FILED
MAR 29 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

RUSSELL DEE CARPENTER,

Appellant.

Filed March 29, 1978

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Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals his conviction of delivery of a controlled substance, asserting trial court erred in failing to admonish the jury concerning prosecutor's misstatement of the law and because the court made an improper comment during closing arguments. Reversed.

John C. Wellman, Des Moines, for appellant.

Richard C. Turner, Attorney General, and Dan Johnston, Polk County Attorney, for appellee.

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

PER CURIAM

Defendant, Russell Dee Carpenter, was charged with delivery of a controlled substance contrary to § 204.401(3), The Code. Trial to a jury resulted in his conviction of the crime charged. He appeals from judgment and sentence imposed upon that conviction.

Defendant's assignments of error both focus on events which occurred during closing arguments. He contends that the prosecutor made a misstatement of the law in the presence of the jury, and that trial court improperly commented upon the evidence.

The trial judge had absented himself from the courtroom during final arguments. At the prosecutor's behest, he was called from chambers. These exchanges ensued:

> MR. HANSEN: May it please the Court: Your Honor, the defendant has been arguing quite lengthy that the State should call Mary Stark, that her parents would like to know about this. There is no evidence in the record that Mary Stark even has parents or is even -- in fact, she may even be living in a group home. The argument is improper. It is the defendant's friend. And he has an equal right to call his witness as I do, and it's improper argument under the law and it's not a witness listed on the minutes under the four day notice, it is not a State's witness.
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> THE COURT: Ladies and gentlemen of the jury —Do you have anything you want to say, Mr. Wellman?
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> MR WELLMAN: I certainly do.
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> THE COURT: You may proceed.
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> MR. WELLMAN: Well, my right to summation is based on fair comment of the evidence. I was talking to the jury that reasonable doubt is created either by the evidence or by a failure on the part of the State to produce evidence. I believe that will be the instruction. Now it is in the record that the police officers did not ever talk to Mary Stark about this transaction. The reason that he gave was the police officer said he felt she wouldn't talk to him about it. My right of fair comment on that evidence that has been introduced in court goes into — I think I am entitled to go into the credibility of their reasons as to why they did not contact her, the failure of the State to call her — well, not the State to call her, but the failure of the officers to investigate this case.
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> MR. HANSEN: May it please the Court, he's going into the failure of the State to call this witness and they would like to know her parents. He knows as well as I do where she's living. It's not her parents --
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> THE COURT: Gentlemen, —
>
> MR. WELLMAN: Wait a minute.

THE COURT: We are not going to argue this matter at this time. The Court understands what the controversy is. The Court can instruct the jury, one, that Mary Stark is not on trial in this case. What the police officers did or did not do seems to the Court to be relatively immaterial. However, counsel does have a right to comment and draw any conclusions he desires from any matters that are in evidence in this case. You may proceed, gentlemen.

MR. WELLMAN: Your Honor, I, just for the record, have to take exception, with all due respect, to what you have said. You have just commented on the evidence. You have given your opinion.

THE COURT: I have only said, Mr. Wellman, that Mary Stark is not on trial in this case. I have given you a right to comment on anything, any evidence that is in this record or draw any conclusions that you desire. The Court has not commented on your argument, it has not commented on what conclusions can be drawn. I have only stated that Mary Stark is not on trial in this case. You may proceed with your argument.

MR. WELLMAN: Your Honor, I won't take up time now, but may I, before we read the Instructions, make a further record on this and have it be valid as if made at this time?

THE COURT: You have every opportunity to make any exceptions that you desire.

(Closing arguments continued and then the following record was made:)

MR. HANSEN: May it please the Court, I have been replying to his argument about Mary Stark and he was talking about her in his argument that she wasn't arrested. I just said was she ever in possession of any drugs. How do you make an arrest if she wasn't in possession.

THE COURT: Mr. Wellman, you have some comments to make here?

MR. WELLMAN: Yes. Mr. Hansen pointed out, consistent with the evidence, Mary Stark was never in possession of drugs and I have no quarrel with that. He then went on to say, and I can quote his statement, that's why the police did not talk to her because since she was never in possession of drugs they couldn't make a case against her. Now if that is his opinion, it is totally contrary to the law, but when it comes from the County Attorney it approaches testimony or opinion, but if that is his opinion it is contrary to the law.

MR. HANSEN: It is not contrary to the law.

THE COURT: The Court is going to say two things. One, I am going to repeat the fact that this is not a trial of Mary Stark. Both counsel have a right to comment on the evidence in this case. You ladies and gentlemen of the jury know what the evidence is. You were here and heard all of it.

> The remarks of either counsel are not evidence in this case. They are only stating the conclusions that they draw from that evidence. Whether those are your conclusions or not is going to depend on you.
>
> (Tr. 84-87.) (emphasis added)

The State initially contends that defendant has no basis for complaint because he has not provided a bill of particulars. The weakness of this claim is demonstrated by the foregoing quotation of the record. In addition, the record was amplified in chambers following the jury arguments. Trial court and the parties appeared to be in substantial agreement as to what had occurred. See State v. Swallom, 244 N.W.2d 321, 324 (Iowa 1976). This is not a case in which the alleged misconduct relied upon as error occurred during an unreported final argument. Instead, the comments from which defendant claims prejudice occurred during the reported discussion before the jury of what had occurred in the unreported argument.

Trial judges are not permitted to comment on the evidence in this state. State v. Fiedler, 260 Iowa 1198, 1203, 152 N.W.2d 236, 240 (1967); State v. Shearer, 206 Iowa 397, 404, 220 N.W. 13, 16 (1928), and citations. The evil which this rule is designed to combat, a tendency of jurors to be excessively influenced in their deliberations by their perceptions of the judge's view of the case, was present here. See State v. Larmond, 244 N.W.2d 233 (Iowa 1976). Defense counsel's argument was that the State had the means to show, by the direct evidence of Mary Stark, who stood to profit by the drug sale; failure to interview and produce that witness should, therefore, be held against the State.[1]

There may be weaknesses in defendant's argument, but demonstration of those weaknesses was the task of the prosecutor as defendant's adversary; it most certainly was not the function of the trial judge, whose position is one of "cold neutrality." State v. Glanton, 231 N.W.2d 31, 35 (Iowa 1975). Trial court's comment that the actions of the police officers seemed relatively immaterial could do nothing but emasculate defense counsel's argument.

[1] It would appear that the prosecutor's assertion regarding whether Stark could be prosecuted was in error. She might be liable under a conspiracy theory, see State v. Blyth, 226 N.W.2d 250, 263 (Iowa 1975), or an aiding and abetting theory. See State v. Lott, 255 N.W.2d 105 (Iowa 1977); State v. Guess, 223 N.W.2d 214, 215-216 (Iowa 1974). Of course, whether Stark had any criminal liability is of little importance on the question of why no one, apparently, chose to interview her.

Because we have determined that trial court's comment was reversible error, we need not consider whether failure to grant a mistrial on the basis of the prosecutor's alleged misconduct, or to admonish the jury against considering it, was an abuse of discretion. We assume such conduct will not recur on retrial.

REVERSED.

DONIELSON, J., dissents.