

IN THE COURT OF APPEALS OF IOWA

FILED

FEB 26 1986

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

MICHAEL L. MARIT,)

Defendant-Appellant.)

Filed February 26, 1986

5-698
85-263

303

Appeal from the Iowa District Court for Scott County (No. 109603) - J.
Hobart Darbyshire, Judge.

Defendant appeals from judgment and sentence entered upon his conviction
of murder in the first degree, and theft in the fifth degree. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Ann E. Brenden, Assistant Attorney
General, and Martin Wozniak, Assistant County Attorney, for plaintiff-appellee.

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

The first issue before us is whether the trial court erred in overruling defendant's motion for a mistrial.

Defendant had previously been tried and convicted of first degree murder and fourth degree theft. His conviction was reversed and remanded for new trial by the Iowa Supreme Court. See State v. Marit, 360 N.W.2d 571 (Iowa 1984).

Prior to defendant's second trial he filed a motion in limine seeking to prohibit disclosure during trial of defendant's prior trial and conviction. The court granted the motion in limine.

At trial during the county attorney's examination of an investigator from the Scott County Sheriff's Department, the investigator was questioned about money in the defendant's billfold that he receipted for. The following exchange occurred:

Q. Could you tell us what ultimately happen to the cash, . . . Do you have that today? A. No, sir, I do not.

Q. What did you do with it? A. That was submitted as evidence in the first trial.

Defendant moved for a mistrial. The motion was overruled.

This issue is clearly controlled by State v. Gavin, 360 N.W.2d 817, 819-20 (Iowa 1985). Defendant has failed to demonstrate any particular prejudice existed. Prejudice will not be presumed under these facts. The defendant must show actual prejudice. Id. He has failed to do so.

II.

Defendant also claims he was denied his constitutional right to effective assistance of counsel in that his trial attorney failed to present one Jimmy Ware and two other witnesses in support of his defense.

We agree with defendant and the state that the record is inadequate for a review of this issue and would reserve the issue for defendant to raise in a postconviction proceeding.

We affirm defendant's conviction.

AFFIRMED.