IN THE COURT OF APPEALS OF IOWA

No. 6-510 / 95-1172



STATE OF IOWA,

Plaintiff-Appellee,

vs.

ERNEST GEORGE FORD,

Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Ernest Ford appeals from his convictions, following a jury trial, for two counts of perjury in violation of Iowa Code section 720.2 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Richard R. Phillips, County Attorney, for appellant.

Considered by Habhab, P.J., and Cady and Vogel, JJ.

HABHAB, P.J.

On February 14, 1995, Ford was charged with three counts of perjury in violation of Iowa Code section 720.2 (1995). The charges arose from testimony Ford gave in January 1995 while being tried for Possession of an Offensive Weapon by a Felon. Ford's defense in that trial was that he was no longer living in the Burlington Road home in which the firearms were found and therefore the firearms were not in his possession. Ford testified he had initially given the firearms to his brother, Omer. In June 1994, Omer told Ford he was moving and would no longer be able to keep the weapons. Ford then decided to store the firearms at the Burlington Road home and move in with his brother, Mike, whom he was staying with at the time.

In September 1994, the firearms were discovered by law enforcement. At the January 1995 trial on the offensive weapons charge, Ford testified to the following: (1) the weapon that resulted in the initial felony conviction, a sawed-off shotgun, was sold to him by a sheriff's deputy in the area, Captain Dave White; (2) he contacted the Thermogas Company during the first week of September 1994 and requested that his LP tank be picked up from the Burlington Road home and service be discontinued; and (3) he did not pay rent on the Burlington Road home for the month of September 1994. That case ended in a mistrial as the jury was unable to reach a verdict. As a result of Ford's above testimony, this case was brought against Ford charging him with three counts of perjury.

At trial on the perjury charges, a rather heated exchange between Ford and the prosecuting attorney took place during the State's cross-examination. During the course of that exchange, the prosecuting attorney, Phillips, slammed the table and stated in a loud voice, "I want the truth." Ford then moved for a mistrial. The district court denied that motion and found no prejudice had resulted from the incident.

Ford was eventually acquitted of one count and convicted of two counts of perjury. The district court sentenced him to two concurrent five-year terms. Ford appeals. He contends he was denied his constitutional right to a fair trial based on prosecutorial misconduct and his motion for mistrial should have been granted. The State contends Ford has preserved error on the denial of his motion for mistrial but not on the constitutional claims.

I. ***Preservation of Constitutional Claim.*** Ford argues he has preserved error on the constitutional claim as the claim for prosecutorial misconduct necessarily involved fair trial considerations implicit in the Due Process Clause of the Fourteenth Amendment. We do not necessarily disagree with Ford's contention in this regard, but point out, although allegations of prosecutorial misconduct do involve due process considerations, our supreme court has stated, "We will not allow a party to make a general reference to constitutional provisions in the trial court and then seek to develop the argument here." *Klobnock v. Abbot* 303 N.W.2d 149, 153 (Iowa 1981). In addition, ordinarily matters not raised in the trial court, including constitutional

questions, cannot be effectively asserted for the first time on appeal. *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974).

However, for the purposes of this opinion, we will assume that error has been properly preserved. It necessarily follows that our scope of review is de novo and we are to evaluate whether the trial court abused its discretion in denying the motion for mistrial.

Ford's claim of constitutional error focuses on prosecutorial misconduct while cross-examining him. This is not a case where the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the privilege against compulsory self-incrimination as to a denial of that right. Rather, it is only a claim that the prosecutor's remarks and conduct so effected the trial with unfairness as to make the resulting conviction a denial of due process.

From our de novo review of the record, we do not believe this case supports that contention. We agree with the trial court that the prosecutor did not call the defendant a liar. It is clear, however, the prosecutor did exhibit frustration, but this may have been brought about by the evasiveness of Ford in answering questions asked of him. Ford's evasiveness, however, cannot be used as an excuse for improper prosecutorial conduct. From our de novo review, we simply do not believe those incidents made Ford's trial so fundamentally unfair as to deny him due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, ___, 40 L. Ed. 2d 431, ___, 94 S. Ct. 1868, ____ (1970). We find no error under this division.

II. ***Motion for Mistrial.*** The rule is that prosecutorial misconduct is grounds for reversal only if it deprives the accused of a fair trial. *State v. Wright*, 309 N.W.2d 891, 893 (Iowa 1981). A defendant is entitled to a new trial where it is shown that the prejudicial effect of a prosecutor's actions remained with the jury. *State v. Peterson*, 189 N.W.2d 891, 906 (Iowa 1971). It is not the prosecutor's misconduct which entitles a defendant to a new trial, but rather any resulting prejudice which prevents the trial from being a fair one. *State v. Webb*, 244 N.W.2d 332,333 (Iowa 1976). Trial courts are vested with broad authority to determine if prejudice actually results from misconduct. *State v. Ruble*, 372 N.W.2d 216, 218 (Iowa 1985). The party claiming prejudice bears the burden of establishing it. *State v. Bishop*, 387 N.W.2d 554, 561 (Iowa 1986).

The district court determined Phillips' conduct in slamming the table and yelling in the courtroom that he wanted the truth was not prejudicial and denied Ford's motion for mistrial. Trial courts have considerable discretion in passing on mistrial motions, and reversal is proper only upon a showing that discretion was abused. *State v. Ware*, 205 N.W.2d 700, 702 (Iowa 1973). It is axiomatic that a trial court is better equipped than appellate courts can be to determine whether prejudice occurs. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). This is because the trial court is a firsthand observer of both the alleged misconduct and any jury reaction to it. *Id.*

In determining whether prosecutorial misconduct creates cause for reversal, we consider the following factors:

> (1) Whether the prosecutor's remarks were made in response to defense counsel's argument to the jury;
> (2) Whether the prosecutor's conduct was isolated and/or deliberate;
> (3) Whether the trial court gave a curative instruction and, if so, whether this was strong and explicit, enough to overcome any surviving prejudice that would affect the outcome of the trial.

State v. Blanks, 479 N.W.2d 601, 604 (Iowa App. 1991). Here, Phillips' remarks were not made in response to the defense counsel's argument to the jury, so we need only consider whether Phillips' conduct was isolated and/or deliberate and the curative steps taken by the trial court.

A prosecutor's misconduct will not warrant a new trial unless the conduct was so prejudicial as to deprive the defendant of a fair trial. *State v. Peterson*, 532 N.W.2d 813 (Iowa App. 1995) (citations omitted). Phillips' conduct was an isolated occurrence. "Prejudice results from *persistent* efforts to inject prejudicial matter before the jury." *Anderson*, 448 N.W.2d at 34, citing *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976). Prejudice can but usually does not result from isolated prosecutorial misconduct. *Id.* We find that although Phillips engaged in misconduct in slamming the table and yelling, this incident was isolated and did not create any prejudicial effect requiring a new trial. Ford has not established that the district court abused its discretion in making its finding that no prejudice resulted from Phillips'

misconduct. No corrective instruction to the jury was needed as no prejudice resulted.

We also find Phillips' questioning of Ford regarding the veracity of his statements was not improper given the charges of perjury against Ford. The State had introduced a wealth of information through exhibits and the testimony of witnesses to support the perjury charges, and questioning Ford in this regard was not inappropriate.

We have given careful consideration to the entire trial and the weight of the evidence against Ford. It is significant the evidence against the accused is strong. *Id.* We are convinced that Phillips' misconduct in no way prejudiced Ford. The trial court did not abuse its discretion in finding that no prejudice occurred as the result of Phillips' conduct. The trial court's denial of Ford's motion for mistrial is affirmed.

AFFIRMED.