



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

GARRY EVILSIZER,

Defendant-Appellant.

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Filed October 28, 1982

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Appeal from Lee District Court, William Cahill, Judge.

The defendant was found guilty by a jury of the crime of escape. He appeals from the resulting conviction. He contends the trial court erred by refusing to submit his requested instruction on entrapment. He also contends the trial court erred by denying him a mistrial, which he had requested on the ground a prosecutor had asked one of his witnesses an improper impeachment question. AFFIRMED.

James P. Hoffman, Keokuk, for defendant-appellant.

Thomas J. Miller, Attorney General, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, and Johnson, JJ.

The defendant was found guilty by a jury of the crime of escape. On appeal, he contends (1) that the trial court erred by refusing to submit his requested instruction on entrapment, and (2) that the trial court erred by denying him a mistrial, which he had requested on the ground that a prosecutor had asked one of his witnesses an improper impeachment question. We affirm.

In August of 1980, Carl Willits and William Cole were assigned to transport two inmates, Evilsizer and Larry Frost, from the State Penitentiary at Fort Madison to Des Moines for deposition. Willits and Cole positioned their inmate passengers in the vehicles in accordance with instructions they had received from the director of the Iowa State Penitentiary, James Menke. Cole and Willits were not armed and possessed no Mace. The two inmates were physically restrained by belly chains, handcuffs, and leg irons. A plastic security shield separated the front and back seats. Willits drove the car with Frost in the front passenger seat, Cole was positioned directly behind the driver, and Evilsizer was directly to the right of Cole. The inmates had been strip-searched prior to departure. The route chosen by Willits included a one-mile stretch of dirt road used as a shortcut.

On the trip back to Fort Madison the following day, Cole drove with Evilsizer in the front passenger seat, and Willits was directly behind the driver with Frost to his right.

On the return trip, the security bubble was put down so that the passengers in the back seat could get the benefit of the air-conditioning.

About half-way down the dirt road, Evilsizer "came out of his handcuff," placed an object in his mouth, and turned off the car ignition. Evilsizer ordered Cole to place his hands on the steering wheel and put on the handcuffs. He then took an object from his mouth, removed his leg irons, and ordered Willits to put them on. Evilsizer released Frost from his restraints and secured Cole and Willits with a chain and handcuffs to some windows at a vacant house. Evilsizer and Frost then departed in the state vehicle.

Evilsizer testified that he believed that the trip from Des Moines was "most unusual." He said that he was accustomed to stringent security. He testified that when the vehicle reached the gravel road at a reduced speed, he had no idea where he was. He said that some time before reaching this road, he had found a handcuff key on the seat between him and the driver. He testified further that he did not plan to escape, but did so because he did not know whether something was going to happen to him, because he wanted to get in contact with his brother and an attorney, because he was afraid he was going to be harmed, and because he was confused.

#### **I. The Entrapment Defense.**

The trial court denied Evilsizer's request that an entrapment instruction be submitted to the jury on the ground that the record did not warrant giving such an instruction.

In State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974), the supreme court adopted the following objective test for entrapment:

Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The court went on to note that the defense of entrapment is intended primarily to be "a curb upon improper law enforcement techniques, to which the predisposition of the particular defendant is irrelevant." Id.

When a fact question exists concerning an allegation of entrapment, the burden is upon the State to disprove entrapment beyond a reasonable doubt. State v. Cooper, 248 N.W.2d 908, 910 (Iowa 1976), citing State v. Tomlinson, 243 N.W.2d 551, 553 (Iowa 1976); State v. Fagan, 190 N.W.2d 800, 802 (Iowa 1971). However, the burden is upon the defendant to generate a fact question on the defense of

entrapment. Cooper, id., citing Tomlinson at 553 and State v. Ostrand, 219 N.W.2d 509, 512-13 (Iowa 1974). In deciding whether the evidence was sufficient to generate a jury question on entrapment, we view the evidence in the light most favorable to the defendant. Cooper, id., citing Tomlinson at 553.

Viewing the evidence in the light most favorable to the defendants, we find nothing from which a jury could reasonably draw the inference that Cole and Willits used persuasion or any other means to induce Evilsizer to commit the offense of escape. We therefore conclude that the trial court did not err in refusing to instruct the jury on the entrapment defense.

## **II. The Mistrial Motion.**

During cross-examination of defendant's witness, Mr. Frost, who was with him at the time of the escape, the State's attorney asked him to specify the crime for which he had been incarcerated. On objection, the court asked the State's attorney whether the question was for impeachment purposes, and then instructed the attorney to ask the appropriate impeachment question. The State's attorney then asked, "Mr. Frost, are you currently incarcerated at the Penitentiary for the crime of robbery with aggravation?"

In response to defense objection and motion for mistrial, the court sustained the objection but did not grant a mistrial. It is noteworthy that the witness did not respond to the question. Even where "evidence is improperly admitted but is later withdrawn with a cautionary statement to the jury to disregard it, there is no error except in extreme instances where the prejudicial effect would probably remain to influence the verdict despite its exclusion." State v. Coffee, 182 N.W.2d 390, 392 (Iowa 1970). The trial court has broad discretion in determining whether to grant or deny a mistrial motion. In this case, the "evidence" was never even admitted. We find no reason to conclude, therefore, that the trial court abused its discretion or that the defendant was prejudiced by the question posed to Mr. Frost.

The defendant's contentions are without merit. We therefore affirm.

**AFFIRMED.**