IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 21, 1984
vs.	)	3-292 / 69489
MOUSSA M. NASSAR,	)	
Defendant-Appellant.	)	

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Appeal from the Iowa District Court for Webster County--Paul E. Hellwege, Judge.

Defendant appeals from his conviction of two counts of delivery of a controlled substance as defined in Iowa Code section 204.401(1)(b). AFFIRMED.

Alfredo G. Parrish, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

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

OXBERGER, C.J.

Defendant appeals from his conviction of two counts of delivery of a controlled substance as defined in the Iowa Code, section 204.401(1)(b). We affirm.

I. Scope of Review

Generally, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. However, on issues concerning violation of constitutional safeguards, this court is obliged to make an independent evaluation of the totality of the relevant circumstances shown by the record under which the ruling on those constitutional rights was made. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982).

II. Exculpatory Evidence

Defendant Nassar claims this case should be remanded for a new trial because the State failed to produce exculpatory evidence material to the outcome of the trial in the form of taped conversations. However, this is not a case where the State suppressed exculpatory evidence by failing to produce it at all. The evidence allegedly withheld was furnished at the trial. Therefore, we do not have a problem involving alleged suppression of materially exculpatory evidence within the meaning of Brady v. Maryland, 373 U.S. 83 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). State v. Epperson, 264 N.W.2d 753, 756 (Iowa 1978). Instead the problem is one of an asserted infringement of due process based upon alleged prosecutor misconduct in failure to produce the tape as soon as the defendant contends he should have. Id. at 756. We are unable to find the prosecutor guilty of misconduct under the record.

Evidence indicates that several months prior to trial and after defendant's motion to produce, a letter was sent to defense counsel allowing access to the tape in question. Defense counsel denied that the letter was ever sent; however, the prosecutor put his secretary on the stand who testified that she had typed the

letter and properly sent it in the mail. As such, the letter is presumed to have been received by the person to whom it is addressed. See Reserver Ins. Co. v. Johnson, 260 Iowa 740, 744, 150 N.W.2d 632, 634 (Iowa 1967) and Central Trust Co. v. City of Des Moines, 205 Iowa 742, 746, 218 N.W.2d 580, 582 (Iowa 1928).

Even assuming, arguendo, that there was no access to the tape prior to trial, the tape was produced at trial and played to the jury. As such, defendant had an opportunity to use it if he chose to do so. See State v. Oppelt, 329 N.W.2d 17, 20 (Iowa 1983). Even though the court denied permission for defendant to reopen his case-in-chief, the court allowed leniency in the surrebuttal testimony based upon the tape recording. Therefore, we do not find suppression in the constitutional sense to have occurred. Id. at 20.

But even if the evidence was suppressed, to constitute a deprivation of due process, the suppressed evidence "'must be material either to the guilt or punishment of the defendant, not merely potentially helpful to the defense.'" State v. Hall, 297 N.W.2d 80, 92 (Iowa 1980). We do not find this tape meets such a test. At most, the tape recording only served to reinforce Nassar's testimony, helping his defense.

Therefore, we find that the trial court properly denied Nassar's application for a new trial on this ground.

III. False Testimony

Defendant contends that Agent Ramaeker falsely testified under oath regarding the existence of exculpatory tapes. However, in his deposition Agent Ramaeker simply answered the questions specifically asked. The fact that he did not volunteer any information does not suggest that he perjured himself. Therefore, we find no merit in this argument.

IV. Trial Court Prejudice

Nassar contends the trial judge made comments exhibiting prejudice and bias toward his defense counsel. We review under the totality of the circumstances whether the defendant received a fair trial. See State v. Pinckney, 306 N.W.2d 726, 729 (Iowa 1981).

Defendant first claims the trial court made an uncalled for and highly prejudicial comment to defense counsel prior to the beginning of trial. However, the statement was made in chambers. Therefore, regardless of its merit we fail to see how defendant could be prejudiced. Id. at 730.

Next defendant asserts that when the trial judge introduced defense counsel as "the black man sitting at the counsel table," such statement indicated judicial bias. We consider this strictly a means of identification and find no merit in this contention.

Third, defendant argues that the trial court indicated bias by interrupting counsel twice during the voir dire. We will not consider the first interruption as defense counsel dropped the issue. The second incident resulted from a question by defense counsel to a prospective juror. After defense counsel explained the rationale of the question to the trial court, the court allowed the question. Therefore, no prejudice resulted.

Next Nassar alleges that the trial court favored the State's witness and gives several incidents in support of this allegation. First, the defense counsel asked the court to instruct Agent Dan Ramaeker to answer yes or no. The court told defense counsel that the witness had the right to answer the question as he desired so long as it is responsive, and if counsel feels it is not responsive he may move to strike. We find the court's ruling was proper. Second, counsel objected to the court on its own motion interrupting the defendant while he was testifying, warning him to answer the question.

> DEFENSE COUNSEL: And have you listened at this point, and also when the jury was out, to the tape of that conversation? A. Yes, I did. Yes.

We find no prejudice in this exchange. The next incident Nassar objected to occurred as follows:

> A. Yes.
>
> COURT: Was there an answer to the last question?
>
> Q. Did you say yes or no? You said yes? A. Yes.
>
> COURT: Just don't nod your head one way or the other.
>
> WITNESS: I'm sorry.
>
> COURT: The reporter can't construe what you mean. She can't guess at it.

We find no prejudice in this exchange.

Fifth, Nassar objected to the court's statement that defense counsel was acting improperly by making an objection to the prosecutor reading from a deposition without showing it to the witness. The court said: "The Court is not of the opinion that Mr. Fisher was reading from the deposition. He was simply paraphrasing what he—of his own knowledge what he thought the deposition says at this juncture." We find no prejudice in this exchange.

Sixth, Nassar contends that the court harshly stated there would be no further proceedings until the following day indicating that it was improper to ask about the existence of additional tapes during surrebuttal. The record is as follows:

> Q. Where is that tape?
>
> A. I believe it's with the county attorney.
>
> MR. PARRISH: Could we have that tape, please?
>
> MR. FISHER: Yeah.

COURT: Well members of the jury, we might as well call it a day. I'll ask you to bear in mind the admonition previously given. The Court will stand in adjournment until tomorrow morning at 9:30. 418

Seventh, Nassar states the court accused his defense counsel of not being an officer of the court. We have examined the record and are unable to find any evidence of such a statement. However, on page 157 of the appendix, the Court said: "You are an officer of this court and you are ordered to produce the file."

Eighth, Nassar states that the court informed counsel he was close to the brink of contempt of court for failing to get the court file. Again this court has searched the record and has been unable to locate any such threat. Nassar does not cite any page. Nassar also asserts that the court proceeded to tell a joke that had racial overtones and accused defense counsel of being too sensitive to the issue. Again the record is devoid of any such statements.

The court has examined each claim of trial court prejudice and finds no evidence of prejudice in the record.

V. Attorney's Refusal to Withdraw

The defendant asserts that "the prosecutor in this particular case should withdraw or appoint a special prosecutor" as he knew he was going to be a critical witness at trial. Nassar cites the Iowa Code of Professional Responsibility for Lawyers, Canon 5, Disciplinary Rule 5-102 as authority for his proposition. However, rule 5-102 does not apply because it provides for withdrawal by a lawyer when he learns or it is obvious he ought to be called as a witness on behalf of his client. State v. Fitz, 265 N.W.2d 896, 901 (Iowa 1978)(emphasis added). Here, the county attorney was called as a witness for the defense. Therefore, we find no error.

VI. Statement During Closing Argument

It is misconduct for counsel to express a personal belief regarding the defendant's guilt. State v. TeBockhorst, 305 N.W.2d 705, 709 (Iowa 1981).

Prosecutorial misconduct does not require a new trial unless it appears to have been so prejudicial as to deprive the defendant of a fair trial. State v. Williams, 315 N.W.2d 245, 55 (Iowa 1982).

In this case the prosecutor made a comment that he knew the defendant sold drugs to Agent Ramaeker. The prosecutor, upon objection, withdrew the statement and the court admonished the jury to disregard it. Therefore, we find any such error was cured. See State v. Hall, 235 N.W.2d 702, 727 (Iowa 1975).

VII. Rebuttal Evidence

Defendant claims that the use of a tape not previously disclosed to the defendant was not proper rebuttal evidence. "Rebuttal testimony is 'that which explains, repels, controverts, or disproves evidence produced by the other side.' " State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978) quoting State v. Miller, 229 N.W.2d 762, 770 (Iowa 1975). The trial court has considerable discretion in admitting rebuttal evidence, and its ruling will be disturbed only upon a showing of clear abuse of that discretion. State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981).

We find that the tape controverts defendant's testimony that he had never talked to a "Bob" about selling some hashish. Furthermore, the court allowed defendant leniency in the surrebuttal. See Clapp v. Greenlee, 100 Iowa 586, 598 59 N.W. 1049, 1053 (Iowa 1897). We find no abuse of discretion. Nor do we find any merit in defendant's contention that the prosecutor withheld the tape in order to surprise the defendant.

For all the reasons stated we affirm the trial court's ruling in total.

AFFIRMED.