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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 30, 1981

vs.)

TAMBRA J. RAGAN,) 1-397/65642

Defendant-Appellant.)

Appeal from Polk District Court - Joel D. Novak, Judge.

Defendant appeals from judgment and sentence following a jury verdict finding her guilty of robbery in the first degree. AFFIRMED.

Wayne H. McKinney, Jr., Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Julie Pottorff, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from judgment and sentence following a jury verdict finding her guilty of robbery in the first degree. On appeal she seeks reversal on the basis of three assignments of error: (1) three separate allegations of prosecutorial misconduct; (2) denial by the trial court of a motion for mistrial based upon the fact that certain jurors observed a codefendant at the trial in leg irons and chains while being transported from the courthouse to the jail; and (3) failure of the trial court to submit a lesser included offense of assault for the jury's consideration. We reject all of these contentions and affirm the judgment and sentence.

I. Defendant raises three separate allegations of prosecutorial misconduct. For purposes of discussion, these allegations are considered separately. In reviewing these claims, we follow the rule that a defendant is not entitled to a new trial on the basis of prosecutorial misconduct unless the alleged misconduct is sufficiently prejudicial that the defendant was denied a fair trial. In resolving claims of prosecutorial misconduct the trial court is vested with a broad discretion and its determination will not be disturbed except upon a showing that this discretion has been abused. State v. Love, 302 N.W.2d 115, 119 (Iowa 1981); State v. Mayes, 286 N.W.2d 387, 392 (Iowa 1979).

A. Defendant's first allegation of misconduct concerns comments by the assistant county attorney on potential sanctions or the lack thereof in the event that the jury voted for acquittal. During voir dire examination of the jury panel, the defense of diminished responsibility was discussed. This prompted a juror to inquire what would happen to the defendants if the jury found either of them not guilty on the basis of diminished responsibility. Counsel for the codefendant then responded that the disposition might involve something in between incarceration and total freedom. In apparent response to this statement, the assistant county attorney stated that this characterization was not true and that defendants would "walk the streets." Defendant's counsel then countered that the prosecutor had misstated the law. The trial court then intervened and the matter was taken up in chambers. At this time, both the defendant and the State moved for a mistrial. Both motions were denied. The trial court cautioned counsel for all parties to make no further comment on the subject and when the voir dire resumed, gave the following admonition to the jury:

> THE COURT: ... All right. Ladies and gentlemen, the Court wanted to make a statement before we continue with the jury selection process, and I think it has been alluded to earlier during voir dire, and the reason the Court is making a statement is the result of a question that was asked by this juror shortly before we broke for lunch. I want to remind you and caution you that the

> jurors that are selected in this case will, at the end of the case, when the Court instructs you as to the law, receive an instruction to the effect that it is your job as jurors to determine the facts of the case. Stated simply, it is your job as jurors to determine whether or not the Defendants are guilty or innocent of the crime with which they are charged. Any punishment is provided by law. That is not a concern of yours.

Admittedly, it is ordinarily improper to comment on the punishment phase of a criminal prosecution. But, we cannot conclude that the prosecutor's comment in the present case sufficiently prejudices the jury to compel the declaration of a mistrial. The jury was properly admonished to disregard any matters relating to punishment. Ordinarily, a proper admonition cures a claim of prejudice such as is now presented in the present case. State v. Love, 302 N.W.2d at 120. The admonition in the present case was quite explicit and we find that it was sufficient to neutralize any prejudicial effect on the jury of the remarks which have been challenged.

B. Defendant's next allegation of misconduct concerns the comment by the prosecutor to the defense counsel. While counsel were at the bench discussing the proper use of a prior deposition during examination of a witness, defendant's counsel brought up the fact that he had been made the subject of an allegedly improper comment by the assistant county attorney. The prosecutor then admitted to the court that he had made a threat of violence toward defendant's counsel which had been accompanied by an obscene remark. No motion for mistrial was made as a result of this occurrence. Error on this point is therefore not preserved for purposes of appeal. State v. Reese, 259 N.W.2d 771, 775 (Iowa 1977). Even if error had been preserved, we would accept the trial court's conclusion on the record, which stands uncontradicted, that the jury could not have heard the remark. This incident therefore provides no basis for reversal.

C. Defendant's third charge of misconduct concerns a comment by the prosecutor during cross-examination of a police officer concerning testimony given by the officer at a pretrial deposition. Defendant's counsel read the following excerpt from the officer's deposition:

> Q. But the question was, "Did you hear Mr. Bachman make a statement that he was with Tammy Ragan when she went in there, went into the Sembower Pharmacy for the purpose of robbing it," and you said, "No, I don't think I was there."

At this point, the assistant county attorney interjected "Finish it."[1] Defendant's counsel

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[1] The prosecutor's comments apparently pertained to the fact that the complete answer of the witness in the deposition was: "No, I don't think I was there when he said that." (emphasis supplied).

then moved for a mistrial asserting that the prosecutor had accompanied this comment by jumping up and slamming his hand on the counsel table. The trial court denied the motion and stated that it did not consider the action to be misconduct. It did, however, caution all counsel to control their emotions and conduct in the courtroom.

Although the prosecutor's behavior may have been somewhat excessive, we do not believe that it prejudiced defendant in any demonstrable way. There is nothing in the record to indicate that the jurors were adversely influenced toward the defendant as a result of this comment by the prosecutor. See State v. Cuevas, 288 N.W.2d 525, 535-36 (Iowa 1980). It therefore provides no basis for reversal.

II. During the trial, a codefendant, Rance Bachman, who was not free on bail, was brought to and from the courtroom daily from the Polk County Jail. Although precautions had been taken to avoid such occurrences, Bachman was inadvertently led in chains past three jurors during a trial recess. Both Bachman and defendant moved for a mistrial as a result of this occurrence. These motions were denied by the trial court. The State acknowledges that freedom of the defendant from chains, leg irons, and handcuffs during the trial for a criminal case is ordinarily a necessary component of a fair and impartial trial. See State v. Evans, 169 N.W.2d 200, 210-11 (Iowa 1969). But it urges that the momentary view of Bachman in restraints cannot be presumed to have prejudiced the jurors against Bachman's codefendant. We find that on the peculiar circumstances presented, the denial of the motion for mistrial was within the sound discretion of the trial court and no abuse of that discretion has been demonstrated. No ground for reversal has been established as a result of this incident.

III. Finally, defendant complains that the failure to submit assault as a lesser included offense constitutes reversible error. In meeting this contention, the State concedes that the elements of robbery which were ultimately charged and submitted in the present case satisfy the statutory test for classifying assault as a necessarily included offense thereunder. But the State contends that the defendant's concessions in her trial testimony with respect to the elements of the greater offense of robbery elevates the State's allegations of the greater offense to a verity and thus destroy any factual basis for submitting the lesser offense for the jury's consideration. See State v. Donelson, 302 N.W.2d 125, 134-35 (Iowa 1981). We have carefully reviewed the

defendant's trial testimony and conclude that this contention by the State is correct.[2] There was therefore no error in not permitting the jury to consider assault as a lesser included offense. We have considered all issues presented and find no grounds for reversal.

AFFIRMED.

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[2] Robbery, as charged in the present case, consists of an intent to commit a theft and the commission of an assault to assist or further the theft. In her trial testimony, defendant admitted to acts constituting an assault and further admitted that such acts were perpetrated with the intent to further a theft of drugs from a pharmacy.