FILED
JAN 29 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-543 / 89-1226

STATE OF IOWA,

Plaintiff-Appellee,

427

vs.

DALE EUGENE ROYER,

Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

Defendant appeals his convictions, following a jury trial, for two counts of first-degree murder and one count of first-degree arson. He challenges an evidentiary ruling. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, and Mary E. Richards, County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

This case involves the question of the admission of evidence defendant contends should have been excluded as hearsay. Defendant-appellant Dale Royer was convicted after retrial of first-degree murder and first-degree arson. His first conviction was reversed. See State v. Royer, 436 N.W.2d 637 (Iowa 1987).

Defendant was charged following the destruction by fire of a home in Ames belonging to a former college professor of defendant. Two of the professor's children died in the fire. The fire occurred during the early morning hours of December 2, 1986.

On December 5, 1986, defendant admitted himself to the psychiatric hospital at Lutheran Hospital in Des Moines. No charges had been filed against defendant at the time of his admission. Patients there are expected to care for their own clothes, and when defendant was admitted he was told a washer and dryer were available for him to use for this purpose. From the facts leading up to the hospitalization, one could find defendant may not have changed his clothing between the time of the fire and his hospitalization.

The objectionable testimony came in when a registered nurse at the hospital was called as a State witness. The following exchange occurred with reference to events that occurred in the morning of December 6, 1986.

Q. Okay. At some time that morning, then, did you receive a call from Dr. Taylor regarding Mr. Royer? A. Yes.
Q. And were you given any directions as a result of that phone call? A. Dr. Taylor asked me--

MS. KEIFER [defense counsel]: Objection, Your Honor, I believe she's going further than the question asks. I would have an objection that she's going to testify to hearsay.

THE COURT: Read the question back.

[The following question was read: And were you given any directions as a result of that phone call?]

THE COURT: I believe that question can be answered yes or no.

A. Yes.
Q. Were you to give a message to Mr. Royer? A. Yes.
Q. And what message did you give to Mr. Royer?

MS. KEIFER: Objection, this is hearsay.

THE COURT: What is the purpose of--What is the purpose of your offer?

MS. RICHARDS [the prosecutor]: To indicate what she did next.

THE COURT: The jury will consider the answer for the purpose of showing what the witness did and why she did it, and not necessarily for the truth of the contents of the statement attributed to somebody else.

For that limited purpose, the objection is overruled. You may answer.

A. I was asked to have Mr. Royer call his attorney.

Q. Did you make arrangements to do that? A. Yes.
Q. And how was that done? A. He was taken to a conference room where he could make a phone call in private.
Q. Okay. And you had the number and so forth to give to him; is that correct? A. Mr. Royer had the number.

Q. Okay. Now, after that, after you did that, then what was your next contact or interaction with Mr. Royer on that morning? A. He asked me if he could wash his clothes.
Q. And do you know, do you recall from your memory, or from any reports that you have kept, about how long that was after your making the arrangements for him to make the phone call? A. As close as I can recall, it would be between twenty and twenty-five minutes.
Q. Okay. And did you make arrangements for him to wash his clothes? A. Yes.
Q. Was that something that had to be done through somebody, through one of the nurses or one of the tenants on the floor? A. Yes.
Q. Why was that? A. The room where the washer and dryer was was locked.
Q. Okay. Now, what clothing was it that he washed, are you aware of that? A. I don't know exactly what pieces of clothing that he had. It was all in a bundle.
Q. Okay. But it was clothing that he wore in the hospital; is that correct? A. I assumed that.

Later that day, after the defendant washed his clothes, law enforcement agents arrived at the hospital to seize the clothing, and nurse Schneider gathered the defendant's clothes for the agents.

Defendant asserts the only real purpose for introducing the statement was for the truth of the matter asserted in the statement and the trial court erred in overruling his hearsay objection. Defendant contends he is entitled to a new trial.

The trial court admitted the out-of-court statement on the ground it did not constitute hearsay because the State did not offer it for the truth of the matter asserted. Defendant argues the State called the nurse to rebut the

defendant's insanity claim and support the State's theory defendant was a devious, calculating person. Defendant contends the purpose of the nurse's testimony was to show defendant attempted to conceal his involvement in the fire by laundering his clothes to remove any diesel fuel or other evidence before they were seized. Defendant does not object to testimony that defendant washed his clothes, but contends the State went too far in introducing the out-of-court statement which he contends showed he washed his clothes after speaking to his attorney on the telephone. Defendant further contends with this evidence, the State suggested to the jury that defendant's attorney told him the agents wanted to seize his clothing and that either the attorney told the defendant to destroy potential evidence or the defendant decided to do so himself after the attorney told him the State's plan.

Defendant argues the trial court's decision to admit this evidence under the theory it was only offered to explain why the nurse made arrangements for the defendant to use the phone, was in error because the statement went beyond that limited purpose by informing the jury that the telephone call was to be made to the defendant's attorney.

We recognize this issue may present a close question. We find it unnecessary to address the question of whether the nurse's testimony was inadmissible hearsay. If an error occurred in the admission of this evidence, it was

not constitutional error. We review, therefore, to determine if there was error, it sufficiently appears the rights of defendant have been injuriously affected. State v. Thompson, 357 N.W.2d 591, 593-94 (Iowa 1984); State v. Massey, 275 N.W.2d 436, 439 (Iowa 1979). Error is generally presumed to be prejudicial. State v. Reitenbaugh, 392 N.W.2d 486, 491 (Iowa 1986). A new trial is not warranted when the record demonstrates the challenged evidence did not impact on the jury's finding of guilt. State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984). See also State v. Barrett, 445 N.W.2d 749, 754 (Iowa 1989).

One of the factors which disproves prejudice from the erroneous admission of hearsay evidence is the strength of the remaining evidence against defendant. Nims, 357 N.W.2d at 609.

The evidence against the defendant was very strong. There is considerable evidence linking him to the fire which killed the two children. See State v. Royer, 436 N.W.2d 637, 638-39 (Iowa 1989). There is considerable evidence linking defendant to setting the fire, as well as establishing a motive. Id. The only question defendant posed was whether he was sane at the time. The record is full of evidence that defendant acted logically and methodically and with purpose in planning and executing this crime. Id. As such, we do not find that the challenged statement impacted the verdict. See Barrett, 445 N.W.2d at 754.

This was a second trial. Two juries have unanimously agreed on defendant's guilt. Barrett, 445 N.W.2d at 754. This fact is of some significance in evaluating the possibility of prejudice. Id. Defendant was entitled to a fair trial, not a perfect one. We affirm.

AFFIRMED.

Hayden, J., concurs; Schlegel, P.J., dissents.

SCHLEGEL, P.J. (dissenting)

I respectfully dissent.

The actions of the defendant in this matter certainly indicate a compulsive act, driven by something other than the normal reactions of a totally sane individual. It is not surprising that the defendant pleaded insanity as a defense to his unspeakable acts.

It was the duty of the prosecution to produce evidence that would tend to show that the defendant was sane and was able to form the intent necessary to carry out the crimes here alleged. One of the ways the prosecutor obviously pursued in that effort was to introduce evidence to demonstrate that the defendant was rational and capable of rational thought and that he was a devious and calculating person. Any proper evidence to show those characteristics would be proper and relevant.

It is difficult to believe that the court could rule that the testimony was not hearsay because it was not offered for the truth of the matter asserted. I have great difficulty in determining what other purpose could have been intended. It was hearsay, plain and simple. The prosecution hoped to gain some advantage from it such as the defendant has suggested. The admission of the testimony was error.

The erroneous admission of hearsay evidence is presumed to be prejudicial unless the contrary is affirmatively

established. State v. Galvan, 297 N.W.2d 344, 348 (Iowa 1980); State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). Such evidence may not be prejudicial if there is a multiplicity of evidence substantially the same as that which had erroneously admitted. See, e.g., State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981); State v. Johnson, 272 N.W.2d 480, 482-83 (Iowa 1978). In this case, there was no other evidence substantially the same as that which was admitted as hearsay. It was clearly prejudicial.

The majority seeks to justify the refusal to find reversible error by falling back upon the discredited notion that because there is overwhelming evidence of defendant's guilt, any error in the admission of the hearsay complained of is without prejudice to the defendant. The problem with that analysis is that all of the other evidence presupposes a rational actor fully capable of the formulation of the specific intent to kill the victims. As stated by the majority: "The only question defendant posed was whether he was sane at the time. The record is full of evidence that defendant acted logically and methodically and with purpose in planning and executing this crime." Maj. op. at 6. Thus, the majority concludes, "[W]e do not find that the challenged statement impacted the verdict." Maj. op. at 6.

There was contradictory evidence in the record. The question is not one for our decision on a matter of disputed fact. The "overwhelming evidence" rule seeks to

substitute our judgment for that of the jury. This denies the defendant of his right to a fair trial. We are saying, in effect: "Certain cases cannot result in anything other than a conviction. Erroneous rulings on evidence cannot make any difference. When the crime is heinous enough, and there is evidence of the elements of the crime, even though there is a dispute in the evidence, prejudicial hearsay makes no difference." Indeed, we are denying the defendant his jury trial.

I do not believe that we can say with any assurance that the rights of the defendant have not been injuriously affected. I believe that we should analyze this case on the basis that, as the supreme court said in State v. Hahn, 259 N.W.2d 753, 757 (Iowa 1977): "[W]e cannot say there was no possibility of prejudice." In that appeal of a conviction for murder, the court reversed because the judge had a conversation with one of the jurors, out of the presence of the defendant and unreported to him or his counsel. The evidence was obviously substantial because the defendant was convicted. In the case at bar, we cannot say there was no possibility of prejudice from the hearsay erroneously admitted.

I would reverse and remand for a new trial.