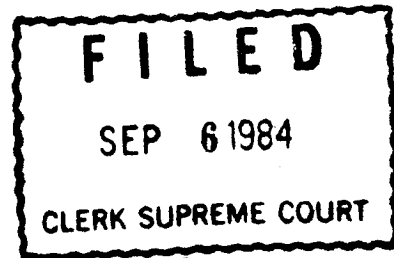


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

BRUCE ALLEN LEMONS,)

Defendant-Appellant.)

Filed September 6, 1984

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4-197
83-884

Appeal from the Iowa District Court for Washington County - Robert Bates,
Judge.

Defendant appeals from his conviction for burglary in the second degree. He contends the trial court erred in overruling his motions for a mistrial based on alleged prosecutorial misconduct and by overruling his motion for a new trial on the ground of newly discovered evidence. AFFIRMED.

Emmit J. George of Johnston & George, Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant
Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

The defendant appeals from his conviction for burglary in the second degree. He asserts that the trial court erred in overruling his motions for a mistrial based on alleged prosecutorial misconduct and his motion for a new trial on the basis of newly discovered evidence. We affirm.

On September 18, 1981, the residence of Phyllis K. Stogdill was burglarized. Defendant, Bruce Allen Lemons, was charged with the burglary and subsequently found guilty by a jury. Lemons appeals from the resulting conviction and sentence raising two primary issues for review. First, the defendant contends that the trial court erred in overruling his motions for a mistrial. He asserts that the prosecution committed prejudicial misconduct by permitting the State's witnesses to make indirect references to a previous burglary at the victim's house and to the possibility that the defendant had been arrested and booked on earlier unrelated occasions. He further asserts that the prosecutor committed prejudicial misconduct in his closing argument.

Lemons also contends that the trial court erred in overruling his motion for a new trial on the ground of newly discovered evidence. At trial, Phyllis Stogdill testified that the defendant had never been in her house with permission. Consequently, Lemons' fingerprint found in her house could not have been made during a legitimate visit. The newly discovered evidence would have consisted of testimony to the contrary by the victim's babysitter, Darrell Hesseltine. The victim allegedly informed Hesseltine that she knew Lemons and had invited him into her residence on one occasion.

I.

It is well established that prosecutorial misconduct is a sufficient ground for reversal only if it deprives the accused of a fair trial. The trial court retains wide discretion in such matters and will be reversed only upon a showing of abuse of that discretion. State v. Wright, 309 N.W.2d 891, 893 (Iowa 1981). In order to

prevail, the defendant must show not only that the misconduct occurred, but also that such conduct resulted in prejudice. State v. Love, 302 N.W.2d 115, 119 (Iowa 1981). Lemons would have this court believe that the prosecutor made persistent efforts to inject prejudicial matter before the jury. We cannot agree, however, that the alleged misconduct resulted in an unfair trial.

The defendant's first claim of misconduct is that State witness, Phyllis Stogdill, referred to a previous burglary at her residence, thereby violating the trial court's ruling in limine to restrict testimony to the September 18, 1981, occurrence. On direct examination of the witness, the following exchange occurred:

Q. Was any mention made in the course of your conversation with Mr. Lemons about calling the police? A. Yes, I said that I thought this time that I was going to call the police.

While the latter statement could be interpreted as inferring the existence of a prior burglary, it is not sufficiently prejudicial to warrant a new trial. The inference made was very slight and does not connect the defendant with the prior incident. As the trial court recognized, such inadvertent statements must implicate the defendant to a greater degree than this in order to result in unfair prejudice. "A defendant is entitled to a fair trial but not a perfect one." State v. Peterson, 189 N.W.2d 891, 896 (Iowa 1971) (citing Bruton v. United States, 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)).

Lemons also claims prejudice resulting from a reference to the possibility that he had been arrested and booked on earlier unrelated occasions. In the course of direct examination of one Officer Gray, this record was made:

Q. When you sent that latent print off, did you give any instructions to the person who was going to be examining it? A. Yes, I did.

Q. What instructions did you give? A. I requested that they check the left thumbprint against Mr. Lemons' card that they had in the file.

Q. Do you know how it is that the DCI obtains fingerprint cards of individuals who the Washington County Sheriff has fingerprint cards on? A. Yes, I do.

Q. How does that occur? A. They are given one of the cards that we use during the booking procedures at the jail.

We agree with the trial court that the manner in which this testimony was presented to the jury did not unfairly prejudice the defendant. There was no direct implication that the defendant was involved in a prior crime. Mere mention of the term "booking procedures" does not result in prejudice sufficient to warrant reversal of the trial court's decision.

The defendant's remaining claims of prosecutorial misconduct stem from alleged misstatements of the record during closing argument. Two separate remarks are cited.

First, the prosecutor stated to the jury that, "they take prints at every crime scene or perhaps most of the crime scenes." Defendant argues that this statement is unsupported by the record. Secondly, the defendant asserts that the prosecutor was attempting to appeal to the jury's passion or prejudice in stating, "she [Phyllis Stogdill] had a problem keeping that house as a safe place for her."

We think the trial court properly overruled defendant's motion for a mistrial based on these statements. In closing arguments counsel "is entitled some latitude to analyze evidence admitted at trial." State v. Brewer, 247 N.W.2d 205, 215 (Iowa 1977) (citing State v. Phillips, 226 N.W.2d 16 (Iowa 1975)). The aforementioned statements fall within this realm of proper conduct. Even assuming the statements could be characterized as improper, the defendant has not demonstrated sufficient prejudice to reverse the lower court's determination.

II.

The defendant also contends that the trial court erred in overruling his motion for a new trial on the basis of newly discovered evidence. We find no error.

Hesseltine, Stogdill's babysitter, would have testified that the victim told him she was acquainted with the defendant and he had been in her residence. The defendant argues that this testimony could not have been discovered before the trial since Hesseltine did not babysit for Stogdill until six months after the burglary.

"Motions for new trials on the basis of newly discovered evidence are not favored, should be closely scrutinized and granted sparingly. In passing on the motion the trial judge is vested with wide discretion." State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975). Pursuant to Iowa R. Crim. P. 23(2)(b)(8), such a motion may be granted:

When the defendant has discovered important and material evidence in his or her favor since the verdict, which the defendant could not with reasonable diligence have discovered and produced at the trial.

Prior to the January 1, 1978 effective date of this rule, the supreme court set forth a four-prong test the defendant must meet in order to prevail. Essentially, the defendant must show: 1) The evidence was discovered after trial and before judgment; 2) it could not have been discovered earlier in the exercise of due diligence; 3) it is material to the issue, not merely cumulative or impeaching; and 4) it would probably change the result if a new trial is granted. State v. Compiano, 261 Iowa 509, 154 N.W.2d 845, 850 (1967).

The defendant argues that this "substantially more rigorous" standard need not be met under Iowa R. Crim. P. 23(2)(b)(8). State v. Gilroy is dispositive on this point. In Gilroy, the supreme court recognized that the criminal code provision was merely a codification of the original standard with the exception that the motion may be made after judgment. 313 N.W.2d 513, 522 (Iowa 1981). Thus, the last three elements of Compiano must still be shown.

Applying the modified Compiano standard, we find no abuse of discretion in the trial court's ruling. The defendant did not meet his burden of demonstrating

that the evidence could not have been discovered earlier in the exercise of due diligence. Hesseltine's affidavit reveals that he was employed by Stogdill from Spring 1982 through Autumn of 1982. Apparently it was during this time period that Stogdill told Hesseltine that the defendant had been invited into her home. What is important for our purposes is that this conversation occurred well before trial. The defendant offers no viable explanation for his delay in discovering the information. In fact, the record reflects that defendant knew Hesseltine before the trial. Moreover, such evidence would have no material purpose independent of impeaching Stogdill's testimony and supporting similar testimony by other defense witnesses. Finally, we are not inclined to interfere with the trial court's determination that the newly discovered evidence would not affect the outcome of the trial. The record indicates there is reason to believe that Hesseltine would not be an unbiased, disinterested witness. In light of this and the cumulative nature of the testimony, the trial court's determination is entirely reasonable.

Finding no error, we affirm the decision of the district court.

AFFIRMED.