

IN THE COURT OF APPEALS OF IOWA

No. 9-48 / 87-1376

FILED

AUG 23 1989

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

HUGH GRANT HORSMAN,

Appellant.

Appeal from the Iowa District Court for Mills County,
Leo F. Connolly, Judge.

Defendant appeals from his conviction, following a jury trial, of first-degree murder, second-degree murder, and attempted murder. **AFFIRMED.**

William L. Wegman, State Public Defender, and Raymond E. Rogers, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brendon, Assistant Attorney General; James Webering, County Attorney; and C. Kenneth Whitacre, Assistant County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

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Defendant Hugh Grant Horsman appeals his conviction of first-degree murder, second-degree murder, and attempted murder.

A jury found defendant guilty of first-degree murder and second-degree murder in the shooting deaths of his brother-in-law, Darrell Kuhl, and a friend, David Rickabaugh, who were helping Mrs. Horsman remove possessions from the Horsman home. Defendant was also found guilty by the trial court of attempted murder for the shooting of his wife during the same incident. At the beginning of his trial, the defendant stipulated that he had shot both men and that they had died as a result. Defendant relied exclusively on the defenses of insanity and/or diminished responsibility.

During the course of his cross-examination of the defendant, the prosecuting attorney inquired whether defendant was currently insane or "wacko." The prosecutor then asked defendant if he thought it was right to shoot Darrell Kuhl. Following an objection to that question, defendant became unresponsive to questions subsequently put to him by the prosecutor. The prosecuting attorney then made the following assertion: "I would state for the record the defendant, Hugh Horsman, is pretending to be catatonic."

On appeal, Horsman first contends that the trial court erred in overruling his motion for a mistrial grounded in

prosecutorial misconduct. Second, Horsman contends that the district court violated his constitutional right to be present at all stages of the trial when it responded to jury notes in his absence. Horsman acknowledges that his attorneys told the trial court that the defendant's presence would not be required at these hearings on jury communications, but he argues that the defense attorneys' failure to protest their client's right to be present does not serve as a waiver of that right.

Our scope of review is for errors at law. Iowa R. App. P. 4.

I.

We first address defendant's claim that the trial court erred in overruling defendant's motion for mistrial based upon prosecutorial misconduct. The defendant asserts that the prosecutor's questions of him concerning his sanity and the prosecutor's statement that he was pretending to be catatonic amount to prosecutorial misconduct. The prosecutor's inquiry as to defendant's mental state does not constitute prosecutorial misconduct. Defendant may be questioned as to his own mental state. See Howard v. State, 347 So.2d 574, 576 (Ala. Crim. App. 1977). Furthermore, the prosecutor's use of the term "wacko" in one question was not properly preserved for review in this court because of defense counsel's failure to object to the question at trial. See State v. Dahlstrom, 224 N.W.2d 443,

449 (Iowa 1975). Undoubtedly, the reason why defense counsel did not object to the use of this colloquialism was the fact that the defendant himself used it during his testimony when relating the avowed diagnosis of a doctor.

The prosecutor's juvenile statement that the defendant was pretending to be catatonic, however, by reason of the defense of insanity employed by defendant, is clearly an example of misconduct.¹ The prosecuting attorney's statement constituted an impermissible opinion as to defendant's credibility. See Iowa Code of Professional Responsibility for Lawyers DR 7-106(c)(4); State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982). Prosecutorial misconduct, however, does not necessitate the granting of a new trial unless it appears to have been so prejudicial as to deprive the defendant of a fair trial. Williams, 315 N.W.2d at 55. Trial courts have broad discretion to determine whether the defendant has suffered such prejudice. Id., State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1982). On review, we will only reverse when the trial court abuses this discretion. Williams, 315 N.W.2d at 55; Bishop, 387 N.W.2d at 561. "Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to

1. "Catatonic" has been defined as "relating to, or characterized by, catatonia." Catatonia being a type of schizophrenia. Stedman's Medical Dictionary 215 (3d Unabridged Lawyer's ed. 1972).

an extent clearly unreasonable." State v. Trudo, 253 N.W.2d 101, 106 (Iowa), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 189 (1977). We find the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Ordinarily, a finding of prejudice is the consequence of persistent efforts to interject prejudicial matter before the jury. State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). The incident in question here was the sole act of prosecutorial misconduct in the trial. Evidence of the defendant's guilt was substantial. We may consider this when weighting the prejudicial effect of the misconduct. Id. Furthermore, the notion that the defendant might feign mental illness had been previously introduced at trial through the testimony of Kevin Harmon. He testified that he and Horsman had had a conversation, previous to the shootings, in which Horsman stated that he was considering using the insanity plea. Having carefully reviewed the entire record, we do not believe that the prosecutorial misconduct involved here deprived the defendant of a fair trial.

II.

Defendant also contends that the trial court violated his constitutional right to be present at all stages of the trial when the trial court responded to two jury notes in his absence. The State asserts that error on this point

was not preserved. We agree. It is a well established tenant of Iowa law that error must be preserved in order to obtain appellate review. See State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983). As this court noted in State v. Lockheart, 410 N.W.2d 688, 697 (Iowa App. 1987):

Though Iowa Rule of Criminal Procedure 18(5)(g) requires that a defendant be present when a communication is received from the jury concerning a point of law arising in the case or if there is any disagreement as to any part of the testimony, we believe Lockheart has failed to properly preserve this issue, Lockheart should have raised the issue in the trial and filed a motion for new trial.

Similarly, here the issue was not raised in the trial court and was not included in his motion for new trial. Furthermore, the record before us does not show that defendant was unaware of the communications between the trial judge and the jury, mindful of the fact that both of his attorneys were present at the time of the communications, so as to prevent him from raising the issue by way of a motion for new trial. As such, defendant has failed to preserve error on this issue. Therefore, we affirm defendant's convictions for first-degree murder, second-degree murder, and attempted murder.

AFFIRMED.