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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed December 21, 1978
vs.	)	
WENDELL DAWANE MILLS,	)	<u>598</u>
Appellant.	)	61135

Appeal from Polk District Court - Richard A. Strickler, Judge.

Defendant appeals rape conviction on the grounds of prejudicial prosecutorial comments. - Affirmed.

John C. Wellman, Des Moines, for Appellant.

Richard C. Turner, Attorney General of Iowa, William R. Armstrong, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for Appellee.

Heard by Oxberger, C. J., and Snell and Carter, JJ. Donielson, J., takes no part.

PER CURIAM

Defendant Wendell Mills appeals conviction of rape in violation of § 698.1, The Code 1977, alleging that prejudicial remarks made by the prosecutor in closing argument denied him a fair trial. We affirm.

The State maintains that the record is inadequate to permit review because counsels' closing arguments were not recorded, and no bill of exceptions was filed. The parties' colloquy with the trial court reveals they were in substantial agreement as to the comments made during closing argument. We believe the record is sufficient to allow us to consider the error assigned since the essential facts are not disputed by the parties.

Initially we must decide if the prosecutor's argument concerning the rules of evidence amounts to misconduct. It is beyond question that an accused is denied procedural fairness when the prosecutor uses innuendo and insinuation having no basis in the evidence to secure a conviction. *State v. Johnson*, 222 N.W.2d 483, 488 (Iowa 1974). We hold it was improper for the prosecutor to comment on restraints imposed by the rules of evidence in the instant case. See *Commonwealth v. Bolden*, 227 Pa. Super. 458, 323 A.2d 797 (1974); *People v. Wilson*, 40 A.D. 839, 337 N.Y.S.2d 391 (1972); *People v. Davis*, 51 A.D.2d 974, 380 N.Y.S.2d 303 (1976).

The State contends that even if the remarks were improper, the error was invited by defendant's closing argument. In substance, the assertion is that once a defendant mentions the State's failure to produce certain testimony, the State may argue in rebuttal that rules of evidence prevent it from doing so. While this contention may apply to a particular set of circumstances, it cannot be accepted as a general proposition. The State should not be allowed to comment on matters outside of the record in response to defense argument which itself is not objectionable. *United States v. Latimer*, 511 F.2d 498, 503 (10th Cir. 1975); *Reynolds v. State*, 505 S.W.2d 265, 266 (Tex. Cr. App. 1974).

Standing alone, prosecutorial misconduct is not a sufficient basis for reversing a conviction. The misconduct must result in prejudice sufficient to deny defendant a fair trial. *State v. Swallow*, 244 N.W.2d 321, 325 (Iowa 1976). Trial

court is vested with considerable discretion in deciding whether such prejudice has occurred. *State v. Horsey*, 180 N.W.2d 459, 461 (Iowa 1970). After a close examination of the record, we find no abuse of discretion in trial court's overruling of defendant's motion for mistrial.

AFFIRMED.