IN THE COURT OF APPEALS OF IOWA

No. 3-026 / 92-482

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RICHARD A. WILLIAMS,

Appellant.

Appeal from the Iowa District Court for Dallas County, Darrell Goodhue, Judge.

Defendant appeals his conviction of theft by deception in violation of Iowa Code section 714.1(3) (1987). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Thomas G. Fisher, Jr., Assistant Attorney General; David J. Welu, County Attorney; and Constance Welu, Assistant County Attorney, for appellee State.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

The defendant, Richard A. Williams, was charged and convicted of theft by deception in violation of Iowa Code section 714.1(3) (1987). He appeals. We affirm.

The defendant was an inmate of the Dallas County Jail. On January 26, 1987, at about 12:15 a.m., he asked the jailer, Anthony Nichols, what time he would be released. When Nichols asked his name, he responded, "Sherman."

Sherman was also an inmate in Williams' cell block and was due for release at 1:55 a.m. (Sherman, like all the others in the block, was asleep.) When Williams identified himself as Sherman, Nichols told him he would be out by 2:00 a.m.

When Nichols approached the cell at the designated release hour, Williams was prepared to leave. Nichols gave Sherman's personal property to Williams. Williams signed Sherman's name on the release sheet. Williams departed with Sherman's personal belongings, including a wallet with approximately $125.

Mr. Bliss, an acquaintance of Sherman, learned that Sherman was to be released at 2:00 a.m. He waited for him outside the jail for approximately forty minutes. When Sherman did not appear, Bliss returned and asked Nichols when Sherman would be released. Bliss stated he had been waiting outside and the only individual who had exited the area was a man who offered him money for a ride to DeSoto.

Nichols returned to the jail cell and roused everyone in the cell calling Sherman's name. Sherman, of course, was present. Williams was not. Nichols then released Sherman and reimbursed Sherman for his property, including payment from county funds of $125. Sherman signed a receipt acknowledging he had received the money and stated the money had been taken by Williams.

The defendant first argues the district court erred in failing to grant his motion for judgment of acquittal based on insufficiency of the evidence to support his conviction. In reviewing the sufficiency of the evidence to support a conviction, we review all evidence in the light most favorable to the verdict to determine whether the record contains substantial evidence to support a guilty verdict, such that a rational juror could find guilt beyond a reasonable doubt. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980). We find there is substantial evidence to support the jury verdict that defendant committed theft by deception.

The defendant argues the State failed to establish both elements of the offense. He argues the evidence was insufficient to establish that he did not have permission from Mike Sherman to obtain or take Sherman's property. The defendant further argues that although he may have deceived the jailer as to his identity for purposes of release, the State failed to establish Williams' deceived

the jailer as to his right, license, or privilege to take the property.

Defendant claims the evidence produced at trial could support his theory that Sherman may have consented or allowed Williams to assume his identity for the purpose of deceiving the jailer into releasing Williams from jail. For the most part, defendant rests his theory on testimony from Nichols that Sherman appeared to be feigning sleep when the jailer returned to the cell after it was apparent the wrong individual had been released.

We are not convinced defendant's theory is supported by the evidence. But even assuming that it is, we conclude the question of its validity is for the jury. In this respect, when we view the evidence in the light most favorable to the jury verdict, we find that a reasonable jury could believe defendant lied about his own identity with the intent to gain, among other things, Sherman's clothing and money.

The defendant next claims the trial court erred in permitting the admission of Exhibit 1 over his hearsay objection. Exhibit 1 is the release signed by Sherman after he received $125 in exchange for a release of the county for giving his property to Williams. Review on appeal is for abuse of discretion. State v. Maniccia, 355 N.W.2d 256, 260 (Iowa App. 1984).

The State claims Exhibit 1 is admissible as a business record under the business record exception to the hearsay

rule. There may be merit in this contention, but we need not decide the question for its admission did not prejudice the defendant. Our review of the record reveals that substantially the same evidence as appears in Exhibit 1 exists in the record. State v. McKettrick, 480 N.W.2d 52, 60 (Iowa 1992). Nichols testified that Sherman received $125 from the county and that this amount of money was paid for property taken by Williams. This evidence came in without objections.

The defendant next claims the trial court erred in failing to properly instruct the jury. In this respect, the trial court instructed the jury under Instruction No. 7 as follows:

> In order to establish theft by deception the State must prove both of the following elements:
>
> 1. The defendant obtained a transfer of possession, control or ownership of the property of another without permission.
>
> 2. That he obtained such transfer of possession, control or ownership by deception.

We have reviewed each claim of the defendant as it relates to his objection to this instruction. We find those claims to be without merit.

Finally, the defendant complains the trial court abused its discretion in failing to grant the defendant's motion for a mistrial based on improper comments made by the prosecutor during closing arguments. The trial court has broad discretion in ruling on motions for mistrial. State v. Brown, 397 N.W.2d 699, 699 (Iowa 1986); State v.

Brotherton, 384 N.W.2d 375, 381 (Iowa 1986). To prevail on a matter of prosecutorial misconduct, the defendant must show both misconduct and prejudice. State v. Barrett, 445 N.W.2d 749, 753 (Iowa 1989). We have reviewed the defendant's challenges as it relates to his motion for mistrial and find them to be without merit. The trial court did not abuse its discretion by denying defendant's motion for a mistrial.

AFFIRMED.