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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FILED JUNE 4, 1986

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

CURTIS JON ROBERTS,)

Defendant-Appellant.)

6-73
85-674

390

Appeal from the Iowa District Court for Warren County (No. 8643), M.C. Herrick, Judge.

Defendant appeals his conviction of second-degree burglary. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Christie J. Scase, Assistant Attorney General, and John Criswell, Warren County Attorney, for plaintiff-appellee.

Considered by Snell, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Defendant appeals his conviction of second-degree burglary. He argues on appeal that the trial court erred in refusing to grant a mistrial due to allegedly improper and prejudicial comments made by the state's witness and the prosecutor during trial. We affirm.

Defendant was charged with second-degree burglary, in violation of Iowa Code §§713.1, 713.5 (1983), and with being an habitual offender in violation of Iowa Code §§ 902.8, 902.9(2) (1983). The jury found defendant guilty of the burglary charge, and he subsequently admitted the prior felony convictions that served as a basis for the habitual offender charges.

During the trial, defendant's attorney was cross-examining a Mr. Rowley, an alleged accomplice in the burglary, concerning apparent inconsistencies in his trial testimony and his prior deposition testimony. During the cross examination, the following colloquy took place:

> Q. Why don't you start on line 4 and read the question and read it down through 7. A. Question: What makes you think that Curt was standing outside? Six: Because he wasn't around when me and Larry were breaking the door.
>
> There has to be some type of trick to that question. I'm sorry, but he was around. He is guilty, you know. Just like I was guilty.
>
> MS. FASANO: Your Honor, I object to that and I would like to be heard outside the presence of the jury.
>
> THE COURT: The jury will disregard that statement and please refrain, Mr. Rowley, from making any voluntary statements here. Just answer the question and if there is some objection made to it I will rule on it, but you are not to make voluntary statements or give any opinions in that regard.
>
> MR. CRISWELL: Dewayne, you are doing just fine. You may not realize it, but you are doing just fine. Just answer the question.
>
> MS. FASANO: Your Honor, I object to counsel's comments at this time and I would like to be heard out of the presence of the jury at this time.

> THE COURT: Members of the Jury, there is a matter I have to take up — first, I would say that I think the county attorney's comments to the witness should be stricken and the jury disregard that insofar as it gives any opinion as to how the witness is doing. I think that is immaterial. That is for the jury to decide. I think the comment was intended to sort of quiet the witness down, but do you want to make some record?

Defense counsel then moved for mistrial, arguing that statements made by the witness and the prosecutor in the jury's presence were so prejudicial that defendant could not receive a fair and impartial trial. The motion was overruled and defendant subsequently raised the issue a second time in a motion for new trial. The trial court again denied the motion. The sole issue raised on appeal is whether the trial court erred in denying defendant's motion for mistrial.

The trial court has broad discretion in ruling on a request for a mistrial. State v. Trudo, 253 N.W. 2d 101 (Iowa 1977), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189. In order to demonstrate abuse of discretion the defendant must show that the trial court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. Any error in admission of evidence is cured by a cautionary instruction to the jury, except in extreme cases where the prejudicial effect would probably remain with the jury. State v. Coffee, 182 N.W. 2d 390, 392 (Iowa 1970); State v. Peterson, 189 N.W.2d 891 (Iowa 1971). The burden is on the defendant to show the requisite prejudice. State v. Dalgleish, 223 N.W. 2d 627 (Iowa 1974); State v. Chadwick, 328 N.W. 2d 913, 916 (Iowa 1983).

Defendant was charged with the burglary of a grocery store in a small town. Defendant however denied any involvement with the crime and Rowley, an admitted accomplice in the burglary, had agreed to testify for the state. The central theme to defendant's defense therefore, was to demonstrate that

Rowley was not credible. But, because of Rowley's voluntary statement, and the prosecutor's actions, defendant claims his impeachment attempts were severely damaged.

We turn first to the issue of whether defendant's impeachment attempts suffered. We note that defense counsel had already extracted numerous admissions about Rowley's background and that the charges pending against him concerning this burglary were dropped in exchange for his testimony against defendant. Moreover, the record contains other instances where Rowley contradicted himself concerning facts about the night of the burglary. The jury heard all of Rowley's testimony and could choose whether to believe him or not. We cannot conclude that the voluntary assertion by this witness that defendant is guilty is of such an extreme nature that it could not be cured by a cautionary instruction by the trial court.

We consider next the comments made by the prosecutor during this colloquy. In State v. Williams, 315 N.W. 2d 45,55 (Iowa 1982), the Supreme Court outlined the standard of review for alleged prosecutorial misconduct.

> Prosecutorial misconduct does not require a new trial unless it appears to have been so prejudicial as to deprive the defendant of a fair trial. State v. Lyons, 210 N.W. 2d 543, 549 (Iowa 1973); State v. Harless, 249 Iowa 530, 536, 86 N.W. 2d, 210, 213-14 (1957) cert. denied, 357 U.S. 908, 78 S.Ct. 1154, 2 L.Ed.2d 1158 (1958). Trial courts are vested with broad authority to determine whether prejudice results from prosecutorial trial misconduct. State v. Vickroy, 205 N.W. 2d 748, 750 (Iowa 1973). We intervene only when the trial court abuses this discretion. State v. Trudo, 253 N.W. 2d 101, 106 (Iowa 1977), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977). "Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id.

In this case the alleged misconduct is the prosecutor's comment concerning the witness' testimony. The Supreme Court in Williams stated:

> In examining a witness, an attorney should not assert an opinion as to the witness' credibility. See Iowa Code of Professional Responsibility for Lawyers DR 7-106(C)(4). The general rule, however, is that improper testimony or in this case improper comment on a witness' testimony, is not unduly prejudicial if the court admonishes the jury to disregard it. State v. Burrell, 255 N.W. 2d 119, 122 (Iowa 1977). Only in those exceptional cases in which the prejudicial effect of such a comment cannot be eliminated will an admonition of the court be found insufficient. State v. Burrell, 255 N.W. 2d 119, 122 (Iowa 1977); State v. Mattingly, 220 N.W. 2d 865, 870-71 (Iowa 1974).

We note that the witness was 18 years old and allegedly had blood pressure problems. However, in spite of these facts we cannot sanction the comments made by the prosecution. Still, we agree with the trial court that an admonition to the jury sufficiently negated the statement so that defendant was not unduly prejudiced. Accordingly we find no abuse of discretion.

We have carefully considered the conduct of both the witness and the prosecutor and hold that neither incident was of such an extreme nature that the trial court abused its discretion in not granting a motion for mistrial. We therefore affirm the judgment of the trial court.

AFFIRMED.