IN THE COURT OF APPEALS OF IOWA

No. 1-282 / 00-1152
Filed October 12, 2001

FILED
OCT 1 2 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LAWRENCE EDWARD PERDUE, II,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

Defendant appeals his conviction, following jury trial, for murder in the second degree in violation of Iowa Code sections 707.1 and 707.3 (1999). **AFFIRMED.**

Raymond L. Reel and Theodore R. Hoglan of the Fairall law firm, Marshalltown, for appellant.

Kevin Cmelik, Appellate Defender, James DeTaeye, County Attorney, and Paul Crawford, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Zimmer and Miller, JJ.

MILLER, J.

Defendant Lawrence Edward Perdue, II appeals his conviction, following jury trial, for murder in the second degree, in violation of Iowa Code sections 707.1 and 707.3 (1999). He contends the trial court abused its discretion in (1) admitting autopsy photographs at trial, and (2) not ordering a mistrial based on statements by the jury concerning the state of its deliberations. We affirm.

I. BACKGROUND FACTS

Both parties agree the facts of the case are not greatly in dispute. Fifteen-year-old P.F., eighteen-year-old Joe Moyer and nineteen-year-old Perdue began drinking alcohol at approximately 4:00 p.m. at Perdue's sister's house. The three decided to invite some girls to the party and arrangements were made to meet three girls at Glick school. Perdue, P.F. and Moyer left the house on foot and were on their way to meet the girls when they encountered the victim, James Teer, on Third Street in Marshalltown.

Teer suffered from mental health problems that a witness described as "bipolar schizophrenic." P.F. perceived Teer to be staring at him and challenged Teer by asking him, "What the fuck are you looking at?" Teer responded but the three boys could not understand him. This verbal confrontation escalated into a physical altercation when Perdue crossed the street to confront Teer and proceeded to strike Teer with a wooden towel rod he had in his pant leg. Teer fell to the ground and Perdue struck him again with the rod, this time breaking it. Perdue then stomped and kicked Teer several times. Perdue fled on foot when P.F. saw the police approaching.

Teer was initially taken to the Marshalltown Medical & Surgical Center's emergency room. He remained there for approximately three hours at which time is was determined his head injuries were more severe than first thought and he was transferred to the Methodist Medical Center in Des Moines where he died the next afternoon. The cause of death was determined to be multiple skull fractures, brain hemorrhages and edema.

Perdue was charged in a two-count trial information with murder in the first degree (Count I) and willful injury (Count II). Jury trial commenced May 16, 2000. Over objection, the court admitted autopsy photographs taken of Teer's brain while it was in the skull and after it was removed, of the empty skull cavity after the brain had been removed, and of Teer's face while he was lying on the autopsy table.

During jury deliberations the jury sent notes to the presiding judge three times. The first note asked questions concerning possible verdicts. That note and the court's response are not involved in this appeal. It is the second and third notes that give rise to the second issue in this appeal. The second note stated, "We the jury have come to a decision on Count II, but have not reached a decision on Count I. It appears we are at an impassable point in our deliberations." The trial court instructed the jury to continue deliberations in an effort to reach a verdict on both counts. The third note referred to portions of certain jury instructions, and stated:

> In reference to our instructions as stated on page 35 line 10 through 19. We the jurors as individuals should not have to compromise are (sic) judgement in order to reach an unanimous verdict.

> In order to reach an unanimous verdict someone would have to violate the Instructions as given.
>
> Page 10A lines 3-5 Are we supposed to reference this page as individuals or as a group? As a group 11 jurors are in agreement to a greater degree of the crime – one agrees with a lesser are the 11 jurors supposed to compromise their belief and agree to the lesser although they don't agree with all the elements of the lesser charges?

Perdue moved for a mistrial at this point, stating a belief that the jury's note indicated the jurors were at an impasse and would have to compromise individual judgments in order to reach a verdict.[1] The court denied Perdue's motion for mistrial and instructed the jurors to continue their deliberations.

Approximately twenty minutes after the jury was instructed to continue deliberations it returned a verdict finding Perdue guilty of murder in the second degree, a lesser included offense under Count I, and guilty of willful injury under Count II. Perdue filed a motion for new trial, a motion in arrest of judgment and an amendment to the motion in arrest of judgment. The amendment requested that no judgment be entered as to the charge of willful injury because it is a lesser included offense of murder in the second degree and the two offenses therefore merge. A hearing was held on Perdue's motions. The court overruled Perdue's motion for new trial and motion in arrest of judgment. However, the court sustained his amendment to the motion in arrest of judgment and convicted and sentenced Perdue only on second-degree murder.

Perdue appeals his conviction, contending the trial court abused its discretion in admitting the disputed autopsy photos and in not ordering a mistrial.

---

[1] Notably, although the jury had earlier indicated it had reached a verdict on Count II, Perdue did not restrict his motion to Count I. However, the parties do not discuss whether a mistrial, if granted, should have been limited to Count I.

II. SCOPE AND STANDARDS OF REVIEW

The decision to admit or deny admission into evidence of photographs lies initially in the trial court's discretion, and we will not reverse except for an abuse of discretion, as where the evidence is clearly irrelevant or prejudicial. *State v. Aswegan*, 331 N.W.2d 93, 97 (Iowa 1983). "The admission or exclusion of photographs or other visual evidence lies in the discretion of the trial court, and we will not interfere with the court's decision in the absence of an abuse of discretion." *State v. Astello*, 602 N.W.2d 190, 196-97 (Iowa Ct. App. 1999). The trial court has broad discretion in ruling on a motion for mistrial. *State v. Brown,* 397 N.W.2d 689, 699 (Iowa 1986). We review a trial court's decision concerning whether to declare a mistrial and discharge a jury because of an inability to reach a unanimous verdict for an abuse of discretion. *See State v. Connelly*, 551 N.W.2d 329, 331 (Iowa Ct. App. 1996) (applying abuse of discretion standard to defendant's claim that retrial was barred when trial judge ordered mistrial because jury was unable to reach verdict). "We find the district court has abused its discretion only when the district court has exercised its discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable." *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996).

III. MERITS

A. Autopsy Photographs

State's exhibits 29 through 32 are photographs taken by Dr. Francis Garrity during Teer's autopsy.[2] Perdue asserts that because Teer's death and

[2] State's Exhibit 29 is a photo of Teer's face while lying on the autopsy table showing the injuries on his face. Exhibit 30 is a photo of Teer's brain outside the skull and Exhibit 31 is a photo of the brain inside Teer's skull. Both show the hematomas and hemorrhages

the manner in which it was caused were not disputed at trial these photographs were irrelevant, adding nothing to the testimony of Garrity who explained Teer's injuries to the jury with a diagram. He further asserts they were inflammatory, and any probative value of the photos was outweighed by prejudicial effect. The trial court admitted the photographs over similar objections. Perdue argues the trial court abused its discretion in admitting the photographs. The State argues the photographs were admissible because they were useful to illustrate the medical testimony of Dr. Garrity and show the cause of death. The State also argues they were relevant to show the nature of the attack, and thus relevant on elements of murder, such as intent. The State urges that given the limited number of photographs, the fact they were not cumulative of each other, and the testimony of four witnesses as to the malicious attack on and severe beating of the victim by the defendant, the photographs were not unfairly prejudicial.

> The test for the admission of such evidence is two-fold: (1) the evidence must be relevant and (2) if the evidence is relevant the trial court must determine whether the probative value of the exhibits outweighs the prejudice which would be caused by their admission into evidence.

Astello, 602 N.W.2d at 197 (quoting *State v. Oliver*, 341 N.W.2d 25, 33 (Iowa 1983)). "Death pictures are not ordinarily excluded because they are gruesome, as these pictures are, for murder is by nature gruesome business." *State v. Hickman*, 337 N.W.2d 512, 515-16 (Iowa 1983).

While Perdue may be correct that the method and cause of Teer's death was not in dispute, he explicitly set forth in his opening statement that his defense was going to be he had no intent to kill Teer and thus he did not commit

---

of the brain suffered by Teer. Exhibit 31 is a photo of Teer's empty skull cavity with the brain removed and a ruler placed in front to show the size.

murder. Perdue asserted through opening statement that, "There was no intent to kill," and that when he ran from the scene when police approached he merely "thought he had just kicked [Teer's] butt." Perdue's intent was clearly at issue, because specific intent to kill was an element of first-degree murder as charged in this case and Perdue expressly denied any such intent.

"[T]he nature, extent, and severity of the wounds which are indicated in the photographs bore on the character of the assault and the intent of the assailant." *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984); *Astello*, 602 N.W.2d at 197. The photographs were probative of the elements of malice, willfulness and specific intent to kill. *State v. Oliver*, 341 N.W.2d 25, 33 (Iowa 1983). They were not inadmissible merely because of their potential capacity to invoke an emotional response from the jury. *Aswegan,* 331 N.W.2d at 97; *Astello*, 602 N.W.2d at 197. "Moreover, the State is entitled to show the crime scene and condition of the victim *even if the cause or manner of death is not disputed.*" *Astello*, 602 N.W.2d at 197. (Emphasis added).

The photographs in question were also relevant and material in illustrating the testimony given by Dr. Garrity. Dr. Garrity testified in detail describing the body, the wounds, the condition of the body revealed by autopsy, and the cause of death, all largely without objection. The photographs illustrated this testimony and helped make it comprehensible for the jury. *See Allen,* 348 N.W.2d at 247; *Hickman*, 337 N.W.2d at 516.

We conclude the trial court did not abuse its discretion in determining the probative value of the disputed photographs was not substantially outweighed by the danger of unfair prejudicial from their allegedly gruesome nature. The

photographs were relevant and probative in illustrating the testimony of Dr. Garrity and making it comprehensible to the jury, and in demonstrating the nature, extent, severity, and viciousness of the attack, particularly as those facts relate to elements of malice, willfulness and specific intent to kill.

B. Motion for Mistrial

The case was submitted to the jury at 1:15 p.m. on Tuesday, May 23, 2000. It appears the jury had been deliberating about six and one-fourth hours when it sent its second note, at about 11:00 a.m. on May 24.[3] During discussion of the second note the court stated its intention to send the jury to lunch at 11:30. It thus appears the jury had been deliberating a total of about seven and one-half hours when it sent its third note shortly before 1:50 p.m. on May 24.[4] This third note came only approximately twenty-four hours after the case was submitted to the jury.

The length of deliberations is a relevant factor in determining whether to declare a mistrial in a case in which it arguably appears a jury may be unable to reach a verdict. *United States v. Lansdown*, 460 F.2d 164, 169 (4th Cir. 1972). Where the defendant moved for mistrial on the basis of a hung jury we held the trial court did not abuse its discretion in denying the motion where the total deliberation time was less than six hours. *See State v. Montes*, 445 N.W.2d 407, 407 (Iowa Ct. App. 1989). *Montes* involved only one count, a charge of second-degree burglary. By contrast, the jury in this case was asked to consider two counts. Each involved lesser offenses. Trial began on Tuesday, May 16 and

---

[3] This assumes deliberations until 5:00 p.m. on May 23 and deliberations commencing at 8:30 a.m. on May 24.

[4] This assumes the jury in fact deliberated from 11:00 to 11:30 while awaiting the court's response to its second note, and returned to deliberate at 1:00 p.m.

thus apparently continued some five and one-half days before the case was submitted. Extended deliberations might reasonably be expected in such a case, and the jury had not deliberated for such an extended and lengthy time such that the length of deliberations alone would compel the trial court to declare a mistrial.

The jury's second note did not say the jurors had reached an impasse or would be unable to reach verdicts. To the contrary, it stated only that it "appear[ed]" the jury had reached an impassable point. Even more importantly the note further informed the court that the jury had reached a verdict on one of the two charges. It thus appeared the jury had been making progress. The parties and the court quite reasonably agreed that given the nature of the case the jury had not deliberated long enough. They agreed the jury should be instructed to continue deliberating in an effort to reach a verdict on both counts, and the court so instructed the jury.

When the jury sent its third note Perdue moved for mistrial. He stated a belief the jury was getting no closer to verdicts, noted the jurors were expressing a concern about having to compromise their individual judgments, and stated a belief the jurors were indicating they had reached an impasse. The State resisted. The trial court denied the motion. It expressed the opinion that given the nature of the case and the time spent on preparation and trial it was appropriate that the jury take some additional time to reach a verdict (on the remaining count) if possible. It instructed the jury to continue its deliberation.

It is noteworthy that the jury had deliberated only about an additional hour since the parties and the court had agreed the jury should be required to continue deliberating. The court overruled the motion for mistrial on the first full

day of jury deliberation, at about 2:00 p.m., at a time when requiring the jury to continue deliberating for some additional time would not require the jurors, parties or court to return another day. The trial court was not faced with a situation in which denying a mistrial would require sequestering the jurors overnight or sending them home overnight or longer. *See State v. Nelson*, 234 N.W.2d 368, 375 (Iowa 1975) (noting such factors are relevant in determining whether to discharge a jury that has been unable to reach a verdict). Of further significance is the fact the jury's note itself showed that the jurors were still discussing and deliberating the case, including the jury instructions, and they were well aware they were not to compromise individual judgment for the mere purpose of returning a verdict on the one remaining unresolved count. We also note that Perdue did not, as he could have, request that the trial court inquire of each juror individually as to their inability to agree on the remaining count. *See Id.* (stating it is preferable for the trial court to make such an inquiry before determining a jury is deadlocked and discharging the jury).

Approximately twenty minutes after the trial court instructed the jury to continue its deliberations the jury announced it had reached a verdict. The jury was polled. The jurors each clearly and unequivocally answered that they agreed with the verdicts.

Perdue cites a case in which the defendant challenged a verdict-urging instruction, and the case's statement that "[t]he ultimate test is whether the instruction improperly coerced or helped coerce a verdict or merely initiated a new train of new deliberation which terminated the disagreement." *See State v. Campbell*, 294 N.W.2d 803, 808 (Iowa 1980). He argues the relatively short time

the jury deliberated after the court instructed it to continue its deliberation compels a conclusion that a juror or jurors were coerced, as there was not sufficient time for any further real deliberation.

We disagree. The jury's second and third notes, while indicating a concern about being able to reach a verdict on count I, showed that deliberations continued, the jurors had apparently discussed the facts to the point where they agreed to vote on verdicts, they had reached a verdict on one of the two counts, and they were aware of and focused on the right and duty of each to decide the case for himself or herself. They had deliberated for several hours and perhaps reached their second verdict as little as one hour of deliberating time after reaching their first verdict. We conclude that under the circumstances the twenty minutes the jury spent reaching a decision concerning the remaining count does not show that a juror or jurors were coerced to agree to a verdict by being instructed to deliberate further.

Our decision on this issue to a large extent turns on the standard of review. While the trial court would have acted within its discretion by granting the requested mistrial, based on all the facts and circumstances shown by the record we conclude it did not abuse its broad discretion by overruling Perdue's motion for a mistrial and instructing the jury to deliberate further.

IV. Summary and Disposition.

We conclude the trial court did not abuse its discretion in admitting photographs and in overruling the motion for mistrial. We affirm Perdue's conviction.

AFFIRMED.

000336