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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 26, 1985
vs.	)	
DANNY LAVERN ANDERS,	)	4-522 84-269
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Wapello County - James P. Rielly, Judge.

Defendant appeals from judgment and sentence for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5. AFFIRMED.

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Pamela S. Greenman, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

The defendant appeals from judgment and sentence for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5 (1983), asserting that he was denied a fair trial due to prosecutorial misconduct. We affirm.

The defendant, Danny L. Anders, was tried before a jury for second degree burglary and his sole defense was intoxication. On three occasions during voir dire the prosecutor allegedly asked prospective jurors if intoxication should be "an excuse to avoid criminal liability." The defense counsel objected to the questions and moved for a mistrial on the basis that the questions were prejudicial. The objections were sustained; however, the motion for mistrial was denied. At trial, the prosecutor, while questioning the defendant's intoxication expert, suggested that persons accused of committing a crime go to a counselor or program in order to make their case look a little better. The trial court again overruled a motion by the defense counsel for a mistrial.

The jury found the defendant guilty as charged. Thereafter, the defendant filed a motion for a new trial on grounds including those now asserted on appeal. The motion was denied and defendant appealed.

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

The defendant's first claim is that the prosecutor on three occasions during voir dire allegedly asked prospective jurors whether they thought intoxication should be an excuse to avoid criminal liability.

The control of voir dire is lodged in the discretion of the trial court and the appellate court will not reverse a decision unless that discretion manifestly has been abused. State v. Menke, 227 N.W.2d 184, 187 (Iowa 1983); State v. Windsor,

316 N.W.2d 684 (Iowa 1982). Abuse of discretion ordinarily can only be found where there is no support in the record for the determination of the trial court. State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976). The trial court is granted a deferential standard of review because it is in a better position than the appellate court to gauge the effect, if any, of such statements on the jury. State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982).

Viewing the record in light of these principles, we conclude that the trial court's ruling should not be disturbed. The State points out, and we agree, that the record is not adequate to provide a basis for reversal. The challenged proceedings were not reported, and the defendant made no attempt to make a record of the proceedings under Iowa Rule of Criminal Procedure 23.1 or Iowa Rule of Appellate Procedure 10(c). The only evidence of what occurred during voir dire consists of defense counsel's recitation of the questions he believed were asked, as set forth in his motion for a new trial. In its ruling on the motion, the trial court did not indicate whether or not the questions were asked in the form alleged. We are not willing to interfere with the trial court's exercise of discretion under these circumstances. See State v. Washington, 308 N.W.2d 422, 424 (Iowa 1981).

It is further claimed by defendant that the prosecutor, while examining defendant's expert witness, commented that persons accused of committing a crime go to counselors to make their cases look a little better. The trial court ruled that this questioning was argumentative, but not sufficient to warrant a mistrial. The trial court did not abuse its discretion in ruling on this motion. The fact that the prosecutor asked an argumentative question was not so prejudicial that the defendant was denied a fair trial.

Iowa law on prosecutorial misconduct clearly states that even though a prosecutor may go beyond the bounds of proper prosecutorial conduct on several occasions, "it is not a prosecutor's misconduct which entitles defendant to a new

trial; it is the prejudice which results therefrom and which prevents the trial from being a fair one." State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982) (citing State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976)). Even the cumulative impact of the statements made regarding the intoxication defense were not so prejudicial as to deny defendant of a fair trial. Although the prosecutor's behavior may have been less than laudatory, we believe that such comments were not sufficiently prejudicial to warrant a new trial.

Defendant also claims that two other factors served to undermine his intoxication defense. First, he maintains that a statement made by a prospective juror that alcoholics must learn to take responsibility for their actions was prejudicial to the defendant. This comment, however, was not solicited by the prosecutor and cannot be considered so prejudicial as to deny defendant a fair trial.

Finally, defendant asserts that jury instruction number 18, which stated that intoxication "does not excuse . . . guilt," confused and misled the jury as to the viability of the intoxication defense. We find no merit in defendant's claim. Jury instruction number 18 is a correct statement of the law and when read in its entirety cannot be seen as prejudicing defendant's right to a fair trial. See II Iowa Uniform Jury Instructions Ann. No. 210 (1982).

On the record before us, we find no abuse of discretion by the trial court. The trial court properly overruled the motion for mistrial.

AFFIRMED.