant's standby counsel objected on the ground that the prosecutor had commented on defendant's failure to testify and moved for a mistrial.

During a discussion outside the presence of the jury, the prosecutor

explained that he was not attempting to discuss the defendant's failure to testify. Rather, he was going to comment on the fact that defendant testified during his closing argument and the jury should not consider this as evidence. Based on this explanation, the trial court overruled the motion for mistrial. We believe this ruling was proper.

> A statement is deemed to be an impermissible reference to silence if either (1) the prosecutor manifestly intended to refer to the defendant's silence, or (2) the jury would "naturally and necessarily" interpret the statement to be a reference to the defendant's silence.

State v. Hutchison, 341 N.W.2d 33, 39 (Iowa 1983) (quoting Catches v. United States, 582 F.2d 453, 458 (8th Cir. 1978)). In the instant case, the prosecutor's comments were in direct reference to inappropriate comments made by the defendant during closing arguments. It cannot be said that there was a manifest intent to refer to the defendant's silence; nor can we characterize the prosecutor's comments as an attempt to improperly influence the jury. We recognize that the prosecutor could have referred to defendant's closing argument without commenting on his refusal to testify. However, any impropriety was minor and does not rise to the level of prejudice which would require a new trial.

The defendant attempts to argue that the prosecutor's conduct was "especially outrageous" since he did not object to the defendant's inappropriate comments. We do not believe this is a proper characterization of the events that transpired. Counsel for the State did object on the first occasion that the defendant spoke to matters outside the record. The court overruled the objection stating: "I agree, but we will let him go ahead." In light of this statement, it is apparent that any subsequent objections would have been fruitless. Because of this, we cannot say that the prosecutor's failure to reassert his objection resulted in any additional prejudice to the defendant.

Finding no error, we affirm the conviction.

AFFIRMED.