IN THE COURT OF APPEALS OF IOWA

No. 1-381 / 90-1213

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

TROY T. HENRY,

Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin, Judge.

Troy Henry appeals from his conviction, following a jury trial, for first-degree murder, first-degree robbery, and first-degree burglary. **AFFIRMED.**

Troyce A. Wheeler, Council Bluffs, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Richard Crowl, County Attorney, and John Comer and Drew Kouris, Assistant County Attorneys, for appellee.

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

OXBERGER, C.J.

Troy Henry, his brother Robert Henry, and Jeffrey Moore were accused of robbing and beating 87-year-old Francis Leonard in Leonard's home. Some four months after the crime, Leonard died from his injuries.

Troy Henry was charged with first-degree murder, first-degree robbery, and first-degree burglary. At his jury trial, one of the State's principal witnesses was his partner in crime, Jeffrey Moore.

Prior to Troy Henry's trial, Moore had taken and passed a polygraph test on his version of the crime. At the beginning of the trial, the court sustained Henry's motion in limine and ordered that no evidence could be presented without court approval concerning the fact Moore had taken and passed a polygraph test.

During the trial Jeffrey Moore made a reference to the polygraph test he had taken. Henry insinuates this reference was deliberately planned by the prosecutor in order to bolster Moore's credibility by suggesting to the jury that Moore had taken and passed a polygraph test. The State responds that the reference was merely an inadvertent comment by Moore, and that the prosecutor had had no advance knowledge of the comment.

After Moore made his reference to the polygraph test, Henry moved for a mistrial on the ground the comment violated the court's earlier ruling on the motion in limine. The district court refused to grant a mistrial.

The jury later found Troy Henry guilty of the crimes charged: first-degree murder, first-degree robbery, and first-degree burglary. Henry has appealed from the resulting convictions.

Henry contends the district court erred by refusing to grant him a mistrial because of Moore's reference to the polygraph test. He contends the comment violated the earlier ruling sustaining the motion in limine. He also contends the comment violated Iowa's policy of allowing polygraph evidence only if both sides have stipulated to its admission. He argues the comment was prejudicial because it bolstered Moore's credibility, which he alleges was questionable. He suggests that while there was evidence to corroborate that part of Moore's story which implicated Moore and Robert Henry, there was little credible corroborative evidence showing that Troy Henry (or any other third person) was involved in the crimes.

In addition, Henry contends his trial attorney rendered ineffective assistance by failing to request that Moore's polygraph reference be stricken from the record, and by failing to request that the jury be given a cautionary instruction to disregard the polygraph reference. The State responds that the attorney made a proper strategic decision not to call the jury's attention to the polygraph reference with a cautionary instruction.

MOTION FOR MISTRIAL: On appeal, Henry argues that the trial court abused its discretion in denying his motion for mistrial. We disagree.

A trial court has wide discretion in determining whether a motion for mistrial should be granted or denied. State v. Brotherton, 384 N.W.2d 375, 381 (Iowa 1986). The trial court is in a better position to observe the matter complained of and its effect on the jury. State v. Callender, 444 N.W.2d 768, 770 (Iowa App. 1989). The court is found to have abused its discretion only when defendant shows prejudice which prevents him from having a fair trial. Id.

At trial, the following exchange occurred between the prosecutor and Jeff Moore:

> Q. I'm not sure what the last question was leading to, but the understanding you and I have ever since April 20th of this year was what about the truth, that you had to do what, since April 20th?
>
> A. Tell the truth.
>
> What's been the agreement between you and I?
>
> A. I had to take a polygraph test.

At the point Moore's mention of polygraph occurred, the defense lawyer objected. The trial court, in chambers stated:

> The Court finds that in the context that it was made that it is not sufficient to require the grant of a mistrial, and the motion is overruled.

Polygraph evidence may be admitted into evidence only

by stipulation of the parties. Unstipulated polygraph evidence may not be admitted. State v. Conner, 241 N.W.2d 447, 457 (Iowa 1976). In the present case there was no such stipulation. In addition, the trial court had ruled in limine that no such evidence was admissible. There can be no question that the evidence of the polygraph was inadmissible in this trial.

We next consider whether the admission of the evidence so prejudiced the defendant that he was prevented from having a fair trial. The State argues that Henry was not prejudiced by the admission of the evidence because the record contains abundant evidence from which the jury could convict Henry, without regard to the "polygraph" comment. We agree.

In addition to physical evidence including the stolen guns and footprints, Moore testified to the car that was used to commit the crime. The tire tracks were measured and determined to be the same car. David Kock, a friend of Henry's, testified he saw Henry and Jeff Moore in vehicle that was used to commit the crime. Koch testified that Henry brought over several guns wrapped in a blanket, and identified Mr. Leonard's gun which was easily identifiable by its homemade hammer. Kock testified that he helped Henry saw off the barrel of the gun, cut off its stock, and put black tape on the gun. A gun matching that same description was found in a later shooting incident in which

Robert Henry was involved. Bruce McDonald, the former boyfriend of Henry's sister, testified that he lived in the Henry household during the summer of 1988. McDonald testified that Troy Henry told him that he and Jeff Moore stole money from a man in a farmhouse under the guise of using his telephone. McDonald testified to a later conversation in which he stated:

> [Henry] said that they [were] at the house. They went in the house, and Bob started beating the old man and that the old man -- he couldn't knock the old man out, so [the defendant] went over and was hitting him and put him out of his misery, finished him off.

We find based upon this testimony and the physical evidence provided at trial that there was ample evidence in which the jury could find Troy Henry guilty of the crimes charged. Reviewing the record, we find there is no reasonable possibility that it affected the outcome of the trial. We affirm the trial court.

Ineffective Assistance of Counsel: Review of alleged violations of constitutional rights is de novo. We make an independent evaluation of the totality of the circumstances in cases involving constitutional rights. State v. Jump, 269 N.W.2d 417, 423 (Iowa 1975). When counsel makes a reasonable tactical decision, we will not engage in second guessing. Fryer v. State, 325 N.W.2d 400 (Iowa 1982). We find there is sufficient evidence in the record that counsel's decision to avoid emphasizing the reference to "polygraph" by the use of a cautionary instruction was

reasonable. We find no merit in the argument counsel failed to preserve the issue for appeal.

AFFIRMED.

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

SCHLEGEL, J. (dissenting)

I respectfully dissent. The majority concludes "there is no reasonable probability that [the polygraph testimony] affected the outcome of the trial." I believe the majority most certainly overlooks the record.

Henry's motion in limine was granted on July 10, 1990, so that no evidence concerning the fact Moore passed a polygraph could be presented unless first approved by the court out of the presence of the jury. Polygraph evidence is only admissible upon the stipulation of the parties. State v. Conner, 241 N.W.2d 447, 457 (Iowa 1976). It is clear here there was no such stipulation.

It is most often the case that where error of a prejudicial nature has been placed in the record the criminal trial is one representing a heinous crime. Likewise, in this case the facts surrounding the killing of Mr. Leonard are so horrible that it is almost unthinkable to consider a new trial for the defendant. It is not our function, however, to be concerned with a determination of guilt or innocence of the defendant. It is our function to insist upon the constitutional guarantee of a fair trial. As the Iowa Supreme Court has stated:

> He may or may not be guilty. With that question we have no judicial concern. Our duty is to insist on procedure and observance of rules best adapted to provide him what the law promises, a fair and impartial trial.

State v. Leuty, 247 Iowa 251, 255-58, 73 N.W.2d 64, 69 (Iowa 1955). Keeping this principle in mind, I believe this conviction must be reversed.

First, while I will not directly address the issue of prosecutorial misconduct, there are some circumstances surrounding the testimony in question that should be known. The prosecutor had bargained with Moore to get his testimony; Moore was given concessions if he would tell the truth and if he passed the polygraph. At the time the disputed testimony came into the record, the prosecutor was attempting to rehabilitate Moore's credibility after the defense put him through a damaging cross-examination as to what promises he had been given in exchange for his testimony. The prosecutor's first question about any understanding between the two elicited the response to "[t]ell the truth," the first prong of their bargain. It naturally follows that when the prosecutor again asked Moore what he had to do to obtain the concessions, Moore thought he wanted testimony about his taking the polygraph test. The record discloses no alternative element or duty on the part of the witness about which the prosecutor could have been inquiring.

Second, regardless of whether the prosecutor is guilty of misconduct or not, the trial court erred in failing to grant Henry's motion for mistrial and for new trial pursuant to the prosecutorial violation of the court's order in limine. Whether the prosecutor did or did not intend to elicit the testimony does not change the inadmissible status of the evidence under the court's prior

order. I believe this testimony was extremely prejudicial and that it should have been stopped at the beginning of the trial.

The record demonstrates Moore was the first witness to testify. His testimony was by far the most damaging evidence against Henry. Because of his testimony the jury also knew the result of the polygraph test was acceptable to the prosecutor. If the result had not been acceptable, Moore would not have been on the witness stand assuring himself of the benefit of the bargain. In addition, a reasonable jury could infer that since Moore had to pass a polygraph test in order to testify, it is very likely the other State witnesses did also.

The majority seems to presume there is a burden upon the defendant to prove he did not receive a fair trial; it does not indicate what burden he bears. It is the duty of the State to prove the defendant's guilt beyond a reasonable doubt. It is likewise the State's burden to prove, beyond a reasonable doubt, that error did not occur, or that if it did, no prejudice resulted to the defendant. In order for us to affirm a conviction where error has occurred, we must find the State has shown, beyond a reasonable doubt, that the error did not affect the outcome of the case. It is our duty to reverse if we find error and cannot say beyond a reasonable doubt that there was no reasonable possibility the error might have affected the outcome. This I cannot do. I believe the reference to the

polygraph test by Moore so infected the record with overemphasis of his testimony that it probably removed all doubt the jury may have had. I would rule that Henry is entitled to a new trial.

The pressure of heavy schedules on trial courts, as well as judicial economy, may cause trial judges to hesitate to declare mistrials in an instance such as this case. Conscientious judges and lawyers do not welcome grounds for mistrials. Most would far prefer a trial free of error to having the necessity to redo work already done. It should be the effort of all involved to achieve, as nearly as possible, an error-free trial. Through such efforts, judicial economy and the search of the Iowa courts for a "fair trial" will be served. The need to seek a ruling that error is either harmless or nonprejudicial wastes the valuable resources of lawyers and judges, as well as having a detrimental effect upon the body of the law. We, at the appellate level, are constantly made aware of the need for finality, judicial economy, and efficiency. If the defendant is guilty of the acts attributed to him by Moore (as he may be) he should be convicted. He should, however, be convicted fairly by a jury in a trial free of prejudicial error.

The majority determines the record contains enough evidence from which the jury could convict Henry without the polygraph testimony. This is the idea that other evidence was so overwhelming that the error could not have

changed the result. That discredited theory places us in the role of an appellate jury, where, contrary to the rules of law, the decision need not be unanimous as it must be with a trial jury. It is impossible to determine the effect of the error upon all of the evidence in this case or how that evidence was perceived by the jury. The amount of admissible evidence introduced to prove the conviction does not correct the prejudicial error of admitting this inadmissible evidence. It is a fact question that only a petit jury, in a trial setting, can answer.

In view of the circumstances under which the polygraph testimony came in, it is difficult to see how the jury could not have been influenced by it. The district court could have put an end to the trial at the time of the testimony in question. Moore was the State's first witness. Judicial economy and fairness would have been served if the mistrial had been granted. The fact that it has now become more expensive to give the defendant a fair trial should not deter us from exercising our proper role. We should not become the exponents of some type of "pragmatic justice." We need to insist that trial courts are more sensitive to the effect such prejudicial testimony can have on a jury. See State v. Peterson, 189 N.W.2d 891, 893 (Iowa 1981) (defendant entitled to new trial where prejudicial effect of prosecutor's actions remained with jury). I would reverse and remand for a new trial.