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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed November 29, 1982
vs.)
GARRY EVILSIZER,) 2-368/67058 111
Defendant-Appellant.)

Appeal from Lee District Court - David B. Hendrickson, Judge.

Defendant appeals his conviction of murder in the second degree in violation of Iowa Code sections 701.1, .3 (1979), claiming that the trial court erred in denying his motion for new trial 1) where the prosecutor, in closing argument, stated to the jury that the State must "prove its case beyond a reasonable doubt—not beyond all reasonable doubt;" 2) where the prosecution allegedly failed to disclose exculpatory impeachment evidence to the defense; 3) where the State allegedly failed to give the last name of a key witness sufficiently prior to trial to give defendant adequate time to prepare the case; and 4) where the State allegedly did not list in the minutes of testimony a material witness who was used as a rebuttal witness but who gave only evidence in chief. AFFIRMED.

James P. Hoffman, Keokuk, Iowa, for defendant-appellant.

Thomas A. Miller, Attorney General of Iowa, and Michael Jordan, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant, Garry Evilsizer, appeals his conviction of murder in the second degree in violation of Iowa Code sections 701.1, .3 (1979). He claims that the trial court erred in denying his motion for new trial 1) where the prosecutor, in closing argument, stated to the jury that the State must "prove its case beyond a reasonable doubt--not beyond all reasonable doubt;" 2) where the prosecution allegedly failed to disclose exculpatory impeachment evidence to the defense; 3) where the State allegedly failed to give the last name of a key witness sufficiently prior to trial to give defendant adequate time to prepare the case; and 4) where the State allegedly did not list in the minutes of testimony a material witness who was used as a rebuttal witness but who gave only evidence in chief. We affirm.

The defendant was charged with first degree murder as a result of his alleged participation in the killing of an inmate at the Iowa State Penitentiary. The jury convicted defendant of murder in the second degree. Subsequently defendant filed a motion for new trial which trial court overruled. This appeal ensued. We will address the issues in the order raised by defendant's brief. Additional facts will be discussed where relevant to a particular issue.

I. Scope of Review. When a violation of constitutional rights is alleged on appeal, we make our own independent evaluation of the totality of the circumstances under which the applicable ruling was made, State v. Cullison, 227 N.W.2d 121, 126 (Iowa 1975); we review other issues on assigned error only. Iowa R. App. P. 4.

In reviewing the trial court's denial of a motion for new trial, we are governed by the principle that

> . . . the decision whether to grant a new trial rests [generally] within the sound discretion of the trial court, and that decision will not be distrubed on appeal unless the complaining party carries the heavy burden of proving that the trial court abused its discretion and prejudice resulted therefrom.

State v. Lindsey, 302 N.W.2d 98, 101 (Iowa 1981).

II. Alleged Prosecutorial Misconduct. Defendant first argues that the trial court erred in not granting a new trial where the prosecutor in closing argument stated to the jury: "The State as you have heard a number of times a week ago, must prove this case beyond a reasonable doubt—not beyond all reasonable doubt. Listen to the instruction, and you will get a copy of the instruction—doesn't say beyond all reasonable doubt, it says beyond a reasonable doubt." The State argues that defendant waived any error by failing to object at the time of argument. We find defendant failed to preserve error on this assignment.

"We have long held that error must be preserved as to final arguments before appellate review may be had." State v. Johnson, 272 N.W.2d 480, 484 (1978).

> In order to properly preserve for review in this court alleged error of counsel occurring during the course of jury argument it is the duty of the aggrieved party to call attention of the presiding judge to the alleged misconduct by timely objection and move by some proper procedure to give the trial court opportunity to correct the matter by admonition or further instruction or in the event the matter is sufficiently prejudicial by declaring a mistrial. It has been pointed out in several of our decisions that ordinarily where the aggrieved party does not object at trial to statements made by opposing counsel counsel in his closing argument and does not move for a mistrial due to the alleged misconduct either at the time an improper argument is made or at the close of the argument before submission of the case to the jury in those instances where the arguments are reported and constitute a part of the record such conduct indicates a willingness of counsel to take his chances on a favorable verdict and constitutes a waiver of the misconduct. Pose v. Roosevelt Hotel Company, 208 N.W.2d 19, 31 (Iowa 1973) and authorities cited.

State v. Phillips, 226 N.W.2d 16, 18-19 (Iowa 1975) (emphasis added).

In the present case, defendant made no objection to the State's argument at the time it was made. Nor did defendant move for a mistrial prior to the

submission of the case to the jury. After the jury returned a guilty verdict, defendant moved for a mistrial. Additionally, the trial court instructed on the proper standard of proof which should have negated any improper impact of the comment. Finding that defendant failed to preserve any assignment on this issue, we have nothing further to review.

III. Disclosure by State. Defendant next contends that the trial court erred in not granting a new trial based upon: 1) the State's failure to produce exculpatory evidence; and 2) the State's failure to produce the last name of a witness prior to trial. The State argues that defense counsel had knowledge of both prior to trial. We affirm the trial court.

A. Exculpatory evidence. Due process is generally violated when the prosecution fails to produce exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 86, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215, 218 (1963). "A prosecutor is charged with the responsibility of seeing that important evidence is not suppressed so as to deny accused a fair trial." State v. Niccum, 190 N.W.2d 815, 826 (Iowa 1971). The undisclosed evidence must be "material," not merely potentially or inferentially helpful to the defense. State v. Hall, 249 N.W.2d 843, 847 (Iowa 1977).

Prior to trial defendant filed a motion for discovery seeking exculpatory evidence. The trial court ordered that such exculpatory evidence be furnished. The order was entered more than six months before the trial took place on February 4, 1981.

At the trial Gary Davis, an inmate, testified that defendant had given clothing with blood on it and the murder weapon to him and had asked him to clean them and had made certain statements. Davis made similar statements regarding these matters to State agents prior to trial. Davis subsequently sent a letter to the prosecuting attorney retracting all statements and asserting that all statements were a result of pressure placed on him by state employees and that

the statements were totally false. At the hearing for new trial, defense counsel stated, with regard to the letter, "[t] hough a copy of that was not furnished by the State directly to the [defense] attorney, however, the defendant did, in fact, have a copy of this [document] as stipulated." The record further reveals that defendant had the letter in his possession as early as September, 1980, approximately five months before trial. When the court addressed defendant whether he actually had possession, defendant refused to make any further record.

Our focus is a narrow one. The issue is whether the State was obligated to inform defense counsel about information that defendant had in his possession which would be beneficial to his cause. We think not.

Relevant and material impeachment evidence may be exculpatory. Armento v. Baughman, 290 N.W.2d 11, 16 (Iowa 1980). The rules of criminal procedure relating to discovery, however, do not necessarily abrogate defense counsel's duty to make an independent investigation into the crime. Additionally, a defendant has a duty to assist counsel in the preparation of a defense.

In the present situation it appears that the breakdown of communication between the defendant and counsel was responsible for any error and not the State. Furthermore, defendant refused to make any additional record on the matter and relied solely upon a stipulation admitting knowledge of the document. Based upon our examination of the totality of the circumstances, we find no reversible error.

B. Name of Witness. Defendant claims error in that the State did not reveal the last name of a witness named "Jimmie." The State argues that the last name of "Jimmie" was known by defendant prior to trial.

At trial, Bruce Farris, another inmate, testified for the State that he overheard defendant and a co-defendant talking about the stabbing and strangling of the victim. During a deposition taken of Farris prior to trial he was asked who was with him at the time he overheard the conversation and Farris related that the person's first name was Jim but refused to give Jim's last name. The State did

not furnish defendant Jim's last name even though the last name was discovered in a related case.

At the time of trial, Farris was asked again who the individual was and he stated that the person's name was Jim but took the fifth amendment with respect to the person's last name. However, upon further cross-examination, the following colloquy appears in the testimony between Farris and defense counsel.

> Q. And remember I also asked you under the deposition which was given under oath on June 17, 1980, what his name was and you said that you took the Fifth Amendment on his full name; is that correct? A. That's correct.
>
> Q. And, so, I never did get that name from you, is that right, at least from you directly? A. No, You got it.
>
> Q. Well, I know I got it, but I didn't get it from you, though, did I? A. Yes, you did.
>
> Q. No, I didn't. A. You brought me in here and had the judge tell me.
>
> Q. That wasn't me, Mr. Farris, that was the attorney representing Mr. Frost, wasn't it?
>
> THE COURT: Mr. Hoffman, I'm wondering if we can have more questioning and less statements. (emphasis added)

Appendix at 5. "'In general there is no prejudicial error if the information withheld is otherwise in the possession of the defendant." State v. Hall, 249 N.W.2d 843, 848 (Iowa 1977). Furthermore, defendant claims prejudice from the "surprise" of learning the person's name at trial and yet requested no continuance. The court in State v. Love, 302 N.W.2d 115, 123, stated that "Defendant did not move for a continuance. He should not now complain that he lacked the time to investigate." We also note that Jimmy Holiday testified for defendant and denied that the conversation took place. We find no merit in defendant's contentions and accordingly affirm the trial court.

IV. Rebuttal Witness. Defendant argues that the State improperly used a witness in rebuttal which it should have used in its case-in-chief and that the State suppressed the identity and whereabouts of the witness.

The trial court's ruling admitting rebuttal testimony will be disturbed only upon a showing that its discretion was abused, State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978). There is no abuse of discretion where the court admits rebuttal testimony which should have been offered in chief and the testimony is not strictly rebuttal. State v. Miller, 229 N.W.2d 762, 770 (1975). This kind of evidence is admissible if it rebuts some of the evidence offered by defendant's witnesses. State v. Nelson, 261 Iowa 204, 153 N.W.2d 711, 714 (1967).

The defendant testified at trial that he witnessed the murder, but that he only walked by the body and murderer. William White was called as a rebuttal witness and testified that he overheard the defendant state the he had strangled and killed the victim. The State apparently had this information prior to trial, although White was not listed in the minutes of testimony. Defendant moved to strike White's testimony on the basis that a motion for discovery had been filed and that this information had never been given to defendant. The trial court overruled the motion.

The record reveals that White's testimony was relevant and contradicted the version of the crime offered by defendant. Admittedly, the State could have offered the testimony in its case-in-chief but we find no abuse in trial court's ruling admitting it as rebuttal evidence.

With regard to the identity and whereabouts of White, the record reveals that he was listed as a possible defense witness. Presumably, from such an indication, defense counsel had an opportunity to discuss the alleged crime with the witness. We find no error and, accordingly, affirm the trial court.

AFFIRMED.