

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 25 1986

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

FILED JUNE 25, 1986

vs.

)

197

JOHN DAVID LONG,

)

6-103
85-416

Defendant-Appellant.

)

Appeal from the Iowa District Court for Marshall County (No. 1207)

- Thomas R. Hronek, Associate District Judge.

Defendant appeals his conviction of escape from custody in violation of Iowa Code section 719.4(3) (1983). **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Elizabeth Ciebell, Assistant Attorney General; and Mark W. F. Lindholm, Assistant Marshall County Attorney, for plaintiff-appellee.

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

SCHLEGEL, J.**198**

Defendant appeals his conviction of escape from custody in violation of Iowa Code section 719.4(3) (1983). He alleges, on appeal, that the trial court erred in overruling his motion for mistrial based upon remarks made by the prosecutor in his opening statement. Defendant also claims that he received ineffective assistance of counsel. We affirm the trial court and reserve the issue of ineffective assistance of counsel for postconviction relief.

Prior to trial, defense counsel filed a motion in limine seeking in part to prevent disclosure of any testimony by Work Release Center employees that would indicate defendant was intoxicated on the day of the alleged escape. Counsel argued that the testimony was irrelevant and beyond the scope of the minutes. Following a hearing on the motion, the trial court held that:

[T]he State, before offering testimony of a foundational or substantive nature relating to any 'alleged condition' of the Defendant . . . shall apprise the Court and defendant's counsel of its intent to allow an offer to be made outside of the presence of the jury and a ruling on admissibility made.

During his opening statement however, the prosecutor stated to the jurors that he expected the State's witnesses to testify that defendant was under the influence of alcohol on the day of the alleged escape. Based upon the court's pretrial ruling on the motion in limine and on the belief that this statement was irrelevant and highly prejudicial, defense counsel moved for mistrial. The trial court ruled that, strictly speaking, any statements made in opening statements to the jury do not fall within the ruling on the motion in limine. The trial court was disturbed concerning the way the prosecution handled this issue. However, the trial court was not convinced any prejudice had resulted from the opening remarks. The trial court then said, "But if there is any, I believe it could quite easily be cured. I'm going to offer to the Defendant at

this time an instruction that the Court will present to the jury prior to the receipt of any testimony." That instruction would have detailed the weight to be given an opening statement. Defense counsel declined this offer.

Defendant was found guilty and he was sentenced to serve a one-year term of imprisonment, to be served consecutive to the term he was already serving. Defendant appeals, alleging the trial court erred in not granting his motion for mistrial. He also alleges he received ineffective assistance of counsel.

The trial court has broad discretion in ruling on a request for a mistrial. State v. Trudo, 253 N.W.2d 101 (Iowa 1977), cert. denied, 434 U.S. 903, 985 S. Ct. 299, 54 L. Ed. 2d 189. In order to demonstrate abuse of discretion, it must be shown that the trial court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. The burden is on the defendant to show the requisite prejudice. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983); State v. Dalglish, 223 N.W.2d 627 (Iowa 1974).

I. Mistrial. The crucial question is whether the prosecutor's statement was so prejudicial that it was an abuse of the trial court's discretion to conclude that a cautionary instruction to the jury would adequately preserve a fair trial for the defendant. We hold the trial court did not abuse its discretion.

The trial court admonished the jury before opening remarks that the statements by the attorneys were not evidence. Reference to defendant's alleged intoxication was not repeated to the jury and there was no motion to have the judge instruct the jury to disregard the statement by counsel.

Furthermore, remarks by counsel, apparently in contravention of a motion in limine, do not necessarily require a mistrial if no prejudice is proven by the defendant. See State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982). Here, the prosecutor's statements were arguably improper. However, defendant has not

Appellate counsel for defendant has acknowledged that the record is inadequate to fully consider trial counsel's performance. We often reserve an issue of ineffective assistance of counsel for postconviction relief proceedings. See State v. Smith, 282 N.W.2d 138, 143 (Iowa 1979). Such a hearing would allow opportunity to more fully develop the record to show "all the circumstances" including any not in the present record, concerning strategy and reasons involved in counsel's performance. State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979).

We affirm the trial court's denial of defendant's motion for mistrial, but reserve the issue of defense counsel's competency. Defendant's right to raise the issue of trial counsel's effective assistance is reserved for postconviction proceedings.

AFFIRMED.