

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

FILED

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STATE OF IOWA,

Plaintiff-Appellee,

Filed February 5, 1980

vs.

EARLE ELDRIDGE,

Defendant-Appellant.

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Appeal from Polk District Court - A. B. Crouch, Judge.

Defendant appeals jury verdict finding him guilty of embezzlement as a bailee in violation of section 710.4, The Code 1975, asserting trial court erred by: 1) excluding as irrelevant evidence of general money handling practices of other employees; 2) denying his motion for discovery of a list of subscribers to a publication; 3) admitting into evidence a list of those persons to whom money was sent as a refund for voluntary subscription to the publication; and 4) depriving him of a fair trial. AFFIRMED.

Glen Muller of Oehler, Radig, Hoy, Muller & Richard, P.C., Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Julie Pottorff, Assistant Attorney General; and Dan L. Johnston, Polk County Attorney; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Earle F. Eldridge, appeals jury verdict finding him guilty of embezzlement as a bailee in violation of section 710.4, The Code 1975. He asserts trial court erred by: 1) excluding as irrelevant evidence of general money handling practices of other employees of the Iowa Commission on the Aging;¹ 2) denying his motion for discovery of a list of subscribers to the publication Prime Time; 3) admitting into evidence a list of those persons to whom the Commission sent refunds for voluntary subscriptions to the publication Prime Time; and 4) depriving him of a fair trial. We affirm.

During 1975 and 1976 defendant was employed by the Iowa Commission on the Aging as an information specialist. While so employed defendant became editor of a news letter mailed to elderly Iowans called Prime Time. Due to Prime Time's funding problems, the elderly were asked to send a \$2.00 voluntary subscription fee. By October 1975, the voluntary subscribers reached approximately 8,000. Although defendant's duties did not include fiscal responsibility for Prime Time, he did receive the subscription checks, which he testified were kept in a locked drawer of his desk. According to defendant, over half of these subscription checks were stolen on November 19, 1975, during his lunch hour. Defendant also received two postal refund checks, in the approximate amounts of \$10,000 and \$26,000, respectively, granted Prime Time for previous excessive postal charges. Defendant testified he gave the \$26,000 check to the Commission's director and placed the \$10,000 check in a separate bank account, which he later used to purchase \$2.00 money orders to refund money to the Prime Time subscribers whose \$2.00 checks were stolen from his desk drawer. After defendant left the Commission, an audit disclosed missing funds in excess of \$10,000. On June 29, 1978, defendant was convicted by a jury of embezzling these funds in violation of section 710.4, The Code 1975.

L. Exclusion of Evidence. Defendant contends trial court erred in excluding as evidence a state auditor's report and testimony evaluating the fiscal and contractual management of the Iowa Commission on the Aging. In excluding the evidence, trial court held the general money handling practices of other employees of the Commission irrelevant to any issue in defendant's trial for embezzlement from Prime Time funds.

¹ Hereinafter interchangeably referred to as "the Commission."

Defendant argues the evidence was relevant to show he had no intent to defraud and his conduct was consistent with what he had observed to be general practices of the agency.

Trial court has wide discretion in determining relevancy of evidence. State v. O'Connell, 275 N.W.2d 197, 203 (Iowa 1979); State v. Kaufman, 265 N.W.2d 610, 619 (Iowa 1978). We will not overrule exercise of that discretion where, as here, defendant has failed to show any prejudice except the mere fact of his conviction. Trial court allowed into evidence portions of the audit pertaining to administration of Prime Time funds. Defendant was allowed to testify in detail regarding his handling of the allegedly embezzled funds. Trial court's refusal to admit the evidence was not clearly untenable or unreasonable. State v. Gartin, 271 N.W.2d 902, 910-11 (Iowa 1978).

II. Motion for Discovery. Defendant contends trial court erred in orally overruling his pretrial motion for discovery of the Prime Time subscription list. The record fails to reveal a trial court ruling on the issue; however, defendant timely filed a statement of proceedings in an attempt to cure this defect. Iowa R. App. P. 10(c).

Our review is governed by the principle requiring a final trial court ruling on motions to preserve appellate jurisdiction. State v. Watts, 244 N.W.2d 586, 588 (Iowa 1976). Defendant has the burden of making a record on trial court's rulings, see State v. Droste, 232 N.W.2d 483, 487-88 (Iowa 1975), but failed to meet these requirements.

We then must determine whether defendant can correct this omission from the record by filing a rule 10(c) statement of proceedings. We believe he cannot. Our interpretation of the rule permits preparation of a statement of the evidence or testimony presented to trial court during a hearing, argument or trial which is unavailable because no report was made or the transcript is unavailable due to loss or destruction of the reported notes. See E. Trott, The New Iowa Rules of Appellate Procedure 1977—A Comparison with Hints for the Practitioner 23 (1978). In this case, defendant attempts to utilize the rule as a substitute for a trial court ruling which he failed to obtain, either by requesting trial court to file a written order or by making a record on the issue in trial court. Defendant's failure to avail himself of either of these options precludes our review.

III. Admission of Subscription List into Evidence. Defendant also argues trial court erred in admitting into evidence the list of persons to whom the Commission

returned checks for the \$2.00 voluntary subscription to the publication Prime Time. Defendant asserts discovery of this list, if one existed, was part of trial court's pretrial order. Our conclusion defendant has failed to preserve the record on this issue limits our review to consideration of whether trial court abused its discretion in allowing the evidence to be admitted. We note the evidence was never in the State's possession, but that of the Commission. Further, the existence of such a list became known through one of defendant's own witnesses. We fail to see how a list of subscribers to whom the Commission had sent refunds would aid the defendant in identifying those subscribers to whom defendant allegedly sent \$2.00 money order refunds. We find trial court did not abuse its discretion by admitting the evidence.

IV. Fair Trial. In his final assignment of error, defendant argues the cumulative effect of the alleged errors deprived him of a fair trial. Our disposition of defendant's previous contentions leads us to conclude defendant received a fair trial.

Judgment of trial court is affirmed.

AFFIRMED.