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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed August 31, 1978
vs.	)	
THOMAS J. HANSEN,	)	588/60996
Appellant.	)	

Appeal from Story District Court - Glenn C. Sedgwick, Magistrate.

Defendant appeals his conviction for operating a motor vehicle while under the influence of an alcoholic beverage. Affirmed.

William Tysseling, of Ames, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General, and Ruth Harkin, Story County Attorney, counsel for appellee.

Submitted to Donielson, Acting C. J., Snell, Oxberger and Carter, JJ.

DONIELSON, Acting C. J.

Defendant Thomas J. Hansen appeals his conviction of operating a motor vehicle while under the influence of an alcoholic beverage, in violation of § 321.285, The Code 1975. In support of his claim for reversal and new trial, Hansen asserts he was prejudiced by certain comments made by the county attorney during closing argument to the jury. He also alleges he was prejudiced by the trial magistrate's contact with the jury foreman outside the presence of defendant, his counsel and the other jurors; and by testimony, which the trial court barred by sustaining defendant's motion in limine but which crept into trial anyway, detailing certain obscene insults he allegedly directed toward his arresting officers.

Defendant's first contentions on appeal concern certain statements made by the county attorney during his closing argument. Although closing argument itself was not recorded, a record was made after the jury was instructed and while it was deliberating. During his argument, the county attorney made in substance the following comments to the jury: "Do you want this [the defendant's alleged conduct] to be a standard for driving on the highways of Iowa while under the influence of an alcoholic beverage?" and "Do you want Mr. Hansen to continue to drive on the highways of Iowa while under the influence of an alcoholic beverage?" Defense counsel immediately objected and moved for mistrial. The trial court overruled the mistrial motion and admonished the jury not to consider the issue of whether or not defendant's conduct should be a standard or whether or not defendant should be permitted to continue to drive on the highways of Iowa, but to limit themselves to the factual issues presented in the case.

Defendant's argument is that these comments, by inviting the jurors to ignore the law and to rely on their own notions of right and wrong conduct and by bringing into issue presumptions about defendant's future behavior, were so prejudicial as to entitle defendant to a mistrial. The State contends that the defendant failed to preserve error on these issues because the defendant's objections to the comments in the trial court were not sufficiently specific to alert the trial court to defendant's theories. Even if error was preserved, the State urges that the comments were proper argument.

In order to properly preserve alleged error of counsel occurring during the course of jury argument it is the duty of the aggrieved party to call attention of the presiding

judge to the alleged misconduct by timely objection and move by some proper procedure to give the trial court opportunity to correct the matter by admonition or instruction or in the event the matter is sufficiently prejudicial by declaring a mistrial. State v. Phillips, 226 N.W.2d 16, 18 (Iowa 1975). Defense counsel's objections that the statements of the county attorney during argument were prejudicial, out of the realm of argument and grounds for mistrial were both timely and sufficiently specific to alert the trial court as to the claimed error so that it might be corrected. See State v. Nimmo, 247 N.W.2d 228, 231 (Iowa 1976); State v. Alberts, 241 Iowa 1000, 43 N.W.2d 703 (1950). Having determined that error has been preserved, we consider the merits.

A criminal defendant is entitled to a fair trial but not a perfect one. State v. Kelsey, 201 N.W.2d 921, 927 (Iowa 1972). Prosecutor misconduct alone is not a sufficient basis for setting aside a conviction; it is not the misconduct which entitles the defendant to relief but resulting prejudice denying the defendant a fair trial. State v. Swallom, 244 N.W.2d 321, 325 (Iowa 1976). The trial court is vested with broad discretion in determining whether prosecutorial misconduct was sufficient to deprive a defendant of a fair trial and justify the granting of a mistrial. An appellate court will interfere only where such discretion has been abused. **Swallom**, supra. Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977).

In the instant case, the trial magistrate was in the courtroom watching the jury while final arguments were in progress. In ruling on defendant's motion for mistrial, the trial magistrate noted that the statements made by the prosecutor were "if not improper, then certainly marginal," but that the defendant's prompt objection and the court's admonition to the jury was sufficient to correct any prejudice which may have resulted. The comments were not as inflammatory as those in State v. Monroe, 236 N.W.2d 24, 30 (Iowa 1975) or State v. Vickroy, 205 N.W.2d 748, 751 (Iowa 1973). Prosecutor misconduct does not always mean defendant was denied a fair trial or that trial court erred in overruling a mistrial motion. State v. Trudo, supra, at 107. We find no reversible error here.

Defendant also urges that the trial court committed reversible error by overruling his motion for new trial because of the trial magistrate's contact with the jury foreman outside the presence of the defendant, his counsel and the other jurors. During the jury's deliberations, the trial magistrate telephoned the jury foreman and called him out of the jury room for a private conversation. After warning the foreman against giving him any indication of the status of deliberations, the trial magistrate advised the foreman of severe weather forecast. He gave the foreman the option of continuing deliberations that evening or returning the next morning to resume deliberations. The foreman responded that he believed a verdict could be reached within a half-an-hour or 45 minutes without adjournment, and returned to the jury room. About 15 minutes after this conversation the jury returned a verdict of guilty.

Private conversations between the trial court and jurors are universally condemned. State v. Grady, 183 N.W.2d 707 (Iowa 1971); State v. Register, 253 Iowa 495, 112 N.W.2d 648 (1962). This does not mean that a judge may never, during trial, have a conversation with a juror. Such communication may be unavoidable in certain contingencies. State v. Cowman, 212 N.W.2d 420, 425 (Iowa 1973).

In the instant case, the discussion was prompted by the severe weather watch which had been issued, a subject unrelated to trial. The trial magistrate offered the foreman the option of continuing deliberations that evening or returning the following morning, and exerted no pressure on the jury to reach a verdict that night. At the request of the jury foreman, deliberations continued and within the time predicted by the foreman, the jury reached its verdict. While we do not approve of the trial magistrate's communication, we believe it had no tendency to influence the verdict and reversal is not required. State v. Fiedler, 260 Iowa 1198, 1207, 152 N.W.2d 236, 242, (1967); State v. Register, 253 Iowa 495, 505, 112 N.W.2d 648, 653 (1962).

Finally, Hansen contends that the trial court erred in overruling application for mistrial and new trial regarding the admission of prejudicial evidence in violation of defendant's order in limine. Prior to trial, the trial court sustained defendant's motion in limine excluding verbatim recitals or graphic descriptions of defendant's obscene comments directed to his arresting officers at the time of his arrest. During trial, a State's witness testified regarding these comments. Defendant objected to this

testimony on the ground it was too graphic and violated the ruling on the motion in limine. We believe the defendant received a more favorable ruling on his motion in limine and objections to testimony than he deserved under these facts. Even so, the court sustained this objection and admonished the jury to disregard the testimony. At the completion of the State's case, defendant moved for a mistrial alleging as grounds the violation of the motion in limine. The trial court overruled defendant's motion on the basis it was not timely made.

A mistrial motion must be made when the grounds therefor first become apparent. State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973). Hansen did not move for mistrial after his objection was sustained and the trial judge admonished the jury to disregard the answer. His motion at the close of the State's case was not timely and was properly overruled. State v. Johnson, 260 Iowa 1207, 1218, 152 N.W.2d 426, 432 (1967). Defendant presents no issue for review here.

AFFIRMED.