IN THE COURT OF APPEALS OF IOWA

FILED
SEP 2 8 1988
CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.) 349
DANIEL GUY PHILLIPS,) 8-358
Defendant-Appellant.) 87-1253

Appeal from the Iowa District Court for Linn County (No. CRF 10241) - Lynne E. Brady, Judge.

Defendant appeals his conviction of first-degree kidnapping. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Jon Hammond, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J. 341

Defendant, Daniel Phillips, appeals his conviction for first-degree kidnapping, contending the trial court abused its discretion in failing to grant a mistrial after determining defendant's fifth amendment rights against self-incrimination were violated by statements made in closing argument. We affirm.

At trial the defendant rested without calling any witnesses. The State presented evidence the victim, a twelve-year-old girl, was accosted by a man she identified as defendant while she was on her way to the store. The man had a gun in his hand, and ordered the girl not to scream or run. He eventually steered her to an abandoned house several blocks away. After removing some of her clothing and taping her mouth and hands with hospital tape, he sexually abused her. The man then untaped her wrists and they both got dressed. Still holding the gun, he took the girl back to where he had first stopped her. Before the man left T.B., he gave her one dollar in quarters.

During closing argument the attorney for the State made the following remarks:

> I think the facts show undeniably a young girl was abducted . . . .
>
> * * *
>
> I believe that's what the evidence indicated.
>
> . . . I think, really, no one is going to dispute that this young girl was kidnapped.
>
> Now [defense counsel], Mr. Grady, will be given an opportunity to speak after a bit, and he may argue

> whatever he pleases; but I don't think, as a reasonable matter, anybody can challenge [that] this young girl was [accosted and sexually abused].
>
> I don't think any reasonable person could deny that; and there is no ground reasonable to deny it.
>
> I don't think anyone is going to deny that she was abducted . . . .
>
> I don't think anybody is going to deny that [they took the route the victim described].
>
> Now I don't think anybody is going to deny that these events happened . . . and if the denial were to be made, it would be up to you as to how reasonable that denial would be, based upon her testimony and all of the corroborating evidence.
>
> * * *
>
> [N]o one can deny that the offense occurred; but I expect the defendant will deny that he was the individual who did the act.
>
> Mr. Grady will soon stand up and speak before you to do that, although he has no obligation to do that. I'm going to concentrate my statements . . . upon the evidence which tends to show who did this act . . .
>
> The defendant might attempt to tell you that the gun seized from him at the time of his arrest was something he'd just come into possession of . . . .

Defendant's attorney objected at this point and requested a hearing outside the presence of the jury. He then moved for a mistrial. He contended the remarks about "what the defendant might say" and "nobody is going to deny this" violated defendant's right to remain silent by calling attention to his refusal to testify. The trial court found the statements to be improper and determined she would admonish the jury to disregard the statements.

Defendant's attorney rejected the court's offer to admonish the jury contending to do so would simply emphasize in the jury's mind the impropriety that occurred. Defendant then made a motion for mistrial. The trial court denied the motion.

The trial court found the statements to be improper. The question we must address is whether the statements could have been corrected by admonishing the jury or whether they so prejudiced defendant's rights as to cause him to be deprived of a fair trial so that his motion for mistrial should have been sustained. See State v. Bishop, 387 N.W.2d 554, 562-63 (Iowa 1986); United States v. Hernandez, 779 F.2d 456, 458 (8th Cir. 1985). Because the remarks violate a fundamental constitutional right, error is harmless only when we can declare a belief it was harmless beyond a reasonable doubt. State v. Nelson, 234 N.W.2d 368, 372 (Iowa 1975); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 705, 710-11 (1967).

The general rule is improper comments are not unduly prejudicial if the court admonishes the jury to disregard them. State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982). And only in extreme instances does the prejudicial effect remain to influence the verdict despite its exclusion. State v. Jensen, 216 N.W.2d 369, 373-74 (Iowa 1974); State v.Johnson, 367 N.W.2d 319, 321 (Iowa App. 1985).

The statements are not so extreme that their effect would remain to influence the verdict despite their exclusion. The trial court has broad discretion in ruling on a motion for mistrial. State v. Washington, 308 N.W.2d 422, 424 (Iowa 1981). We find no abuse of discretion.

AFFIRMED.