IN THE COURT OF APPEALS OF IOWA

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No. 2-385 / 91-864

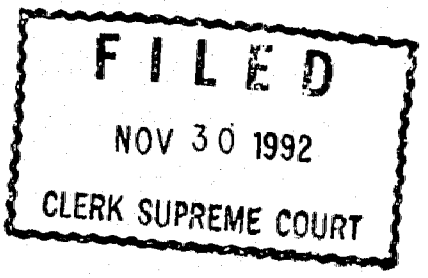
STATE OF IOWA,

Appellee,

vs.

STEVEN E. LONG,

Appellant.



Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Steven Long appeals from his conviction, following a jury trial, of voluntary manslaughter. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ramey, Assistant County Attorney, for appellee.

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

OXBERGER, C.J.

The State charged Steven Long with first-degree murder following the shooting death of his girlfriend, Janet Noe.

Scope of Review

The admission of evidence is within the sound discretion of the trial court. State v. Williams, 305 N.W.2d 428, 432 (Iowa 1981). Because Long argues admission of surprise testimony violated the constitutional protections of due process and fundamental fairness, this court's review is on the totality of circumstances, and the court conducts a de novo evaluation of the evidence. Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981).

I. Admissibility of DCI Agent's Testimony

Long complains the district court erred in allowing DCI Agent Harvey to testify the gun which killed Noe had been shot from a distance of three inches. Long contends the State failed to properly notify him of this in the minutes of testimony. He also notes Dr. Gauger testified at deposition the gun had been fired from a distance of two to four feet. Long contends his defense, including prior trial remarks and questioning, was based on the gun being fired from a distance of two to four feet.

Iowa Rule of Criminal Procedure 5(3) provides:

> The prosecuting attorney shall, at the time of filing such information, also file the minutes of evidence of the witnesses which shall consist of a notice in writing stating the name, place of residence and occupation of each witness upon whose expected testimony the information is based, and a full and fair statement of the witness' expected testimony.

We determine whether the challenged testimony is consistent with the overall nature of the minutes in analyzing these claims. State v. Ellis, 350 N.W.2d 178, 182 (Iowa 1984). The determination of the sufficiency of the minutes depends upon the facts of each case. State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). The minutes "need not detail each circumstance of the testimony," id., but must generally alert the defendant to the source and nature of the evidence against him. State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983). If the minutes put the defendant "on notice of the necessity of further investigation of the witness's probable testimony, "reversal of the conviction is not required." State v. Musso, 398 N.W.2d 866, 868 (Iowa 1987) (citing Lord, 341 N.W.2d at 743).

We have reviewed the minutes of testimony of Dr. Gauger and Robert Harvey provided to us in the parties' briefs. Neither set of minutes provides specific information regarding the likely range from which the gun was fired. The minutes of Dr. Gauger's testimony state his testimony:

> [W]ill include the details of the autopsy performed and other tests and observations made by him or at his direction and upon which he customarily relies in making his medical determinations as to the manner and method of death of an individual.

This description falls squarely within the requirements set forth in Lord and Musso. The description generally alerted Long of the type of evidence against him, e.g., that he performed an autopsy "and other tests and

observations . . . upon which he customarily relies [in determining] "the manner and method of death . . . ." As stated, the minutes also indicated to Long that further investigation might be necessary.

Likewise, the minutes of Robert Harvey's testimony stated he would testify "to all aspects of his examination." Harvey is a Department of Criminal Investigation criminalist, and it would reasonably be expected that he would conduct a variety of tests. The language "to all aspects of his examination" provided Long with general notice of the evidence against him and the necessity of further investigation.

While Dr. Gauger indicated in his deposition the gun had been fired from a distance of two to four feet, there is no suggestion he was intentionally misleading. At the time of deposition, he had not yet conducted additional tests. There is also no evidence to indicate the State neglected to inform Long of the examination. In addition, the trial court judge offered defense counsel ample time and opportunity to prepare once the additional evidence was available. Dr. Gauger's minutes of testimony, taken together with Harvey's, adequately advised Long of the general evidence against him and the need for possible further investigation. We hold the district court did not commit error in allowing Harvey to testify the gun had been fired from a distance of three inches.

II. Alleged Prosecutorial Misconduct

Long next complains the prosecutor improperly commented on stricken evidence during his closing argument. The prosecutor stated ". . . we weren't going to hear it. We don't hear hearsay." However, defense counsel had previously made elaborate references to the incident in question during his closing remarks, including what may or may not have been said during the incident.

"The rule is well settled that one who induces the trial court to 'let down the bars' to a field of inquiry cannot complain if an adversary takes advantage of the same opening." State v. Payton, 481 N.W.2d 325, 328 (Iowa 1992). While Payton was referring to evidence, we find the rule equally applicable to closing remarks. The defense counsel specifically referred to remarks which may have been made to his advantage. He cannot now complain that the prosecution acted likewise.

III. Sufficiency of Evidence

Long next complains there was insufficient evidence to convict him of voluntary manslaughter. However, defense counsel made no challenge to the sufficiency of the manslaughter charge at trial.

In State v. Thompson, 326 N.W.2d 335, 338 (Iowa 1982), our supreme court held that a defendant similarly charged with first-degree murder but convicted of voluntary manslaughter could not make a sufficiency complaint when he

did not expressly challenge the manslaughter charge at trial.

We find the court's holding in Thompson dispositive on this issue and accordingly find Long failed to preserve error on this issue.

We note Long contends that if we find a waiver of the sufficiency challenge, he received ineffective assistance of counsel.

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.

AFFIRMED.