

IN THE COURT OF APPEALS OF IOWA

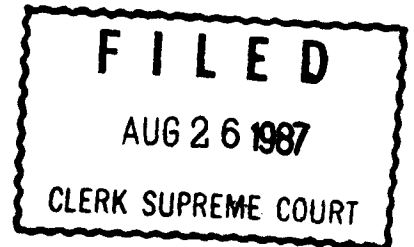
STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

HAROLD A. HOUSENGA,)

Defendant-Appellant.)



Filed August 26, 1987

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86-246

Appeal from the Iowa District Court for Muscatine County (No. 1617B-885),
Margaret S. Briles, Judge.

The defendant appeals from his conviction, following a jury trial, for the
crime of theft in the second degree. **AFFIRMED.**

William F. Creasey of Goedken & Creasey, Muscatine, for
defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney
General; and Stephen Petersen, Muscatine County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

The defendant, Harold Housenga, appeals from his conviction for the crime of theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2) (1985). He contends the court gave an erroneous jury instruction, failed to sever his trial from a codefendant, and that his counsel rendered ineffective assistance by failing to object to certain hearsay evidence. We affirm.

Since the proceeding is a criminal case, our scope of review is on assigned errors only. State v. Brookhiser, 375 N.W.2d 287, 288 (Iowa 1985). We now turn to Housenga's first assignment of error. He contends the trial court gave an erroneous instruction which was unsupported by the evidence adduced at trial. Housenga, however, did not object to this instruction and, therefore, failed to preserve any error for our review. In State v. Blackford, 335 N.W.2d 173 (Iowa 1983), the supreme court reiterated that objections to jury instructions must be made prior to jury arguments. Failure to comply will result in a waiver of instructional error as a ground of appeal. Id. at 177; State v. Rouse, 290 N.W.2d 911, 914-15 (Iowa 1980). Since no objection was made, no error was preserved and we do not reach the merits of Housenga's claim.

Housenga's second assignment of error concerns his request to sever his trial from that of codefendant McLain. A motion to sever must be made prior to trial. Iowa R. Crim. P. 10(2)(e). An untimely request "shall constitute waiver thereof" unless the court grants relief "for good cause." Iowa R. Crim. P. 10(e).

The record discloses that Housenga did not make a pretrial motion to sever from McLain. The State, however, during rebuttal introduced incriminating statements made by McLain. Housenga contended that these were so prejudicial a jury instruction could not prevent any spillover on to his case. Housenga's trial attorney did not know of the existence of these statements prior to trial since the witness was not named in the minutes of testimony. Consequently,

Housenga then moved to sever from McLain. It appears from the record that although the court recognized no pretrial motion had been made, it gave relief from the waiver by entertaining and ruling on the motions. We, therefore, find that Housenga's motion was timely made and properly preserved for our review.

We now turn to the merits of Housenga's severance claim. The general rule is that defendants who are indicted together are tried together. Iowa R. Crim. P. 6(1), 10(2)(3); State v. Sauls, 356 N.W.2d 516, 517 (Iowa 1984); State v. Belieu, 288 N.W.2d 895, 897 (Iowa 1980). Rule 6(4)(b), however, states that defendants may be tried jointly "if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties." It is within the trial court's discretion to grant a severance, and the ruling will only be reversed on appeal through a showing of an abuse of discretion. State v. Snodgrass, 346 N.W.2d 472, 475 (Iowa 1984); State v. Hood, 346 N.W.2d 481, 483 (Iowa 1984). To establish an abuse of discretion, the defendant must show sufficient prejudice to constitute denial of a fair trial. Id.

Housenga argues that since McLain's statements were inadmissible as to him, he would be prejudiced by the jury's inability to compartmentalize the evidence admitted against McLain. He contends this inability resulted in the jury considering the statements against him. We reject this contention.

We note that the trial court instructed the jury that evidence admitted against one defendant only could not be considered against another defendant. A limiting instruction of this type normally will be sufficient to avoid any potential prejudice. State v. Brown, 397 N.W.2d 689, 697 (Iowa 1986); State v. Belieu, 288 N.W.2d 895, 900 (Iowa 1980). The court in Brown stated a defendant "must demonstrate that certain evidence admitted only against [a codefendant] was potentially prejudicial to his case and that in fact it was more likely than not

the jury was unable to compartmentalize this potentially prejudicial evidence and consider it only against [a codefendant]." Id. at 697.

McLain's statements were made to DCI agent Sandy following the arrest. McLain stated "he wanted to know just how this was set up." He also said "What's a guy going to do when his wife — or when his children are starving and the economy is so bad." At the Muscatine County Jail, McLain during an interview stated that he became involved in the John Deere garden tractors because he saw it "as an easy way to make a buck" and that he would receive four hundred dollars. A limiting instruction was given to the jury regarding this evidence.

Certainly these statements were highly incriminating to McLain, but none mentioned Housenga, they did not relate to Housenga, nor did they inculcate Housenga. Because of their nature, a limiting instruction would be adequate to cure any prejudicial effects the statements could have. We believe the jury in this case was able to compartmentalize the statements and consider them against McLain only. The evidence will not be prejudicial to Housenga merely because it is potent and damning. See State v. Sauls, 356 N.W.2d 516, 518 (Iowa 1984). The State has the right to introduce the most powerful evidence it has against a defendant, and Housenga cannot complain solely because they did so. We hold the trial court did not abuse its discretion in denying the motion to sever.

Housenga's final assignment of error is that his trial counsel rendered ineffective assistance by failing to object to certain hearsay testimony. Generally, we decline from entertaining a claim of ineffective assistance of counsel on direct appeal. We prefer to resolve the question in a postconviction proceeding where a full record can be developed explaining the basis for the attorney's actions. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982).

The defendants in this case were tried jointly. Special problems arise in such a trial and counsel is forced to make difficult tactical decisions. This trial

was particularly difficult at times, and we feel the record is inadequate to determine the issue. We decline to do so and feel it is more appropriately addressed in a postconviction proceeding. See Iowa Code section 633A (1987).

AFFIRMED.