IN THE COURT OF APPEALS OF IOWA

No. 3-633 / 92-1184

FILED
MAR 24 1994
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

WARREN L. WILLIAMS,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, L.D. Lybbert, Judge.

Defendant appeals from his convictions of terrorism, in violation of Iowa Code section 708.6 (1991), and assault causing bodily injury, in violation of sections 708.1 and 708.2(2). **AFFIRMED.**

Paul T. Shinkle of Gottschalk & Shinkle, Cedar Falls, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Peter B. Newell, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., Habhab, J., and McCartney, S.J.*, but decided by Donielson, C.J., Hayden, Sackett, Habhab, Cady, and Huitink, JJ.

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

HABHAB, J.

Defendant, Warren L. Williams, appeals from his convictions of terrorism, in violation of Iowa Code section 708.6 (1991), and assault causing bodily injury, in violation of sections 708.1 and 708.2(2). We affirm.

In November 1991, Merle Janet Pearson came to Iowa from Illinois to attend the funeral of her former husband, Charles Pearson, Sr. On the evening of November 5, 1991, while she waited for her son Charles Jr., she was sitting in her parked car in front Pearson's house with her son Deon and his friend Sherard Allen a/k/a Wilder. The occupants of the car observed a man walking toward the house. Deon rolled down the window and exchanged words with the man. As Deon began climbing out of the car, the man pulled out a rifle and pointed it at Deon's head pulling the trigger, but the gun did not discharge. At about the same time, Deon pushed the gun from his head and Sherard grabbed and pushed at the gun. Five shots fired in rapid succession and both Merle and Deon were injured. Charles Jr. ran from the house, noticed that his mother was bleeding, and drove her to the emergency room at the hospital. Merle, Deon, Charles Jr., and Sherard all identified Warren Larue Williams as the shooter.

Williams was charged by trial information with terrorism and willful injury. Before trial, Williams filed pro se motions to replace defense counsel, to take depositions at the State's expense, and to produce, among

other things, all medical records, notes and x-rays relating to Merle's and Deon's injuries. Attorneys Roth and Rausch filed a joint motion to withdraw. On May 15, 1992, after a hearing on the motions to withdraw, attorney Guernsey was appointed and jury trial was continued until June.

After the State presented the testimony of Officer Steven Tompkins, Merle, and Deon, Williams asked that he be allowed to defend himself. The district court granted the request, but ordered Guernsey to remain and offer assistance. Williams asked for rulings on his previous pro se motions. The district court noted that depositions had been taken at State's expense and that there was nothing to produce other than what Williams had already received. The district court denied Williams' requests for a ballistic expert and that the front seats from Merle's car be produced.

The State rested. Williams called and examined Sherard Allen, Charles Jr., and Sherrette Pearson in an attempt to present testimony on his defenses of accident and justification. He also subpoenaed Tom Mayes, Sherrette's boyfriend, but Mayes could not be located.

The district court submitted jury instructions, including instructions concerning justification and lesser-included offenses of willful injury (assault with intent to inflict serious injury, assault causing bodily injury, and assault). Williams objected to the lesser-included offenses being submitted.

Williams was convicted of terrorism and assault causing bodily injury. The district court sentenced him to concurrent terms of imprisonment of five years and one year, to be served consecutively to a term he is presently serving. Williams appeals.

I. Mistrial Motion for Juror Misconduct.

Williams claims the district court erred by denying his motion for mistrial based on alleged juror misconduct.

Just before the jury was to enter the courtroom for final arguments, a juror asked the court to excuse her from the jury. She was brought to chambers and questioned by Williams and the State. She stated that during recesses some other jurors had been discussing the events that had been taking place in the trial, in violation of the court's admonishment not to talk to each other about the case until instructed to do so. The juror was removed and replaced with an alternate juror, who had heard all the evidence. Williams made a motion for a mistrial, claiming the other jurors' actions violated Iowa Criminal Procedure 18(5)(d). The trial court overruled Williams' motion.

The trial court has broad discretion in ruling on motion for new trial and we disturb only upon a showing the trial court action was clearly unreasonable. State v. Sauls, 391 N.W.2d 239, 240 (Iowa 1986).

In order to receive a new trial on basis of juror misconduct, the applicant must show three conditions have been met:

> (1) Evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2)the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

State v. Johnson, 445 N.W.2d 337, 341 (Iowa 1989) (quoting State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984)).

Our supreme court has noted that the third requirement of this test is not easily satisfied. Id.; see e.g. State v. Harrington, 349 N.W.2d 758, 762-63 (Iowa 1984) (juror affidavits which stated that the jury discussed the fact that the defendant had on a previous occasion shot his brother, a fact which was not in evidence, failed to establish that misconduct was calculated to and did influence the verdict to a reasonable probability); State v. Christianson, 337 N.W.2d 505-06 (juror's telephone call during deliberations, by which he obtained information impeaching a witness, fell short of showing reasonable probability that information affected verdict); State v. Folck, 325 N.W.2d 368, 372-73 (jury's discussion of facts not contained in the record, including facts bearing on credibility of witnesses, could not have influenced the verdict); Sauls, 391 N.W.2d at 242 (no reasonable probability that outside information affected the verdict where outside information could have been determined from evidence which was admitted at trial).

In this case, the juror's testimony was only that other jurors discussed events that happened in the courtroom, before the case had been submitted. She was not able to tell the trial court anything specific about the other jurors discussions.

We find the trial court did not abuse its discretion in refusing to grant Williams' motion for a new trial.

II. Lesser-Included Offenses.

After the defense rested, the court gave both parties a set of proposed jury instructions, which included instructions on lesser-included offenses of willful injury. The defendant objected to all the lesser-included offenses. The State responded that it would not object to their removal. Then, the following exchange occurred:

> THE COURT: Well, this is an unusual situation. The law generally requires the court to instruct on not only the offenses charged but any lesser included offenses as to which -- well, even if there is no evidence to support the lesser included offenses. In this case there is evidence that would support the lesser included offenses, and for that reason I am going to overrule the objection and I am going to give the jury the lesser included offenses.
>
> MR. NEWELL: Your Honor, the state would like to make it of record then the state has no objection to the court giving the lesser included instructions and agrees to their being given.

Williams argues that because he did not want the jury instructed on the lesser-included offenses, it was error for the trial court to do so. Our supreme court addressed this issue in State v. Greer, 439 N.W.2d 198 (Iowa 1989). In Greer, our supreme court stated:

> Defendant also seeks to establish trial court error by reliance on the language in Jeffries which indicates "[w]e also retain the rule that a defendant may expressly waive a lesser-incuded offense instruction." State v.Jeffries, 430 N.W.2d 728, 737 (Iowa 1988). Defendant interprets this language as granting veto power to the defendant to block submission of any lesser-included offense which the accused does not fancy.
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> We do not interpret the quoted language in this manner. The State also may have a legitimate interest in having a lesser-included offense, which satisfies the statutory elements test, submitted to the jury. If there is a failure to convict on the greater offense, a failure to submit the lesser offenses could, under prevailing double jeopardy standards, effectively bar the State from ever bringing the defendant to trial for the lesser offenses. See id. at 734-35. The State should not be forced to accept that result because of a unilateral election by the defendant.

Greer, 439 N.W.2d at 200.

However, this does not end our inquiry. We find this case is similar to State v. Wallace, 475 N.W.2d 197 (1991). In Wallace, the defendant was charged with the crime of willful injury. Id. at 198. Before the district court submitted the case to the jury, the defendant attempted to waive all lesser-included offenses. Id. at 198-99. The trial court refused to accept the attempted waiver and submitted three lesser-included offenses. Id. at 199. The defendant was convicted of one of the lesser-included offenses. Id. Our supreme court held the defendant was entitled to rely on his "all or nothing" defense and therefore the district court's failure to abide by the defendant's decision was error requiring reversal. Id. at 202. Our supreme court went on to explain that had

the State refused to consent to the defendant's waiver, the district court would have been correct in submitting lesser-included offenses. Id.

The State argues it changed its position on the lesser-included offenses, prior to the instructions being submitted to jury. It claims Mr. Newell's statement, quoted above, was a withdrawal of the State's consent to the defendant's waiver of the lesser-included offenses. We agree. Mr. Newell specifically stated the State agreed with the lesser-included instructions being given.

We find the district court did not err in overruling defendant's objection to instructing the jury on lesser-included offenses.

III. Ineffective Assistance of Counsel Claim.

Williams claims his trial counsel was ineffective in (1) not taking depositions prior to the eve of trial, (2) not securing medical records of the victims, even though the extent and nature of their injuries was an issue, and (3) failing to timely attempt to locate witness Tom Mayes.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We

conclude there is an inadequate record for us to adjudicate the defense claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

The issue of the taxation of costs for the appendices filed in this case has been submitted with this appeal. Appellant's counsel twice filed appendices which were struck for failure to comply with the rules of appellate procedure. We order the cost of those appendices to be borne by appellant's counsel. See State v. Oppelt, 329 N.W.2d 17, 21 (Iowa 1983); Stone v. City of Wilton, 331 N.W.2d 398, 405 (Iowa 1983).

AFFIRMED.