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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
BRADLEY YAHNKE,)
Defendant-Appellant.)

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8-184
86-1160

Appeal from the Iowa District Court for Linn County (No. CRF 9153), Thomas M. Horan, Judge.

Defendant appeals from his conviction, following a jury trial, for the crime of second-degree murder. **AFFIRMED.**

B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Mona Knoll and Gerald Vander Sanden, Assistant Linn County Attorneys, for plaintiff-appellee.

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

DONIELSON, P.J. 351

The defendant appeals from his conviction, following a jury trial, for the crime of second-degree murder. We affirm.

Joni Heims was found shot to death in her living room. Except for the bullet removed from her body, there was no physical evidence at the crime scene tending to identify the killer. This was partly because the crime scene was substantially disturbed during attempts to give first aid to Heims. The bullet removed from Heims' body had ballistic characteristics indicating it had been fired from a certain unusual brand of antique rifle.

Suspicion initially focused on two men, both of whom Heims had recently confronted and accused of stealing marijuana from her. After investigation one of the two men, defendant Bradley Yahnke, was arrested and charged with Heims' murder. Two factors led police to arrest Yahnke: (1) He had no alibi for the afternoon of the crime. He claimed to have spent the afternoon at home, but two persons who tried to telephone him on that afternoon received no answer. One of these persons initially lied at Yahnke's request about the timing of the phone call. (2) Yahnke's father (with whom Yahnke lived) owned an antique rifle consistent with the bullet found in Heims' body.

After a jury trial, Yahnke was convicted of second-degree murder. He has appealed.

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

I. Yahnke contends the district court erred by excluding from evidence the results of a polygraph test he took during the initial police investigation. The polygraph results were favorable to Yahnke because the examiner concluded Yahnke was telling the truth when he denied any involvement in, or knowledge of, Heims' death. The results were excluded from evidence because there was no stipulation by Yahnke and the State that the results could be admitted. Yahnke argues that his willing submission to the polygraph examination, combined with his simultaneous waiver of Miranda rights without the assistance of counsel, had the same effect as a stipulation to the admissibility of the test results.

"Polygraph evidence may only 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). The stipulation requirement reaches not only inculpatory test results proffered by the State, but also inculpatory results brought forth by a defendant. State v. Losee, 354 N.W.2d 239, 242 (Iowa 1984). A stipulation will not be inferred. See State v. Marti, 290 N.W.2d 570, 587 (Iowa 1980).

Based on principles of stare decisis, we find the polygraph evidence was inadmissible for lack of a clear stipulation by both parties.

II. Yahnke contends he should have been granted a mistrial because the judge highlighted certain testimony by saying "I think it's important" when overruling an objection. The testimony concerned the fatal bullet's similarity to a box of shells found in the Yahnke home. The following transcript excerpt sets forth the exchange during direct examination of F.B.I. Special Agent Robert C. Halberstam by the State:

> Q. Mr. Halberstam, when you tell us that the spent bullet matched in elemental composition to four bullets that you tested that came from this box of shells, what are you telling us from a practical standpoint?
> MR. CORRELL: Your Honor, this is repetitious.
> THE COURT: It may be -I think it's important. The objection is overruled. Go ahead.
> A. What I have said and explained the manufacturing process and the process for packaging bullets is that bullets that match in composition are commonly found in a same box of cartridges. They can be found in other boxes, but it is likely they were manufactured by the same manufacturer and packaged on or about the same date. (emphasis added).

Yahnke moved for mistrial. The court overruled the motion and in response submitted to the jury the following instructions:

> The court has not by its Instructions or by any ruling made, or by any act done, or by anything said during the trial, intended or attempted to give any intimation or opinion as to what the facts are or what are not the facts, what the proof is or what it is not, nor what your verdict should be.
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> * * *
>
> You must not refer to, discuss, nor consider, during your deliberations in the jury room, anything except the evidence admitted during the trial and these instructions. Any other matters, state-

> ments, suggestions, or inferences must be deliberately discarded by you.
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> * * *
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> Witnesses have been called who have testified as experts . . . . This testimony should be considered in connection with the knowledge, skill and experience possessed by the witnesses; but it is solely the province of the jury to say what weight it should receive . . . .

We agree with the trial court that Yahnke was not prejudiced by the court's remark, nor do we find the comment to be unfair. See State v. O'Kelly, 211 N.W.2d 589, 597 (Iowa 1973). The remark "I think it is important" may just as likely have been in reference to it being important for the jury to understand the testimony due to its somewhat complex nature, rather than inferring it was important testimony. Furthermore, any potential prejudice was cured by the instructions. Cautionary instructions to a jury to disregard certain evidence or other matters are generally sufficient to remove any danger of prejudice. State v. Williams, 315 N.W.2d 45, 55-56 (Iowa 1982).

We do not find the trial court abused its discretion in overruling Yahnke's motion for mistrial on this ground.

III. Yahnke also contends he should have been granted a mistrial because the prosecutor made a reference during cross-examination to Yahnke's exercise of his fifth amendment right to remain silent during police interrogation. The relevant testimony Yahnke contends is damaging is set forth as follows:

Q. Mr. Yahnke, on the 27th of February after you had been arrested and taken to the Cedar Rapids Police Department I believe you said that you were interviewed. A. Yes, I was.

Q. But the interview was halted, was it not? A. Yes.

Q. And that is because Mr. Thomas, Jim Thomas, asked that it be halted, was it not?

MR. CORRELL: Excuse me, Your Honor. I object to that. That is absolutely irrelevant.

THE COURT: The objection is sustained.

Yahnke moved for mistrial, claiming the question sought an improper response that he had invoked his right to remain silent, which is prohibited under Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed.2d 91 (1976). The court denied Yahnke's motion.

We find since the objection was sustained, no error occurred. In addition, the court offered to admonish the jury to disregard the question, which Yahnke's counsel declined.

Further support for the trial court's denial of Yahnke's motion for mistrial may be gleaned from the fact Yahnke had previously waived his fifth amendment rights after receiving Miranda warnings and it was Yahnke's attorney, at the request of Yahnke's father, who asked that questioning of Yahnke be stopped. Thus, since the privilege against self-incrimination is a personal one and can only be invoked by a defendant and not by an attorney who acts without his concurrence or at his request, there was no denial of due process to Yahnke. Moran v. Burbine, 475 U.S. 412, 418, 106 S. Ct. 1135, 1139, 89 L. Ed. 2d 410,

418-19, 421 (1986). The State did not attempt to elaborate or call further attention to this issue in further questioning or in closing argument. In light of the single question posed by the State, an immediate objection which was sustained, an answer not being given and the submission of curative instructions, we do not find the question asked by the prosecutor so infected the trial with unfairness as to make the resulting conviction a denial of due process. Greer v. Miller, ____ U.S. ____, ____, 107 S. Ct. 3102, 3109, 97 L. Ed. 2d 618, 630 (1987).

Based on the foregoing discussion, we find the trial court did not err in denying Yahnke's motion for mistrial.

IV. Yahnke contends the district court erred by permitting two criminalists to testify that they had obtained perfect scores in proficiency testing for firearms identification. The two experts were the only witnesses willing to testify that the fatal bullet came from the antique rifle owned by Yahnke's father. (Another expert was unwilling to reach this conclusion.) Yahnke contends that the experts' testimony about the source of the fatal bullet was improperly highlighted by the allegedly irrelevant hearsay about their earlier perfect scores in firearms identification tests.

We find the evidence was relevant to lay a foundation for the expert testimony of the two D.C.I. criminalists. The qualifications of these two men were probative of their

abilities and skill to accurately match bullets to the firearms which had fired them. The trial court did not abuse its discretion in allowing the challenged testimony.

V. Yahnke also contends he is entitled to a new trial because a page was inadvertently omitted from the written instructions given to the jury. The missing page was eventually supplied during the third day of jury deliberations, but Yahnke contends the deliberations were essentially prejudicial because the missing page included the definition of malice aforethought, a concept which the jury asked the court to define during its deliberation. (This request led to the discovery of the omitted page.)

In ruling on this issue, the trial court stated:

> The Court read the entire set of original instructions to the jury in this case, including page 1 and 2 of Instruction No. 13. The missing page of Instruction No. 13 was provided to the jury the day before they reached their verdict and, consequently, the jury had an adequate opportunity to read and consider the missing page of Instruction No. 13 before the verdict was rendered. The defendant was not prejudiced by the fact that page 1 of Instruction No. 13 was inadvertently omitted from the Instructions.

We agree with the trial court's ruling and find no error occurred.

VI. Yahnke challenges the sufficiency of the evidence to prove his guilt. Yahnke complains there were no eyewitnesses, no evidence was found at the scene which was later linked to him, the homicide investigation was poorly conducted, and firearms experts at trial disagreed whether

the bullet recovered from the victim had been fired from a rifle owned by defendant's father.

We will review the evidence in the light most favorable to the State. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). All legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict. State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981). The verdict is binding on the reviewing court if there is substantial evidence to support it; substantial evidence means such evidence as could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt of the crime charged. Id.; State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). The weight of the evidence and credibility of the witnesses are for the jury. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984); State v. Robinson, 288 N.W.2d at 341. The jury tests the credibility of both direct and circumstantial evidence by weighing the evidence in light of their common knowledge and past experience. State v. O'Connell, 275 N.W.2d 197, 205 (Iowa 1979).

Reviewing the evidence in a light most favorable to the State, we find there was substantial evidence to prove Yahnke's guilt beyond a reasonable doubt.

VII. Finally, Yahnke contends the district court erred by allowing certain alleged hearsay testimony by an investigating officer about prior inconsistent statements by

Yahnke's father. Yahnke's father testified that he tried to telephone Yahnke on the afternoon of the crime, that he got no answer until about 6:00 p.m., and that Yahnke seemed distressed and emotional when the father finally did reach him. The challenged testimony from a police officer would have indicated that in prior statements, Yahnke's father had been more emphatic about Yahnke's apparent distress and about the fact that Yahnke was expected for work at his father's restaurant during the part of the afternoon for which he cannot account.

The police officer's testimony regarding statements of the father which were inconsistent with his trial testimony was admissible for impeachment as prior inconsistent statements. State v. Wycoff, 255 N.W.2d 116, 118 (Iowa 1977).

Yahnke argues the most damaging testimony was that the police officer was allowed to testify that Yahnke was not home between 5:00 and 6:00 on the date of the crime and that there was no inconsistency on this subject with the trial testimony of Yahnke's father.

Yahnke's father testified without objection that his son, the defendant, was not home until 6:00 p.m. Any error in admitting substantially the same hearsay testimony given by the police officer on this subject was harmless. See State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982). As such, we find no error occurred and Yahnke was not prejudiced.

For all of the reasons stated, we affirm the conviction of defendant, Bradley Yahnke.

AFFIRMED.