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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
CORNELIUS MONTGOMERY,	)	8-462 87-1090
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County (No. D7X004468), Robert E. Mahon, Judge.

Defendant appeals his conviction in the district court, after a jury trial, for the crime of robbery in the first degree, in violation of Iowa Code section 711.2. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Michael W. Buckner, Assistant County Attorney, for plaintiff-appellee.

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

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Defendant appeals his conviction of robbery in the first degree in violation of Iowa Code section 711.2 (1985). He contends the trial court abused its discretion in not ordering a mistrial after the county attorney in closing argument made statements the defendant contends were impermissible comments on his innocence. We affirm.

The evidence at trial showed defendant was charged with robbery in the first degree after a jewelry store in Waterloo was robbed by a man with a shotgun who wore a cap over his face. The two employees in the store were tied by the robber. The employees heard a second person going through the display case, but they were not able to identify the robbers. Some of the employees' testimony about the robbery was contradictory. An employee of a nearby store identified defendant as a person who went by their window near the time of the robbery. There was testimony the robbers left the scene in a car matching the description of one owned by defendant's mother. A watch similar to one from the store that was robbed was found in a room where defendant stayed. Defendant accompanied three other men when they went to Davenport to attempt to sell some of the stolen merchandise. Louis Chamber, serving a term for second degree robbery as a result of robbering the jewelry store in question, testified defendant was not the second robber but rather the other robber was a man he knew only as Silk.

After the prosecutor's initial closing argument, the defendant moved for a mistrial on the ground that at the summation of the argument the prosecutor posed the following questions:

> My recollection was that there was a series of questions, is it a coincidence that these Exhibits were identified? Is it a coincidence that that watch showed up where he lives? And the last or one of the last of the questions in this series, is it a coincidence that we're here today in these proceedings and seems to me to mean is it a coincidence that we're here--that this man is here on trial charged with this crime?

The defendant contended the prosecutor's argument encouraged the jury to ignore the presumption of innocence and impermissible focused on the fact the State had arrested, charged, and tried the defendant. The trial court overruled the mistrial motion. Before the defendant began his closing argument, the trial court read the following instruction to the jury:

> The defendant is presumed by law to be innocent and not guilty of the offense charged. This presumption of innocence requires you to ignore all suspicion which might rise from the arrest, Trial Information, or the present situation of the defendant. The presumption of innocence remains with the defendant throughout the trial and must prevail unless the evidence establishes the defendant's guilt beyond a reasonable doubt.

The jury found the defendant guilty of robbery in the first degree. The defendant then moved for a new trial on this same ground. The trial court again overruled the motion.

Defendant argues the prosecutor's closing argument misstated the law and encouraged the jury to ignore the

presumption of innocence. Defendant contends the trial court erred in overruling the defendant's mistrial motion.

The State contends we cannot decide the propriety of the closing argument because the defendant did not file a bill of exceptions in accordance with Iowa Rule of Criminal Procedure 23.1 which provides:

> 1. **Purpose.** The office of a bill of exceptions is to make the proceedings or evidence appear of record which would not otherwise so appear.
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> 2. **What Constitutes Record; Exceptions Unnecessary.** All papers pertaining to the cause and filed with the clerk, and all entries made by him or her in the record book pertaining to them, and showing the action or decision of the court upon them or any part of them, and the judgment, are to be deemed parts of the record, and it is not necessary to except to any action or decision of the court so appearing of record.
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> 3. **Grounds for Exceptions.** On the trial of an indictable offense, exceptions may be taken by the state or by the defendant to any decision of the court upon matters of law, in any of the following cases:
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> a. In disallowing a challenge to an individual juror.
>
> b. In admitting or rejecting witnesses or evidence on the trial of any challenge to an individual juror.
>
> c. In admitting or rejecting witnesses or evidence.
>
> d. In deciding any matter of law, not purely discretionary on the trial of the issue.
>
> Exceptions may also be taken to any action or decision of the court which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on the trial.
>
> 4. **Bill by Judge.** Either party may take an exception to any decision or action of the court, in any stage of the proceedings, not required to be and not entered in the record book, and reduce the same to writing, and tender the same to the judge, who shall sign it if true, and if signed it shall be filed with the clerk and become part of the record of the cause.

> 4. **Bill by Bystanders.** If the judge refuses to sign it, such refusal must be stated at the end thereof, and it may then be signed by two or more attorneys or officers of the court or disinterested bystanders, and sworn to by them, and filed with the clerk, and it shall thereupon become a part of the record of the cause.
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> 6. **Time to Approve Bill.** The judge shall be allowed one court day to examine the bill of exceptions, and the party excepting shall be allowed three court days thereafter to procure the signatures and file the same.
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> 7. **Modification of Bill.** If the judge and the party excepting can agree in modifying the bill of exceptions, it shall be modified accordingly.
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> 8. **Time Allowed to Prepare Bill.** Time must be given to prepare the bill of exceptions when it is necessary; if it can reasonably be done, it shall be settled at the time of taking the exception.

The State wants us to determine filing a bill of exceptions under the rule is the sole means a defendant has for creating a record when the proceeding being questioned is not recorded. We disagree.

Immediately after the alleged improper remarks were made, defendant's attorney dictated into the record a summation of the alleged improper remarks. Neither the State nor the trial court challenged the correctness of the statements. A mistrial motion must be made when the grounds first become apparent. State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980); State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973).

The basic purpose of a record is to alert the trial court of the error and give the court an opportunity to avoid reversible error by timely admonition, see Team

Cent., Inc. v. Teamco, Inc., 271 N.W.2d 914, 926 (Iowa 1978); Turner v. Jones, 215 N.W.2d 289, 291 (Iowa 1974), as well as provide an adequate record for the appellate court to review on appeal.

The record made meets all these requirements. We reject the State's argument and find this case clearly distinguishable from their cited case of State v. Angle, 353 N.W.2d 421, 423 (Iowa 1984) where there was an absence of any record.

We address defendant's complaint. One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not addressed as proof at trial. Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468, 475 (1978). A defendant is entitled to have the case decided solely on the evidence. State v. Williams, 334 N.W.2d 742, 744 (Iowa 1983); see State v. TeBockhorst, 305 N.W.2d 705, 709 (Iowa 1981).

On motions for mistrial considerable discretion is allowed the trial court and the appellate court will not interfere unless there has been a manifest abuse of discretion. State v. Lamar, 260 Iowa 957, 965, 151 N.W.2d 496, 501 (1967). The district court determined if there were any impropriety in the prosecutor's closing argument

the instructions given before defendant's closing argument corrected the matter. Additionally, the instructions given the jury prior to deliberation emphasized they could not consider the State's allegations in the trial information as evidence; the State bore the burden to prove beyond a reasonable doubt each allegation; they must presume the innocence of the defendant, a presumption requiring them "to ignore all suspicion which might arise from the arrest, trial information, or the present situation of the defendant;" and their verdict must be reached according to the evidence received and the law given in the instructions.

The defendant has failed to show the district court abused its discretion in denying his mistrial motion. The district court effectively cured any prejudice in its instruction to the jury. See State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982).

AFFIRMED.