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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed April 8, 1983
vs.	)	2-446 / 67904
ROOSEVELT REED, JR.,	)	
Defendant-Appellant.	)	

Appeal from Black Hawk District Court, Carroll E. Engelkes, Roger F. Peterson, and Dennis D. Damsgaard, Judges.

Defendant appeals from his conviction for burglary in the second degree in violation of Iowa Code section 713.3. AFFIRMED.

W. H. Gilliam of Rapp & Gilliam, P.C., Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant appeals from his conviction on one count of burglary in the second degree in violation of Iowa Code section 713.3. We affirm.

The facts in this case are substantially undisputed. Defendant was arrested when he was discovered inside a railroad office by police officers who were investigating an apparent break-in. Upon his arrest, defendant was read his Miranda rights. Approximately twelve hours later, defendant was again read his Miranda rights, whereupn he signed a waiver form and made inculpatory statements to the police.

The first trial did not proceed to a judgment on the merits. After the jury had been sworn in, the trial court declared a mistrial, necessitated by the withdrawal of defendant's counsel. Defendant's counsel was permitted to withdraw due to an ethical conflict when he stated to the court his belief that defendant intended to offer perjured testimony. Prior to retrial, the court overruled a motion to dismiss which alleged that retrial would violate the double jeopardy constitutional provision.

At the second trial, the court overruled a motion to suppress inculpatory statements made by defendant to police. Defendant alleged that his waiver of his Miranda rights was not voluntary, knowing and intelligent. Evidence was introduced indicating that defendant had a below normal IQ, suffered from mild brain damage, and was only marginally literate.

The minutes of testimony specified in some detail the circumstances surrounding the crime scene about which two police officers would testify, but did not disclose that they would identify photographs of the scene. Over objection that the testimony exceeded the scope of the minutes, they were permitted to identify the photographs. The minutes of testimony also indicated that an

employee of the railroad would testify that he was working at the offices, heard the sound of breaking glass, called police, was present when the officers arrived, observed defendant inside the offices apprehended by police, and would "testify in detail to his observations." Over objections that his testimony exceeded the scope of the minutes, he was permitted to testify that the building was not open to the public and that defendant was not authorized to enter the building. Over similar objection, he was permitted to testify concerning remarks he heard defendant make to the police officers in response to questions about whether he understood his Miranda rights.

Defendant raises three issues on appeal. He asserts that: (1) his constitutional rights to due process and freedom from double jeopardy were violated when he was retried following a mistrial which was declared when his attorney was permitted to withdraw; (2) the trial court erred in permitting witnesses for the State to testify beyond the scope of the minutes of testimony; and (3) his waiver of his Miranda rights was not voluntary, knowing and intelligent, and that certain inculpatory statements made to police should therefore have not been admitted.

Because this is an appeal from a criminal conviction, our scope of review is de novo on all issues involving the alleged violation of basic constitutional safeguards. For all otner issues our review is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. Due Process and Double Jeopardy

The doctrine of double jeopardy has been enunciated in the constitutional and statutory provisions of many jurisdictions. It has its basis in the old common law, and provides that a criminal defendant may not twice be threatened with the

loss of life, liberty or property in collateral prosecutions for the same offense. Jeopardy may be said to attach at that point in a criminal proceeding where the defendant is in danger of having a valid judgment pronounced as a result of the trial. The fact that no such judgment has in fact been pronounced is immaterial. All that matters is that the proceeding has advanced to a point where the defendant is threatened with the possibility of a valid judgment against him. This point is reached once a jury has been empaneled and sworn.

However, the fact that jeopardy has attached in a particular case is merely a threshhold issue; it is not, by itself, determinative. "The double-jeopardy provision... does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." Wade v. Hunter, 336 U.S. 684, 688-89 (1949).

The double jeopardy provision is not a bar to the retrial of cases which ended in mistrials if the circumstances surrounding the declaration of the mistrial manifested its necessity, and a failure to declare a mistrial would have frustrated the ends of justice. See U.S. v. Perez, 22 U.S. 579. This doctrine of "manifest necessity" is very flexible, and the trial court is given a great deal of discretion in determining when the interest in a fair and just result dictate a new trial.

There is no rigid formula guiding the trial court in its determination. The court must consider all of the surrounding facts and circumstances in reaching its decision. State v. White, 209 N.W.2d 15 (Iowa 1973). No single factor is conclusive. Neither the fact that the mistrial was called for the benefit of the defendant, nor

the fact that defendant objected to the declaration of the mistrial are determinative. People v. Gardner, 195 N.W.2d 62 (Mich. 1972). Consequently, a great deal of deference is accorded to the trial court's determination, and a plea of double jeopardy will not be sustained unless the trial court abused its discretion in ordering a mistrial. See State v. Brooks, 279 P.2d 1048 (N.M.).

Under what circumstances can it be said that a trial court abused its discretion in declaring a mistrial? In Gardner, the trial court declared a mistrial sua sponte when improper testimony was introduced which indicated that defendant was on parole. Because a corrective instruction could have been given, and because the defendant could have had valid reasons to prefer continuing the trial despite the prejudicial testimony, it was held that the trial court abused its discretion in declaring a mistrial without consulting the defendant.

In Downum v. U.S., 372 U.S. 734 (1963), the trial court declared a mistrial because the prosecutor had not served any of his witnesses with summons, and there was no other way to insure that they would show up to testify. The Supreme Court ruled that the declaration of a mistrial for the purpose of affording the prosecutor with a more favorable opportunity to secure a conviction was an abuse of discretion.

Finally, in U.S. v. Jorn, 400 U.S. 470 (1971), the Supreme Court held that total failure to exercise discretion is an abuse of discretion. In Jorn the trial court acted so abruptly in declaring a mistrial that even had the prosecutor desired to suggest a continuance, he was given no opportunity to do so.

Generally speaking, where there has been a breakdown in the judicial machinery, the trial court does not abuse its discretion by declaring, sua sponte, a mistrial. See Gardner. Such situations include, but are not limited to, instances of jury deadlock, see White, and instances of illness or death of a juror, judge or counsel. See State v. Critelli, 24 N.W.2d 113 (Iowa 146).

In Critelli, the trial court declared a mistrial when the assistant county attorney, who had been prosecuting the case, became seriously ill. None of the other assistant county attorneys had had any previous connection with the case, and therefore could not proceed without extensive preparation. In ruling that the trial court did not abuse its discretion in declaring a mistrial, the Iowa Supreme Court stated that "[t]o have attempted to hold the unemployed and segregated jury even for five days and to expect new counsel to prepare a case... would be unreasonable..." Id., at 117.

In the present case, defendant's counsel withdrew when he learned that defendant intended to offer perjured testimony. Counsel's withdrawal under the circumstances was necessitated by the Code of Professional Responsibility. Because the defendant was entitled to representation, the trial court properly concluded that a new counsel would have to be appointed. The trial court considered a continuance, but concluded that it would be unreasonable to require the jury panel to remain available while a new attorney prepared the case. Furthermore, the trial could not proceed until the ethical conflict which resulted in the withdrawal of defendant's first attorney was resolved. Under these circumstances we hold that the trial court did not abuse its discretion when it declared a mistrial. Therefore, the retrial of defendant on the same charge did not violate the prohibition against double jeopardy.

Defendant's due process claim is premised on his assertion that he was denied the effective assistance of counsel in making the decision whether he should consent to a mistrial or demand a continuance. This claim is without merit. Defendant has not asserted that his first defense counsel did not advise him of his right to demand a continuance. In fact the court did consider a continuance, but rejected it. Under the circumstances, even if defendant had

demanded a continuance, it would have been within the discretion of the trial court to declare a mistrial notwithstanding defendant's objection.

II. Testimony Beyond the Scope of the Minutes

Defendant contends that certain testimony was improperly admitted because it went beyond the scope of the minutes of testimony. Specifically, defendant complains that testimony given by police officers which identified photographs of the scene of the break-in, testimony by a railroad employee which concerned defendant's authorization to be on the premises, and testimony by the same employee concerning remarks made by defendant when he was apprehended were not included in the minutes of testimony attached to the trial information, and therefore should have been excluded. We do not agree.

The requirements for the minutes of testimony are set out by Iowa R. Crim. P. 5(3). The minutes must provide a "full and fair statement of the witness's expected testimony." This does not mean that every detail of the expected testimony need be laid out ad nauseum, however. It is enough if the minutes are sufficient to advise defendant of the nature and scope of testimony evidence to be used against him. State v. Walker, 281 N.W.2d 612 (Iowa 1979). The purpose of requiring minutes of testimony is to prevent defendant from being prejudiced by surprise testimony at trial.

The identification and use of photographs to illustrate testimony was at issue in the case of State v. Sanders, 312 N.W.2d 534, 540 (Iowa 1981). In Sanders, a witness for the prosecution testified to certain matters specified in the minutes, and then used photographs to illustrate his testimony. Defendant argued that the trial court erred in permitting the admission of the photographs on the grounds that the minutes did not apprise him of the state's intent to use them. The

Supreme Court did not agree and held that the admission of photographs to explain testimony was consistent with the criteria enunciated in Walke. The photographs at issue in the present case were merely illustrative of testimony which was covered in the minutes. The trial court therefore did not err when it admitted them.

As far as the testimony of the railroad employee is concerned, this court is of the opinion that the minutes of testimony gave defendant fair warning of its substance and scope. The minutes provided that the employee would testify "in detail" about his observations at the scene of the crime. The minutes additionally stated that the police officers would testify as to statements made by defendant to them. Defendant could not have been surprised by any of the testimony offered at trial. His contention is, therefore, without merit.

III. Waiver of Miranda Rights.

Defendant alleges error in the admission of certain inculpatory statements made by him to police after his arrest. Although defendant was advised of his Miranda rights at least twice, and signed a waiver of these rights prior to making his statement, he asserts that his waiver was not voluntary, knowing and intelligent.

In order to be effective, a defendant's waiver of his constitutional right against compulsory self-incrimination must be made voluntarily. A waiver is of no consequence if it is made involuntarily, either in fact or in law.

A waiver which is made on the basis of coercion, threat or physical abuse is involuntary in fact. See Spano v. New York, 360 U.S. 315 (1959). We are not presented with such a situation here. Defendant does not allege any coercion of any sort. Indeed, the record indicates that the defendant offered to make the disputed statements on his own volition.

A waiver which is made in the absence of Miranda warnings is involuntary in law, even if it is voluntary in fact. A defendant cannot waive his rights if he has not been apprised as to what those rights are. Again, this is not the situation with which we are presented. Defendant was read his Miranda rights, and indicated he understood them, prior to signing his waiver. We therefore rule that the contention that he did not voluntarily waive his rights is without merit.

A waiver of the right against compulsory self-incrimination must not only be voluntary; it must also be knowing and intelligent. This requirement means that the defendnat must be substantially aware of the likely consequences of his waiver. Brady v. U.S., 397 U.S. 742 (1969). It does not, however, mean that defendant must have correctly assessed every relevant factor bearing on the decision he made, or that he can only waive his rights upon the advice of his counsel.

It is the opinion of this court that defendant knowingly and intelligently waived his rights. He was aware of the nature of the charge against him, he has had extensive prior experience in the legal system, and at the time he signed the waiver, he gave every indication that he understood what it was he was doing. The fact that he is of below normal intelligence does not render him incompetent. The record indicates that he is self-sufficient and in full control of his faculties. The fact that he is only marginally literate is also not determinative here. The officers read defendant's written waiver form aloud to him, so his difficulty in reading did not prevent him from understanding its contents.

AFFIRMED.