

IN THE COURT OF APPEALS OF IOWA

No. 6-444 / 95-977

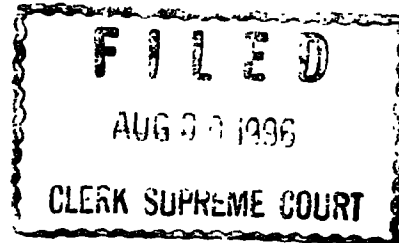
STATE OF IOWA,

Plaintiff-Appellee,

vs.

HARRY J. PERKINS, JR.,

Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, .
Judge.

Defendant appeals from his conviction, following a jury trial, of second-degree
criminal mischief. **AFFIRMED.**

Harold J. Delange, II, Davenport, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney
General, William E. Davis, County Attorney, and Kelly G. Raines, Assistant County
Attorney, for appellee.

Considered en banc.

HABHAB, J.

Defendant Harry J. Perkins appeals from his conviction of second-degree criminal mischief. He argues he should have been granted a mistrial and should have been allowed to question the complaining witness about their past relationship. We affirm.

In the early morning hours of October 17, 1994, the victim called police to inform them she saw and heard defendant, her ex-boyfriend, vandalize her car outside her parents' house. A tire had been slashed, there was a dent in the trunk, and the windows and tail lights had been smashed. She testified defendant was angry with her for terminating their relationship, and earlier that night he had confronted her and threatened to "f _ _ _ up" her car.

Prior to trial, the district court sustained a motion in limine by the State and prevented defendant from questioning the victim about her prior sexual relationship with defendant and her resulting pregnancy and abortion.

During opening statements the prosecutor stated a detective had conducted an interview with the victim. Based on information the victim had provided, the detective had initiated contact with defendant and scheduled a time for defendant to see him for an interview. The prosecutor informed the jury defendant did not show up for the interview.

Defense counsel moved for a mistrial claiming this amounted to a comment on defendant's right to remain silent. The trial court overruled the motion but did admonish the jury opening statements were not evidence.

Defendant submitted an alibi defense. The jury, however, found him guilty as charged. He was sentenced to a five-year prison term. Defendant now appeals.

I. Motion for Mistrial. During her opening argument, the prosecutor referred to defendant's failure to appear for an interview scheduled with a detective.

A report was generated by the patrol unit. This report was then relayed to the Detective Bureau. Sergeant Brandt was the detective who was responsible for conducting the investigation. He will testify to you about the nature of his contact with [the victim]. He will describe that he conducted an interview of her, and that in the course of that interview he required that she produce certain estimates.

Also, based on the information that she had given to him as to who the perpetrator of this particular crime was, he initiated contact with the defendant, established a time for an interview, for the defendant to come see him, and the defendant never showed up.

This, essentially, folks, in a nutshell, is what the State's case in chief is comprised of. And at the close of all of the evidence, the State is going to be asking you to return a verdict on the charge of Criminal Mischief in the Second Degree.

After the conclusion of the prosecutor's opening statement, defense counsel made a motion for a mistrial. He argued the prosecutor's statements amounted to a comment upon defendant's invocation of his Fifth Amendment rights. The State cannot comment on a defendant's invocation of his constitutional rights. *State v. Craney*, 347 N.W.2d 668, 679 (Iowa 1984), *cert. denied*, 469 U.S. 884 (1984). As a general rule, a prosecutor's comment on a defendant's failure to testify violates a

defendant's due process rights. *Brewer v. State*, 444 N.W.2d 77, 84 (Iowa 1989). We review to determine whether the language used by the prosecutor, when viewed in context, would naturally and necessarily be understood by a jury to be a comment on the failure of the accused to testify. *Brewer*, 444 N.W.2d at 84.

The prosecutor's statements, taken in context, could not be viewed as a comment on defendant's failure to testify or his invocation of his Fifth Amendment rights. The prosecutor's statements merely explained the incidents, investigations, and interviews which preceded the filing of the criminal mischief charge which was about to be tried. Defendant was not under arrest or in custody when the detective wished to interview him, and his failure to appear for an interview would not naturally or necessarily be construed by the jury as a comment on defendant's invocation of his Fifth Amendment rights. *See e.g., State v. Taylor*, 336 N.W.2d 721, 727 (Iowa 1983) (prosecutor's comment about defendant's pre-arrest failure to step out of cornfields and meet deputies was not an unconstitutional comment on defendant's exercise of Fifth Amendment rights). The prosecutor's comments did not constitute a violation of defendant's constitutional rights and the trial court properly denied the motion for a mistrial.

II. Motion in Limine. Defendant appeals the trial court's grant of the State's motion in limine. We review for an abuse of discretion. *See State v. Martin*, 385 N.W.2d 549, 553 (Iowa 1986).

A defendant's right to cross-examine a witness is a primary interest secured by the confrontation clause of the Sixth and Fourteenth Amendments. *Id.* A party is given reasonable latitude in cross-examination. *Id.* However, it is for the trial court, in exercising its sound discretion, to determine the scope of cross-examination. *Id.*

When witnesses testify, they place their credibility in issue. *Id.* An opposing party can question this credibility by attempting to impeach a witness through proper cross-examination. *Id.* Here defendant wished to question the victim about their sexual relationship, her pregnancy and her abortion. He argues these matters go to the motivation and credibility of the victim. Defendant theorizes the victim was angry with him about their breakup and was motivated to retaliate by lying and implicating him in the vandalism of her car.

The trial court did not err when it excluded this irrelevant and highly prejudicial evidence. The court allowed defendant to question the victim about the length of their relationship, the number and duration of their arguments, and the fact she terminated the relationship because defendant was seeing other women and she felt "wronged" by his conduct. There was no abuse of discretion in the grant of the State's motion in limine.

AFFIRMED.

All judges concur, except Sackett, C.J., who specially concurs.

SACKETT, C.J. (concurring specially)

I concur with the majority, but in doing so I do not condone certain parts of the State's opening statement.

The prosecutor in opening identified defendant as the individual the victim identified as having committed the crime. He further stated time for an interview was established and defendant did not show up, and then said, "This essentially, folks, in a nutshell is what the State's case in chief is comprised of." This conveys to the jury part of the State's evidence will be defendant's failure to talk to the police officer. Not only is this a comment on defendant's failure to explain what happened, but the prosecutor is telling the jury part of the State's case is defendant's failure to say anything. This is an impermissible comment on a defendant's right against self-incrimination. *See State v. Brewer*, 444 N.W.2d 77, 84 (Iowa 1989).

I concur because I feel the instruction given by the trial judge corrected the error.