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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	**Filed October 29, 1985** 352
Plaintiff-Appellee,	)	
vs.	)	5-421 84-1662
KEVIN DUANE ABELL,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Adair County on a change of venue from Union County, Arthur E. Gamble and Thomas Bown, Judges.

Defendant appeals from his conviction for second-degree murder. **AFFIRMED.**

Robert W. Reynoldson of Reynoldson, Van Werden, Kimes, Reynoldson & Lloyd, Osceola, and James C. Steffes of Anderson, Werner & Holm, Creston, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, and Arnold O. Kenyon, III, Union County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

Appellant appeals from three rulings of the court made during his trial for murder. He says the errors require reversal of his conviction for second-degree murder. We affirm the trial court.

Appellant Kevin Abell says error occurred: (1) when the court refused to dismiss the charge and later overruled a new trial because a letter was sent by the prosecutor to witnesses indicating they should not talk with people about the crime; (2) in denying a motion for mistrial because of statements made during voir dire; (3) in overruling a motion for a mistrial because of a juror's comment; and (4) admitting the opinion testimony of a criminologist.

There were four prosecution witnesses who saw the shooting of the victim on October 22, 1983. They were David Conley, Douglas John Lee, Treasa O'Neall, and Margaret Diane Wiseman. A letter was sent to each of these witnesses by the county attorney which read in part, "I would appreciate your not discussing this case with anyone without contacting me first. The reason for this is simply that the other people may misinterpret what you are saying and attempt to twist your statement against you at a later time." The defendant says the witnesses were reluctant to talk to his investigator, and the investigator could not speak to two of the witnesses.

The State concedes that it is improper to prevent witnesses from talking with the defense counsel. Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966). However, the State argues that while the prosecutor in Gregory told eyewitnesses not to talk to anyone unless the prosecutor could be present, all the county attorney asked here was that he be contacted first. The statement was a request, the State says, not a command or directive.

We cannot agree that the county attorney may do by indirection or insinuation that which the law would not otherwise allow. See e.g. State v. Carey, 165 N.W.2d 27, 31-32 (Iowa 1969). The statement of the prosecutor had the same intent and effect as that occurring in the Gregory case.

The actions were improper, but it is the prejudicial effect of error and not error alone which supports reversal of the trial court. State v. Cole, 295 N.W.2d 29, 40 (Iowa 1980). We do not find the defendant here was prejudiced. The defendant deposed Douglas Lee and Diane Wiseman. The investigator interviewed Treasa O'Neall and managed to interview David Conley, although Conley was reluctant to talk at first. The minutes of testimony were also available to the defendant. Through the interviews and depositions, the defendant obtained all the information he wanted, despite the prosecutor's letter. The defendant was therefore not prejudiced by the actions.

The second error which defendant points to is a statement made by the county attorney during voir dire. He commented, "And what punishment, if any, will be for the court, after the Court hears all the evidence that goes on at trial. . . " (emphasis added). The defendant says the prosecutor was letting the jury know that the court had several alternatives in sentencing the defendant, including providing for no punishment at all. The defense says this is error, since the crime with which the defendant was charged, first-degree murder, carries a mandatory life imprisonment sentence. Iowa Code § 902.1 (1985).

The trial court has considerable discretion in granting or denying a motion for mistrial. State v. Dalgliesch, 223 N.W.2d 627, 628 (Iowa 1974). The ruling will be set aside only if abuse of discretion is shown. State v. Staker, 220 N.W.2d 613, 617 (Iowa 1974). Abuse of discretion occurs when the discretion is based upon clearly untenable reasons, or to an extent clearly unreasonable. State v. Heck, 301 N.W.2d 741, 742 (Iowa 1981).

The trial court concluded here the statement was not prejudicial to the defendant, and that is was more likely intepreted by the jurors to indicate punishment was a decision for the court to make if any was warranted because the jury found him guilty. If defendant was not guilty the court could not impose punishment.

However, the statement indicated the punishment "will be for the court." This indicates the punishment may vary at the court's discretion. Instead, the court could only impose that punishment dictated by the legislature.

The defendant says this is prejudicial to him, indicating different verdict might have been given by the jury if it had known the defendant would spend life in prison upon a guilty verdict. The defendant's claim that this is what happened is supported only by his own speculation. Without some concrete indication to the contrary, this court is unwilling to presume that the jury would abrogate its duty and make a determination based upon sympathy. We do not believe prejudice has been shown.

We also find the court did not abuse its discretion in overruling a motion for mistrial because of a juror's statement. As a result of publicity about the case, the trial was moved from Union to Adair County. When the prospective jurors were asked whether they had heard anything about the case, one juror answered:

> I never heard anything about the case at all, except I was in Creston and the question was asked, "Was he guilty?" And the lady from Creston—I don't know who she was or anything about her—she said, "Yes". And I said, "Well, that's why this is—why they are taking the case to Greenfield, Adair County."

The court denied a motion for mistrial. During further voir dire, the juror was asked whether she had formed an opinion about the case. The prosecutor asked if she would give the opinion of the Creston woman any weight or credibility.

She responded, "Oh, no, huhuh, but I felt like you should know about it." In renewing its motion for a mistrial, the defense presented the opinion of a legal consultant with Starr and Associates in Des Moines, who commented the statement had irreversible damaging effects on defendant's case. The trial court found the second statement by the juror, rather than aggravating the situation, "went quite aways toward repairing any damage that might have been done by her earlier statement."

We do not find the reasoning of the trial court was inappropriate or was that its decision an abuse of its discretion. We uphold the conclusion the prejudicial effect upon the defendant, if any, is not of the degree warranting reversal.

The defendant finally asserts the court should not have permitted the opinion testimony of a criminologist with the Division of Criminal Investigation, Robert Harvey. At the time of the shooting, the defendant was standing holding a gun towards the victim who was on the ground. The testimony indicated the victim began to stand as the gun went off. The defendant said the gun went off accidentally in a struggle over the weapon. The criminologist testified as to whether he thought the victim's hands were on or touching the shotgun when it discharged. The defense says there was insufficient foundation for this testimony.

The courts in this jurisdiction are liberal in permitting expert opinion evidence to be offered. State v. Hummell, 228 N.W.2d 77, 82 (Iowa 1975). The trial court's ruling will be overturned upon a clear showing of abuse of the court's discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985).

As the State points out, the expert testified he had a Bachelor of Science degree in chemistry and biology, nineteen and one-half years experience in

the investigative bureau, and for the preceding ten years had been supervisor of the lab in the DCI. Harvey had performed gunshot residue analysis, distance determinations, and firearms identification as a part of his work.

Harvey also said he had taken swabs from the front and back of the victim's hands to test for the presence of residue from the gunshot. The results of the test showed gunshot residue on the back of the left hand and none on the right hand. Harvey concluded the victim was not holding the gun when it went off. His conclusion was substantiated by the path of the pellets through the body and examination of residue on the victim's jacket.

We find ample evidence to support the court's conclusion that the foundation requirements were met. The evidence tends to show the expert was qualified, his opinion was supported by a substantial factual basis, and the jury knew the testimony was opinion evidence. McCormick, Opinion Evidence in Iowa, 19 Drake L. Rev. 245, 266 (1970).

We find there was no error in the trial court's ruling and affirm defendant's conviction.

AFFIRMED.