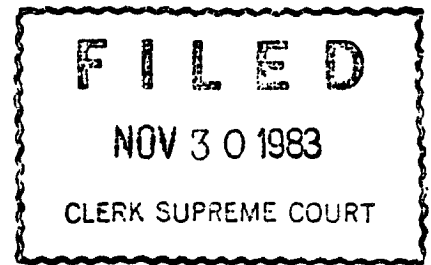


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
vs.)
)
LOIS E. LANG,)
)
Defendant-Appellant.)

Filed November 30, 1983

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3-337
69486

Appeal from Scott District Court - David J. Sohr, Judge.

Defendant appeals her conviction of solicitation to commit murder in violation of Iowa Code § 705.1. AFFIRMED.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, P.J.

Defendant appeals her conviction of solicitation to commit murder in violation of Iowa Code § 705.1. She claims that the trial court: 1) abused its discretion in allowing the jurors to take into deliberations with them certain audio tapes and transcripts of telephone conversations between defendant and an informant; 2) erred in allowing the informant to invoke his privilege against self-incrimination during cross-examination at trial, thus violating defendant's right to confront witnesses; and 3) erred in failing to strike the informant's testimony. We affirm.

Defendant was charged by information with solicitation to commit a felony; specifically, solicitation to murder her husband. She filed notices of intent to rely upon the defenses of compulsion and entrapment. The charge was based upon information obtained from one John Pieper who had already been arrested for fourth-degree theft and carrying a weapon. Pieper informed the police that defendant wanted him to find someone to kill her husband. This information was given by Pieper in the apparent hope of favorable treatment on the charges pending against him. He then secretly tape-recorded a number of phone conversations with defendant in which they discussed arrangements to have defendant's husband killed. These tapes and transcripts made thereof were admitted at trial and were allowed to go with the jurors into the jury room during deliberations. Defendant was arrested shortly after a prearranged meeting with a policeman in the role of a "hit man." She was found guilty by the jury of the offense charged and was sentenced to a term of not more than five years. This appeal followed.

I.

Defendant first claims that the trial court erred in allowing the jury to take the tapes and transcripts into their deliberations. She contends this allowed the jury to place undue emphasis on the evidence contained in them. First, we note that there is no indication whatsoever that the jury listened to the tapes again or

reread the transcript during their deliberations. In any event, it is clear that these items, which were admitted into evidence without objection, were properly allowed to go to the jury room. "Upon retiring for deliberations the jury may take with it all papers and exhibits which have been received in evidence, and the court's instructions." Iowa R. Crim. P. 18(5)(e). This rule gives the court discretion in deciding whether a jury may examine an exhibit during deliberations. State v. Thompson, 326 N.W.2d 335, 337 (Iowa 1982). We find no abuse of that discretion here. In State v. Triplett, 248 Iowa 339, 79 N.W.2d 391 (1956), app. dismiss. 357 U.S. 217, 78 S. Ct. 1358, 2 L. Ed. 2d 1361, the court allowed defendant's tape-recorded confession to go into the jury room. Id. at 348-49, 79 N.W.2d at 397. The tapes and transcripts in this case were certainly no more prejudicial to defendant than that involved in Triplett was to defendant therein. We also reject defendant's claim that the tapes and transcripts should be treated as depositions which, according to Rule 18(5)(e), may not be taken to the jury room during deliberations. This issue presents no cause for reversal.

II.

Defendant also claims that her constitutional rights under the confrontation clause were violated when the trial court allowed Pieper to refuse to answer certain questions during cross-examination by invoking his fifth amendment right against self-incrimination. Specifically, defendant claims that Pieper waived his fifth amendment rights by giving self-incriminating answers during direct examination, that a certain incriminating answer was not "compelled" under the fifth amendment and therefore should not have been struck, and that certain questions on cross-examination did not call for an incriminating response. However, defendant did not raise any of these issues below; she did not challenge at any time during trial Pieper's invocation of his fifth amendment rights on grounds of waiver or anything else. Under these circumstances, defendant may not advance these claims here for the first time. State v. Hamilton, 309 N.W.2d

471, 476 (Iowa 1981). Her failure to preserve error leaves us nothing to review.

III.

Finally, defendant argues the trial court erred in overruling her motion to strike Pieper's testimony in its entirety since his refusal to answer certain questions violated her right of confrontation. In determining whether confrontation has been denied, "'the relevant factual inquiry is whether, under the circumstances,' the jury has been deprived of a satisfactory basis for evaluating the truthfulness of the prosecution witness's testimony." State v. Ege, 274 N.W.2d 350, 356 (Iowa 1979) (citations omitted).

We find no abuse of discretion in overruling defendant's motion to strike Pieper's testimony. See State v. Cole, 295 N.W.2d 29, 38 (Iowa 1980). The record clearly shows that most of the evidence sought to be elicited in the unsuccessful cross-examination of Pieper had already been brought out on direct; the answers sought, therefore, would have been cumulative at best. Id. In any event, we are convinced that there was enough evidence educed by defendant, which could impeach Pieper's credibility and professed motive, to give the jury an adequate basis for evaluating the truthfulness of Pieper's testimony.

Finding no reason to disturb the result reached below, we affirm defendant's conviction and sentence.

AFFIRMED.