

IN THE COURT OF APPEALS OF IOWA

No. 9-507 / 88-1031

FILED

DEC 21 1988

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

449

ALICE NORENE MCFARLAND,

Appellant.

Appeal from the Iowa District Court for Poweshiek County, Phillip R. Collett, Judge.

The defendant appeals a judgment and sentence entered by the trial court following a jury trial finding her guilty of second-degree murder and attempted murder. Defendant contends: (1) the trial court erred in refusing to suppress statements made by her on July 30, 1987; and (2) she was denied effective assistance of counsel when her attorney failed to request certain lesser-included offenses be submitted to the jury. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Mark Zbieroski, Assistant Attorney General; and Ron Kelly, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

On July 28, 1987, Frank Amos met with Echo Jackson at Caldwell Park in Ottumwa during the noon hour. Ms. Jackson arrived at the park around 12:25 p.m., brought a blanket, and walked to a secluded shaded area in the park. As the two sat in the park, Amos heard a voice behind him yell "you two sons of bitches." He and Jackson were then shot. Jackson died, and Amos managed to get to his truck and drive to a nearby house for help.

The defendant, Alice McFarland, was an employee of Easter's grocery store and had known Amos for many years. McFarland had been in an intimate relationship with Amos, but just prior to the shootings she had had numerous heated exchanges with him. Amos regularly visited Easter's to have coffee and visit with McFarland and Jackson, who was also an employee at Easter's.

At 10:10 p.m. on the night of the shootings, Officers Logan and Goepel interviewed McFarland at her home. At 9:40 the next morning the police met McFarland at the grocery store, and asked her to accompany them to the police station. She cooperated with the officers' request, and at the station she was read her Miranda rights. McFarland indicated she understood her rights and was willing to speak with the officers. She signed a form indicating her waiver of her Miranda rights. The police then interviewed her and she denied involvement in the

shootings. The police asked McFarland if she would be willing to take a polygraph test in Des Moines. McFarland agreed to take the test. The officers accompanied her as she then ran errands to her work place and home. They arrived at DCI headquarters in Des Moines later that day.

At 3:29 p.m., McFarland was again informed of her Miranda rights, and she signed a waiver form. Agent Dennis Wilbur and McFarland proceeded to the polygraph room, where she was interviewed. No polygraph test was administered, because McFarland confessed to Wilbur she had lied and she had committed the shootings. McFarland was returned to Officers Logan and Goepel. At 4:45 p.m., she was informed of her Miranda rights for the third time. She again indicated her understanding of her rights and she signed a waiver form. She then proceeded to make inculpatory statements to the officers.

The jury ultimately found McFarland guilty of second-degree murder and attempted murder. The trial court denied McFarland's motion for a new trial and sentenced her to fifty and twenty-five-year terms on the respective charges. McFarland has appealed.

McFarland contends the trial court erred in refusing to suppress statements she made to the police on July 30, 1987. She contends she did not voluntarily waive her Miranda rights because: she had no prior criminal record and was unfamiliar with the criminal justice system; the

police reading of her rights was perfunctory and minimal; she has a low level of intelligence and little education; she was interrogated for a long length of time; she was confused by the questioning; the police used deceit in obtaining her conviction; she suffered from an organic brain dysfunction making her susceptible to intimidation; and the conditions in both the police station and DCI headquarters were oppressive. Finally, McFarland argues her trial counsel were ineffective when they failed to request voluntary manslaughter and assault be submitted to the jury as lesser-included offenses to the crimes charged.

I. Motion to Suppress. The burden of proof is upon the State to prove McFarland's waiver of constitutional rights was knowingly, voluntarily, and intelligently given. State v. Reid, 394 N.W.2d 399, 402 (Iowa 1986). An express written waiver alone is not enough to establish the waiver of an individual's Miranda rights. Fryer v. State, 325 N.W.2d 400, 409 (Iowa 1982). The State also has the burden of establishing by a preponderance of the evidence the defendant's inculpatory statements were made voluntarily. State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1982).

The test for voluntariness is whether the totality of the circumstances demonstrates the statement was the product of an essentially free and unconstrained choice made by a defendant at a time when his or her will was not

overborne nor his or her capacity for self-determination critically impaired. Id. quoting State v. Collison, 227 N.W.2d 121, 127 (Iowa 1975).

Factors to be considered in determining the voluntariness of statements include:

The defendant's knowledge and waiver of his Miranda rights, the defendant's age, experience, prior record, level of education and intelligence, the length of time defendant is detained and interrogated, whether physical punishment was used, including the deprivation of food or sleep, defendant's ability to understand the questions, the defendant's physical and emotional condition and his reaction to the interrogation, whether any deceit or improper promises were used in gaining the admissions, and any mental weakness the defendant may possess.

State v. Whitsel, 339 N.W.2d 149, 153 (Iowa 1983). In reviewing defendant's claim, we must make an independent, de novo review of the totality of the circumstances surrounding the statements she made on July 30, 1987.

The testimony of the three law enforcement officials who interviewed defendant on the 30th reveals she was calm, alert, and cooperative. They stated there was nothing unusual about her behavior and her responses were appropriate for the questions posed. On three separate occasions defendant was informed of her Miranda rights, and each time she waived those rights and cooperated with the officers. She was specifically asked if she understood her rights and was willing to answer questions.

Defendant was a fifty-four-year-old high school graduate. She had run her own business in the past, and at

the time of the shootings she was employed as a scanning coordinator in a grocery store. She willingly accompanied the officers to the Ottumwa police station on the 30th. While the interview took place in a small office, we cannot find the conditions to have been either oppressive or intimidating. Two breaks occurred during the 10:00 a.m. to 12:45 p.m. interview session in Ottumwa. After defendant agreed to go to Des Moines for a polygraph, the officers accompanied her while she ran some errands. They also stopped and picked up lunch on their way to Des Moines.

They arrived in Des Moines at 2:52 p.m. Defendant was again informed of her Miranda rights. She spent only an hour with Officer Wilbur before she admitted she had committed the shootings. Before the Ottumwa officers proceeded to further interview her, she was again informed of her Miranda rights.

At no time did defendant ask for an attorney or ask that questioning be ceased. She fully cooperated with the officers. The interviewing sessions were punctuated by breaks and the opportunity for defendant to run errands and eat lunch. None of the circumstances surrounding the rooms in which the interviews took place, nor the intention to use the polygraph equipment, undercuts a finding that defendant's statements were made voluntarily.

Defendant points out that her Miranda warnings were read to her and she was not asked to make a specific

notation indicating she understood each and every one of her rights. We do not find such specification was necessary, nor were the police required to ask her if she knew any attorneys or would like to see a telephone listing of attorneys.

Defendant contends the officers were deceitful when interviewing her in Ottumwa. She asked if anyone had identified her as being at the scene of the shootings. Officer Goepel told her that was information he could not discuss with her. This conduct does not amount to deceit.

The trial court rejected defendant's claims of mental problems as being without credible evidence. While the report of Dr. Varner was considered by the court, we too question its accuracy and find the weight of the evidence supports a finding that defendant's statements on the 30th were the products of essentially free and unconstrained choice. The defendant's only reference to being confused during questioning was apparently made in response to the officers' questions as to whether she objected to the tape recording of their interview. This is not an indication that her statements were in any way involuntary.

Upon our de novo review of the totality of the circumstances, we find defendant's statements made on July 30, 1987, were voluntarily made. The trial court did not err in denying her motion to suppress.

II. Effective Assistance of Counsel. On appeal, defendant claims her trial counsel were not effective in that they failed to request jury instructions on the lesser-included offenses of voluntary manslaughter and assault. The failure of defense counsel to take proper steps regarding instructions may under some circumstances not rise to the level of ineffective assistance of counsel, and under other circumstances can be so egregious that counsel's performance does not satisfy the constitutional right to effective assistance of counsel. State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective counsel. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987); State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978).

Ordinarily we do not decide the question of ineffective assistance of counsel on direct appeal, preferring to reserve it for postconviction proceedings. State v. Poyner, 306 N.W.2d 716, 719 (Iowa 1981). The rationale for this policy is the fact that an evidentiary, adversary postconviction relief hearing provides an opportunity to more fully develop the record to show all the circumstances, including any not in the present record, concerning strategy and tactics involved in counsel's performance. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980).

In some cases, a motion for a new trial may address the question of adequacy of counsel, see Poyner, 306 N.W.2d at 719, and the record is sufficient for review on appeal. In this case, however, the motion for a new trial addressed the trial court's alleged failure to instruct on lesser-included offenses; a discussion of the defense attorneys' tactics and strategies regarding requested jury instructions was not fully set out for the trial court's consideration. We decline today to address whether defendant was denied effective assistance of trial counsel. Defendant's conviction is upheld without prejudice to a postconviction claim of ineffective assistance based on the lesser-included jury instruction issue. State v. Callender, 444 N.W.2d 768, 772 (Iowa App. 1989).

AFFIRMED.