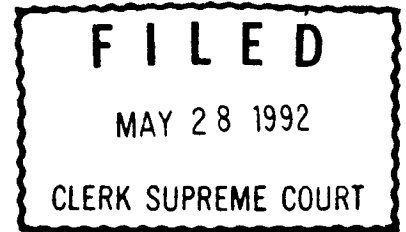


IN THE COURT OF APPEALS OF IOWA

No. 2-019 / 91-544



STATE OF IOWA,

Appellee,

vs.

JERRY DEAN ASHBURN,

Appellant.

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Appeal from the Iowa District Court for Scott County,  
Edward B. de Silva, Judge.

Ashburn appeals his convictions, following a jury trial, for first-degree murder, attempt to commit murder, and going armed with intent. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; William E. Davis, County Attorney; and Joseph Grubisich, Assistant County Attorney, for appellee.

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

**OXBERGER, C.J.**

Jerry Ashburn engaged in thefts and burglaries with a group of other men including Edward Bumgardner, Glen Barangan and Michael Wailand. In an apparent dispute over the division of loot, Ashburn allegedly shot Bumgardner and Barangan. Believing that both men were dead, Ashburn allegedly loaded their bodies in the trunk of his car, drove to Missouri, dumped the bodies in an abandoned farmhouse, and set fire to the farmhouse. Barangan did die as a result of these events. Bumgardner, amazingly, survived.

Ashburn denied shooting the two men. He acknowledged he disposed of the "bodies" in the manner outlined above. He asserted he did so at the request of Wailand. He stated he believed Wailand had committed the shootings, although he did not witness the shootings.

Ashburn was charged with several crimes. A jury found him guilty of three of the crimes: first-degree murder, attempt to commit murder, and going armed with intent. Ashburn has appealed from the resulting convictions.

Ashburn contends the district court erred by excluding his proposed evidence of Michael Wailand's prior conviction for possession of burglar's tools. Ashburn sought to admit this evidence in order to impeach Wailand's testimony for the State. The district court refused to permit such impeachment on the ground the crime was not one which necessarily involved dishonesty or false statement. Ashburn contends this ruling was erroneous.

Ashburn next contends he should have been granted a mistrial or a new trial due to prosecutorial misconduct during closing argument. Ashburn notes that the prosecutor made the following statement to the jury: "We don't have capital punishment in Iowa, folks." Ashburn complains this comment improperly injected the question of punishment into the jury's deliberations.

Ashburn also challenges the district court's marshaling instruction for the crime of first-degree murder. This marshaling instruction allowed the jury to consider, among other theories, a felony-murder theory with willful injury as the underlying felony. Ashburn contends willful injury is not a proper predicate offense for felony murder because it is essentially the same act as the homicide itself. Ashburn argues the instruction given here improperly allowed the jury to elevate the murder offense from second degree to first degree. Ashburn acknowledges the Iowa Supreme Court has previously rejected the issue he raises here. State v. Ragland, 420 N.W.2d 791, 793 (Iowa 1988); State v. Beeman, 315 N.W.2d 770, 776-777 (Iowa 1982). However, Ashburn asks that Ragland and Beeman be overruled.

Finally, Ashburn contends his trial attorney rendered ineffective assistance in two respects. Ashburn complains the attorney failed to make sufficient efforts to impeach the testimony of Michael Wailand with Wailand's 1988 conviction for possession of burglar's tools (see above). Ashburn also complains that the attorney failed to seek a

mistrial after a witness made an inadvertent reference to Ashburn's prior incarceration.

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

We find the district court did not abuse its discretion in excluding evidence of Michael Wailand's prior conviction. A prior criminal conviction is not admissible for impeachment unless one or more of the elements of the crime are "couched in terms implying deceit, fraud, cheating, or stealing." State v. Gavin, 328 N.W.2d 501, 503 (Iowa 1983). Possession of burglar's tools is the crime of which Wailand was convicted. The elements of this crime are possession of any key, tool, device, or any explosive with the intent to commit a burglary. Iowa Code § 713.7 (1991). The elements of burglary include intent to commit a felony, assault, or theft. Iowa Code § 713.1 (1991).

The enumerated element of assault and a variety of potential underlying felonies are not per se deceitful or fraudulent, nor do they necessarily involve cheating or stealing. The mere fact that Wailand was convicted of possession of burglar's tools, without any indication as to the type of burglary intended, does not sufficiently speak to his truthfulness or veracity.

We find the district court did not abuse its discretion in overruling Ashburn's motions for a mistrial and a new trial, which were based on a closing statement made by the prosecution. Trial courts have considerable discretion in passing on mistrial motions, State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973), and we reverse only upon a showing that that discretion was abused. The rule is that prosecutorial misconduct is ground 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).

We are not persuaded the jury was prejudiced by the prosecution's remark, or an unfair trial resulted therefrom. Although the remark regarded capital punishment, the context in which it was made did not include Ashburn. The point of the remark was the victims in this case, despite the fact that they were criminals, did not deserve to be murdered (capital punishment).

Ashburn challenges the marshaling instructions given by the district court, contending the court improperly included willful injury as a predicate offense for felony-murder. We reject the argument that the elements of felonious assault merge with the elements of second degree murder, hence precluding that offense from being the predicate offense for felony-murder. The legislature

intended felonious assaults, including willful injury under Iowa Code section 708.4, be felonies that may serve as the basis of a felony-murder and that the merger doctrine not apply to such assaults. State v. Beeman, 315 N.W.2d 770, 777 (Iowa 1982).

We find the claim of ineffective assistance of counsel inappropriate for review. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987). We preserve these claims for post conviction proceedings.

**AFFIRMED.**