FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 26, 1984
vs.	)	
MARY LOU DANIEL,	)	4-152 83-962
Defendant-appellant.	)	

Appeal from the Iowa District Court for Story County - Glen C. Sedgwick, District Associate Judge.

Defendant appeals from her conviction of fraudulent practice in the third degree in violation of Iowa Code section 714.11. AFFIRMED.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Deborah A. Goins, Assistant Story County Public Defender, Nevada, Iowa, for defendant-appellant.

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

Defendant appeals from her conviction of fraudulent practice in the third degree in violation of Iowa Code section 714.11. Defendant was accused of cashing her welfare check and later reporting the same check to have been stolen. The main factual question at trial was whether the endorsement on the check had been forged. A handwriting analyst testified for the State that in his opinion the endorsement was the defendant's genuine signature. On cross-examination, defense counsel challenged the credentials and opinion of the handwriting analyst. Although closing arguments were not reported, the transcript of the hearing on defendant's motion for new trial reveals that in his closing argument the prosecutor stated something to this effect: "If the State's handwriting expert is wrong, where is the defendant's expert?"

Defendant claims that this comment improperly suggested to the jury that she had a burden to rebut the State's evidence. The State argues that the prosecutor's statement was justified by defendant's attack on the witness's credibility. The trial court denied defendant's motion for a new trial.

Our review of criminal cases is on assigned error. Where the defendant alleges the violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

The supreme court has on several occasions considered whether a prosecutor's comment on the failure of the defendant to call witnesses is reversible error. In State v. Allison, 260 Iowa 176, 147 N.W.2d 910 (1967), cert. denied 391 U.S. 906, 88 S. Ct. 1657, 20 L. Ed. 2d 420 (1968), defense counsel commented at some length on the State's failure to produce an eyewitness to the robbery. In rebuttal the prosecutor pointed out that the defendant had failed to call two alibi witnesses who had been subpoenaed. Id. at 182, 147 N.W.2d at 913. Even though the court ultimately held that error had not been preserved on this

issue, id. at 184, 147 N.W.2d at 914-15, the court considered the merits of the argument and found no violation of defendant's rights. Id. at 182, 147 N.W.2d at 913. The court stated:

> The prosecutor did not directly mention defendant's failure to testify. We think that a strained and forced construction is necessary to conclude that the argument was aimed at indirectly accomplishing the same end. The fair purport of State's argument in this regard was to call attention to defendant's failure to call alibi witnesses as he had indicated during trial he intended to do. As the arguments developed this answering argument by the State was not a violation of the rule laid down in Griffin v. State of California. Comment on failure of defendant to call witnesses available to him has been held fair argument, State v. Peirce, 178 Iowa 417, 159 N.W. 1050; State v. Boyd, 199 Iowa 1206, 200 N.W. 205; State v. Katz, 241 Iowa 115, 40 N.W.2d 41. This rule is still sound, particularly where, as here, the reference came in rebuttal to defendant's comment on the State's failure to call witnesses available to it.

Id.

In State v. O'Kelly, 211 N.W.2d 589 (Iowa 1973), cert. denied 417 U.S. 936, 94 S. Ct. 2652, 41 L. Ed. 2d 240 (1974), defendant was charged with receiving stolen goods. A farmer testified that he had been disturbed one night by noise, that the next morning he observed vehicle tracks running down to the fence, and that he discovered a stolen safe just over the fence in his field. Id. at 591. On cross-examination defense counsel brought out the fact that hunters occasionally came on the farm. Id. at 592. The prosecutor, in his closing argument, commented that if there were hunters why had the defendant not produced them so the jury could hear they were out there hunting. Id. Defendant moved for a mistrial on the ground that this comment suggested the defendant had a burden to produce evidence. Id. The court held that it was not an abuse of the trial court's discretion to deny defendant's motion for a new trial. Id. at 597. The court, noting that defendant had brought up the subject of hunters on cross-examination, stated that the prosecutor's arguments appeared "to be of the responsive kind which are frequently made in a hotly contested case." The court observed that the prosecutor had not argued that defendant had the burden of proof. Id.

The supreme court reached a different result in State v. White, 225 N.W.2d 104 (Iowa 1975). In White the county attorney, in closing argument, criticized the defendant for failing to produce his nephew and brother-in-law. He also asked the jury to consider why defendant had not called his wife as a witness. Id. at 105. The court held that in view of the statutory spousal privilege, the county attorney's reference to defendant's failure to produce his wife was improper. Id. at 105-06. Likewise, the court held the comment on defendant's failure to call the other two witnesses was improper. Citing O'Kelly the court noted that such comments are permissible when they are responsive to remarks of defense counsel. However, the court stated that nothing in the record of this case justified the prosecutor's statements. Id. at 106.

In State v. Nelson, 234 N.W.2d 368, 370 (Iowa 1975), the prosecutor argued in closing statement: "We have evidence—uncontroverted evidence in this record, uncontroverted by any testimony of the defendant, and they certainly had every opportunity to call witnesses . . . ." The supreme court held that the comment improperly attempted to focus the jury's attention on defendant's failure to testify. Id. at 371. Although the State relied on White and O'Kelly, the court found no defense statements which would justify the prosecutor's comments. Id. at 371-72. Furthermore, the court in Nelson observed:

> Although the point is not raised here, arguments and counter-arguments relating to lack of evidence or failure to produce witnesses, together with the cases the State relies on, must ultimately be re-examined in light of our recent decisions holding trial court's reasonable doubt instruction must limit the jury's consideration of lack of evidence to lack or failure on the part of the State, not the defendant. State v. Hansen, 225 N.W.2d 343, 346 (Iowa 1975); State v. Boyken, 217 N.W.2d 218, 219 (Iowa 1974).

Id. at 372. However, later the same year the court decided State v. Hall, 235 N.W.2d 702, 728 (Iowa 1975), cert. denied 434 U.S. 822, 98 S. Ct. 66, 54 L. Ed. 2d 79 (1977), in which White and O'Kelly were cited favorably to support the "invited error" doctrine. In Hall, a prosecutor's reference to defendant's failure to testify

was held not to be reversible error when defense counsel in closing argument had implied that defendant did not testify because the case against him was so weak as to make a reply unnecessary. Id. See also State v. Wright, 309 N.W.2d 891, 893 (Iowa 1981); State v. Brewer, 247 N.W.2d 205, 215 (Iowa 1976).

In the present case a handwriting analyst opined that the endorsement on the welfare check was defendant's handwriting. On cross-examination defense counsel questioned his credentials:

> Q. Mr. Birnbaum, I didn't quite understand your initial testimony. I think you said for two years you've been working under another document examiner in DCI; is that correct?
>
> A. Between 1979 and 1981 I trained with Jerry Brown, Chief Document Examiner with the Iowa Department of Criminal Investigation. Since 1981 I have been doing independent documentation.
>
> Q. In all your time as a document examiner, have you ever made a mistake with regards to an opinion formed from a comparison?
>
> A. During my training I did on occasion differ with Jerry's opinion, yes.
>
> Q. At the present time you're not certified, are you?
>
> A. I am currently a candidate for certification by the American Board of Forensic Document Examiners.
>
> Q. But you have not completed the certification process; is that correct?
>
> A. I have completed the application procedure. I have not completed the testing procedure.
>
> Q. You are not certified as yet; is that correct?
>
> A. That's correct.

On recross defense counsel pursued the subject.

> Q. Mr. Birnbaum, would you admit that you are in a profession where you give opinions? Would you agree with that?
>
> A. That's correct.
>
> Q. And that is your opinion?

A. That's correct.

Q. When you make up an opinion—

A. Yes, ma'am.

Q. —and certainly, I guess, then you would have to agree that possibly other handwriting experts can disagree with each others opinions. Isn't that fair to say?

A. That's right.

We agree with the trial court that, "The clear inference of the cross-examination was that there may be other experts who would indeed contradict the testimony of the witness."

We conclude that this case is very similar to O'Kelly and that O'Kelly is still good law. Defense counsel here, as in O'Kelly, on cross-examination implied that there were other potential witnesses not before the court who could benefit defendant's case. The prosecution had the right to rebut that argument by observing that the defendant had the same opportunity to call those witnesses as did the State. We further note that trial courts have considerable discretion in determining whether closing arguments are improper and whether the defendant suffers prejudice as a result. State v. Taylor, 336 N.W.2d 721, 727 (Iowa 1983); State v. Hollins, 253 N.W.2d 597, 600 (Iowa 1977). This is particularly important where, as in this case, closing arguments were unreported. The trial court had the opportunity to hear the prosecutor's comments in context and evaluate their impact on the jury. See State v. Taylor, 336 N.W.2d at 727.

Courts in other jurisdictions have decided cases consistent with this opinion. See e.g. Yancey v. Housewright, 664 F.2d 187, 190 (8th Cir. 1981) (prosecutor's argument that defendant had not called witnesses to support his alibi defense was neither improper nor prejudicial since prosecutor "merely stated the obvious"); People v. Harris, 113 Mich. App. 333, 317 N.W.2d 615, 618 (1982) (comments by prosecutor that defendant had not called a witness to corroborate his version of the facts "merely point out the weaknesses in the defendant's case and do not

improperly shift the burden of proof to the defendant"); State v. Miller, 115 Ariz. App. 279, 564 P.2d 1246, 1251 (1977), vacated on other grounds 129 Ariz. 465, 632 P.2d 552 (1981) (prosecutor may state in closing argument that if defendant disputes the fingerprint comparison he is free to hire his own expert witnesses to testify on the matter).

AFFIRMED.