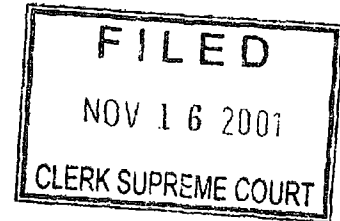


IN THE COURT OF APPEALS OF IOWA

No. 1-459 / 00-1499
Filed November 16, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

MONTE WENDELL SEAGER,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee (South) County, D.B.
Hendrickson, Judge.

Defendant, Monte Seager, appeals from his conviction for two counts of
first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett and James Kivi,
Assistant Attorneys General, and Michael A. Riepe, County Attorney, for
appellee.

Heard by Mahan, P.J., and Hecht and Habhab, JJ.

000447

HECHT, J.

On appeal from his conviction for two counts of first-degree murder, Monte Seager contends (1) the prosecutor's closing argument improperly shifted the burden of proof to the defense, and (2) the State's use of a "re-seized" weapon violated his constitutional rights. We affirm Seager's conviction.

I. Facts and Background Proceedings. On October 29, 1978, Clementine Beavers and her sixteen-year-old daughter Karol were shot to death in their Mt. Pleasant home. Clementine was shot once with a .22 caliber rifle, at close range, in the back of the head; Karol was shot twice and had been sexually assaulted. At the time of the murders, Seager lived four blocks away from the Beavers and was a classmate of Karol's. Police first questioned Seager on November 2, 1978, when he informed police he was home the evening of the murders watching television. In a second interview on July 1, 1980, Seager told police he left his house twice on the night of the murders to check some marijuana plants he was growing in the backyard. In a third interview on July 15, 1993, Seager admitted owning a .22 caliber rifle on the weekend of the murders and having previously shot the particular type of ammunition used to kill the Beavers.

Seager was indicted for the murders in August 1981. The district court granted Seager's motion to suppress certain evidence, including a .22 caliber Mossberg rifle seized from his home in 1979. The pretrial suppression was appealed by the State, but affirmed by the supreme court in *State v. Seager*, 341 N.W.2d 420, 423-24 (Iowa 1983). The murder charges were subsequently

000448

dismissed without prejudice, and the case remained dormant until July 23, 1993, when the State obtained a new search warrant and re-seized the rifle from storage at the Mt. Pleasant Iowa Highway Patrol Office. The State again charged Seager with first-degree murder and the district court again suppressed the rifle. The State appealed, and the supreme court reversed in *State v. Seager*, 571 N.W.2d 204, 206-07 (Iowa 1997), holding the second search was not tainted by the earlier illegal search.

The case was remanded for trial and a jury found Seager guilty of two counts of first-degree murder. Seager appealed, and in an unreported decision, the court of appeals reversed and remanded for a new trial due to the admission of evidence that Seager had tended his growing marijuana plants on the night of the murders. Before the new trial, Seager filed a motion to suppress the rifle reasserting the contentions previously rejected by the supreme court when it ruled the gun was admissible. The district court overruled the motion.

Seager was brought to trial before a jury on August 8, 2000. During the closing argument in the new trial, the prosecutor, who was discussing the firearms identification and the defense's DNA expert, asked the jury "[w]here's their [the defense] firearms expert?" Seager's counsel objected on the ground the prosecutor's argument had improperly shifted the burden of proof. After the court sustained that objection, the prosecutor argued the State's evidence was "unrebutted." The district court sustained another defense objection to this argument and admonished the jury to disregard any suggestion Seager had the burden of proof and reminded the jury the State had the burden. Seager moved

for a mistrial. The motion was denied, and the jury found Seager guilty on two counts of first-degree murder. Seager appeals.

II. Standard of Review. We generally review a district court's ruling on a motion for mistrial based on prosecutorial misconduct for abuse of discretion. *State v. Greene*, 592 N.W.2d 24, 30 (Iowa 1999). However, in assessing alleged violations of constitutional rights, our standard of review is de novo; we make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). Because Seager contends the prosecutor's comments shifted the burden of proof and denied him due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution, our review of the district court's ruling is de novo.

III. Merits. Seager contends the prosecutor's statements in closing argument asking the jury "[w]here's their firearms expert?" and stating "the evidence is unrebutted" shifted the burden of proof to the defense, denying him due process of law as guaranteed by the Fourteenth Amendment. We disagree. Prosecutorial statements regarding the defendant's failure to present evidence are permissible under both Iowa and Federal case law provided the statements are "not phrased to call attention to the defendant's own failure to testify." *State v. Craig*, 490 N.W.2d 795, 797 (Iowa 1992) (finding no misconduct when a prosecutor asked the jury why the defendant's friends who he was speaking with prior to the incident did not testify); see also *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986) (finding no misconduct from prosecutor's statements "the

000450

defendant had the opportunity to put on evidence if he chose to"); *United States v. Moore*, 129 F.3d 989, 993 (8th Cir. 1997), *cert. denied*, 523 U.S. 1067, 118 S. Ct. 1402, 140 L. Ed. 2d 659 (1998) (finding no prosecutorial misconduct for statements that government's evidence was uncontradicted); *Sidebottom v. Delo*, 46 F.3d 744, 759 (8th Cir. 1994), *cert. denied*, 516 U.S. 849, 116 S. Ct. 144, 133 L. Ed. 2d 90 (1995) (holding no prosecutorial misconduct regarding statements that State's evidence was uncontroverted); *Weddell v. Meierhenry*, 636 F.2d 211, 214 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S. Ct. 2024, 68 L. Ed. 2d 329 (1981) (finding no error when "the prosecutor remarks on the defendant's failure to call witnesses or to produce evidence to either establish his defense or to refute the state's evidence, except where the defendant alone has the information to do so.").

Here, the State specifically attacked Seager's failure to present his own gun experts, information not exclusive to Seager himself. The State did not call attention to Seager's failure to testify, but emphasized the weaknesses in his evidentiary presentation. Furthermore, the court admonished the jury following the prosecutor's statements and correctly allocated the burden of proof, curing any possible harm that could have resulted from such comments. See *State v. Williams*, 315 N.W.2d 45, 55-56 (Iowa 1982) (holding "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").

Seager contends the constitutionality of a general rule allowing prosecutorial comments on the defense's failure to produce witnesses or

evidence is called into question by two cases, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). *Winship* addressed the issue of whether proof beyond a reasonable doubt is required during the adjudicatory stages of a delinquency proceeding when a juvenile is charged with an act which would constitute a crime if committed by an adult. *Winship*, 397 U.S. at 359, 90 S. Ct. at 1070, 25 L. Ed. 2d at 372. The Court held constitutional safeguards as a matter of due process apply in such cases. *Id.* at 368, 90 S. Ct. at 1075, 25 L. Ed. 2d at 377-78. Moreover, *Sandstrom* involved a jury instruction that the law presumes a person intends the ordinary consequences of his voluntary acts, *Sandstrom*, 442 U.S. at 512, 99 S. Ct. at 2453, 25 L. Ed. 2d. at 43, and “simply held that an instruction which creates a presumption of fact violates due process if it relieves the State of its burden of proving all of the elements of the offense charged beyond a reasonable doubt.” *Gilmore v. Taylor*, 508 U.S. 333, 342, 113 S. Ct. 2112, 2118, 124 L. Ed. 2d. 306, 318 (1993). We conclude neither *Winship* nor *Sandstrom* compels a reversal on due process grounds in this case.

Seager contends cases from the Eleventh and Sixth Circuits signal a trend supportive of his due process argument. In *United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992), the court addressed alleged misconduct from the prosecutor's repeated references to the defendant and his family's failure to produce a pistol as exculpatory evidence. The court found the comments were “probably improper,” but found “the district court rendered any error harmless by the repeated instructions to the jury that the defendant has no burden to produce

any evidence.” *Id.* at 1087. We find *Simon* supportive of the State’s contentions on appeal, as the district court both admonished the jury and gave instructions that the defendant has no burden to produce evidence. Similarly, in *United States v. Bond*, 22 F.3d 662, 669 (6th Cir. 1994), the court found no prosecutorial misconduct resulting from statements regarding the failure of defense witnesses to provide an alibi, holding a prosecutor “may summarize the evidence and comment on its quantitative and qualitative significance.” In short, we reject Seager’s assertion these cases from the Sixth and Eleventh Circuits support a reversal in this case.

Seager urges this court to revisit the supreme court’s previous ruling in *State v. Seager*, 571 N.W.2d 204 (Iowa 1997), which held the 1993 search warrant was not tainted by the illegal search of Seager’s home in 1979. We decline Seager’s invitation as the legality of the seizure was previously addressed by our supreme court and does not warrant re-examination.

We hold the prosecutor’s comments in closing argument did not violate Seager’s constitutional rights and affirm his conviction.

AFFIRMED.