

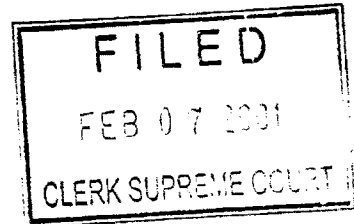
IN THE COURT OF APPEALS OF IOWA

No. 0-745 / 00-0390
Filed February 7, 2001

STATE OF IOWA,
Appellee,

vs.

BRIAN FORDHAM,
Appellant.



Appeal from the Iowa District Court for Pottawattamie County, Mark J. Eveloff, Judge.

Brian Fordham appeals the district court's conviction and sentence, after a jury trial, for assault causing injury in violation of Iowa Code sections 708.1(1) and 708.2(2) (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Richard Crowl, County Attorney, and Andrew Dopheide, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Hecht, JJ.

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VOGEL, J.

Defendant Brian Fordham appeals his conviction and sentence for assault causing injury, in violation of Iowa Code sections 708.1(1) and 708.2(2) (1999). He claims the trial court should have granted his motion for mistrial based upon prosecutorial misconduct. We affirm on appeal.

Fordham was charged with striking his four-year-old son and leaving a large bruise on his face. Fordham gave a child protective worker inconsistent stories about what happened. The victim was examined by Dr. Kathy Edwards, who found he had an obvious handprint on his face, which was consistent with a hand slap to his face. Dr. Edwards testified it would take quite a bit of force to cause a bruise as large as the one suffered by Fordham's son. The son told the doctor his father hit him.

During the prosecutor's closing argument, defense counsel made four objections. Fordham then sought a mistrial. The district court denied the motion, finding the prosecutor's statements were not so egregious as to warrant a mistrial. A jury found Fordham guilty of assault causing injury. The court denied Fordham's motions for arrest of judgment and for new trial. Fordham was sentenced to 200 days in the county jail, with all but twenty days suspended, and was ordered to complete an anger management class. Fordham appeals.

We review a district court's ruling on a motion for mistrial for an abuse of discretion. *State v. Hardin*, 569 N.W.2d 517, 522 (Iowa App. 1997). District courts have considerable discretion in ruling on such motions. *State v. Fryer*, 243 N.W.2d 1, 7 (Iowa 1976).

Fordham contends the district court abused its discretion by denying his motion for a mistrial. He claims the prosecutor engaged in misconduct during closing arguments in four instances: (1) presenting a slide which stated reasonable doubt is not the same as 100% certainty; (2) presenting a slide which stated, "Admit what you can't deny and deny what you can't admit;" (3) stating there was too much child abuse in the world, and the jury could help remedy that; and (4) stating the county attorney's office concluded a crime had been committed.

Prosecutorial misconduct in closing arguments may result in reversal of a conviction, if it deprives Fordham of a fair trial. *State v. Poyner*, 306 N.W.2d 716, 719 (Iowa 1981); *Hardin*, 569 N.W.2d at 522. There are two requirements to obtain relief on the basis of misconduct in closing arguments. *State v. Romeo*, 542 N.W.2d 543, 552 (Iowa 1996). First, a defendant must make a timely objection, and second, there must be some record of the argument so the appellate court has something to review. *Id.*

The State asserts Fordham failed to preserve error in this case. We agree error has not been preserved. While defense counsel made objections during closing arguments, the arguments were not recorded. Fordham did not file a bill of exceptions pursuant to Iowa Rule of Criminal Procedure 23(1), nor a statement of the record pursuant to Iowa Rule of Appellate Procedure 10(c).

Furthermore, the prosecutor did not concede he made the statements attributed to him by Fordham. The first statement attributed to the prosecutor, and apparently shown to the jury with the use of a slide projector, was that

reasonable doubt was not the same as 100% certainty. At the hearing on the motion for mistrial, the prosecutor stated only, "The not one hundred percent, I don't think there's anything improper about that." He did not specifically admit making this statement to the jury. The district court noted the jury had been admonished on this matter, but made no finding concerning whether the prosecutor had made the specific statement attributed to him. The slide was not offered into evidence.

The second statement attributed to the prosecutor was, "Admit what you can't deny and deny what you can't admit." Fordham claimed the statement, with accompanying slide, gave rise to an inference this is a tactic all defendants use.

The prosecutor stated at the mistrial hearing:

And admit what you can't deny, deny what you can't admit, there's nothing improper about that either. I did not say that the defendant was using an argument that all defendants make in these kinds of criminal cases, . . .

The district court found the prosecutor was probably skirting the issue of whether or not all defendants use this argument, but found the prosecutor did not specifically state that. Again, the slide was not made part of the record.

The third alleged statement was that there was too much child abuse in the world, and the jury could help remedy that. The prosecutor did admit to stating there was too much child abuse in the world. At the mistrial hearing he stated:

However, I don't think there was any implication on my part that to the jury asking them to remedy that by a verdict in this case. I didn't lead this particular case to -- I didn't tell the jury, rather, that this case is how you can remedy that. I wouldn't do that.

Thus, the prosecutor specifically denied asking the jury to help remedy the amount of child abuse in the world. The court admonished the prosecutor, but found there was no cause for a mistrial. There is no record to review what was actually said.

The fourth alleged statement was that the county attorney's office concluded a crime had been committed. The prosecutor denied making this statement. The court admitted it did not hear exactly what the prosecutor said. Again, there is no record to show the alleged statement was made.

Fordham has failed to preserve error in this case because he has not presented a proper record for our review of the prosecutor's alleged improper remarks. The prosecutor's concessions as to what he did argue all fell short of Fordham's characterizations of the statements. Fordham has failed to show the district court abused its discretion in denying his motion for a mistrial. We affirm defendant's conviction and sentence.

AFFIRMED.