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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-210 / 91-459

STATE OF IOWA,

Appellee,

vs.

TIM ALLEN COKER,

Appellant.

Appeal from the Iowa District Court for Lee County, D.B. Hendrickson, Judge.

Coker appeals from his convictions, following a jury trial, on four counts of forgery. **AFFIRMED.**

Vivian P. Meyer, Keokuk, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, and Michael P. Short, County Attorney, for appellee.

Heard by Schlegel, P.J., and Habhab, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The defendant, Tim Allen Coker, appeals from his convictions of guilty on four counts of forgery contrary to section 715A.2, Iowa Code (1989). We affirm.

Coker was initially charged by trial information with five counts of forgery, and upon jury trial was found innocent of one count but guilty on the remaining four counts, all Class D felonies.

Coker asserts four errors on appeal. He first contends a pretrial photographic lineup procedure used by the State was impermissibly suggestive. Second, he contends the trial court erred in not granting a new trial based upon purported newly-discovered evidence. Third, he contends the trial court erred in failing to declare a mistrial based upon a violation by the State of a court ruling on Coker's motion in limine. Finally, he contends prosecutorial misconduct warranted mistrial.

Coker is accused of taking checks belonging to a third party and forging the name of the third party as maker of the checks. The payee was "Scott Stanbaugh." These checks were cashed for $200 each within a few days of each other in October 1991.

Coker had assisted in moving the furniture of a third party whose checks were in a drawer of a dresser. In the move, a dresser drawer fell out, spilling its contents at a time when Coker had access to the contents.

Identification of Coker as the person cashing the checks was made by the testimony of clerks of various stores where the checks were presented. The witnesses further testified they identified Coker in court based upon observation and their conversations with him.

These identifications are supported by other evidence. A handwriting expert testified to the high probability that Coker wrote the "Scott Stanbaugh" endorsements. A store manager who was not shown the photographic lineup identified Coker as the party cashing the checks. Other witnesses testified as to Coker's possession of these third-party checks and that Coker bragged about cashing three forged checks for $200 each during the time period in question. Coker also on occasion used the alias "Scott Stanbaugh" and had in his possession an identification card in that name.

Coker for the first time asserts that the identification of him made by the witnesses at trial was tainted by their exposure before trial to photographic lineups that were impermissibly suggestive. Coker did not object to nor move against the introduction of these identifications at trial. Under these circumstances error, if any, has been waived and we therefore do not address the issue. State v. Holderness, 301 N.W.2d 733, 737 (Iowa 1981).

Subsequent to trial, Coker proffered in support of his motion for new trial what he characterized as

newly-discovered evidence that impeached certain witnesses. Coker's mother testified and her evidence consisted of hearsay and hearsay upon hearsay. It would have been inadmissible at trial, Iowa R. Evid. 801(a)-(c), and lacked authentication. The trial court found such testimony to be unreliable, and we agree.

Coker's unsworn testimony at the posttrial hearing pertained to two letters he received, both of which were collateral to the issues of innocence or guilt. One unsigned letter expressed the regret that the writer was sorry "I done this to you"; the other letter concerned the writer's pleasure that Coker was going to prison.

Impeachment testimony had been introduced at trial, and this additional hearsay testimony did not add significantly to the sum of knowledge about those witnesses. We agree with the trial court that these letters did not rise to the level of newly-discovered evidence.

Prior to trial Coker sought and received a ruling that prohibited any reference at trial to any other prior conviction of a charge of forgery. At trial Coker's former wife, in testifying about a false identification card Coker had, said that Coker gave the card back when he was released "from jail." Objection was promptly made with the request that the comment be stricken and that witnesses refrain from similar further comments. The trial court not only acceded to these requests, but instructed the jury at that time to disregard the statement. The trial court, in

its written instruction No. 9, again reminded the jury to not consider as evidence anything it had told them to disregard. These directions cured any prejudice. State v. Johnson, 183 N.W.2d 194 (Iowa 1971). Coker now asserts that the trial court, on its own motion, should have declared a mistrial. This claim ignores that the trial court granted Coker the precise relief requested.

Coker also now says that at the time he asked his trial counsel to move for a mistrial. However, the record is barren of any conversations to that effect. This factual allegation is not but should be supported by citation to the record. Iowa R. App. P. 14(a)(4)(5). Under the circumstances, we find that Coker is bound by the decision made by his counsel.

The claim of prosecutorial misconduct should be raised at trial. Coker has raised this issue for the first time on appeal. Failure to raise the issue at trial is a waiver of such claim. State v. Sage, 162 N.W.2d 502, 503 (Iowa 1968). In addition, his claim is based in large part upon allegations of fact for which there is no citation to the record as required by Iowa Rules of Appellate Procedure 14(a)(4)(5). Consequently, we find the issue has not been preserved for our review.

The convictions and judgments thereon are accordingly affirmed.

AFFIRMED.