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NOV 26 1985
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IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,) Filed November 26, 1985

vs.)

B. C. PENDLETON,) 5-450
84-1319

Defendant-Appellant.)

Appeal from the Iowa District Court for Scott County - Margaret S. Briles, Judge.

Defendant appeals his conviction of first degree murder and first degree robbery. **AFFIRMED.**

Kent A. Simmons of Liebbe & Simmons, Davenport, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Pamela Greenman Dahl, Assistant Attorney General; James L. Ottesen and Virginia Barchman, Assistant Scott County Attorneys; for plaintiff-appellee.

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

SCHLEGEL, J.

Defendant appeals his conviction of first degree murder and first degree robbery. We affirm.

Defendant Pendleton and an accomplice were convicted of robbing the St. Louis House tavern in the early morning hours of August 18, 1983, and in the process, shooting and killing Carol Stinger, the bartender. Although there were no eyewitnesses to these events, testimony from several State's witnesses concerning defendant's acts and statements after the murder convinced the jury that defendant was guilty. Defendant alleges, on appeal, that he was denied his constitutional rights of due process and a fair trial; and that his alleged common-law wife should not have been allowed to testify against him.

I. **Due Process and Fair Trial.** Frank Lingard, the owner of the St. Louis House tavern, testified that when he entered his place that night, he saw two black men dash out of the tavern and run up the street. He gave the police a general description of the two men and their clothing. Lingard later submitted to a polygraph examination, and during the examination he was asked the following question:

> Did you see two black males running out as you came into the tavern?
>
> Answer: Yes.

The examiner concluded that Lingard was not telling the truth when he answered the question above. When confronted about this apparent deception, Lingard explained that he had received information that one of the robbers might have been a Mexican rather than a black man.

Defendant filed a pretrial motion requesting "any statements . . . that are inconsistent with those statements made by the witnesses listed by the State of Iowa as potential witnesses in their minutes of testimony filed with the indictment in this cause." The motion also included a request for other

exculpatory evidence. The State responded by offering defense counsel the opportunity to view all of the prosecution files, which the defendant apparently did not do. The State did not inform defendant of Lingard's polygraph results.

Defendant alleges that he made a specific request for exculpatory evidence, and the refusal by the State to divulge the polygraph results denied him his constitutional rights of due process and a fair trial. The two primary thrusts of his appellate argument are that: (a) Lingard's testimony was untruthful and the State suppressed the polygraph results and yet allowed perjured testimony at trial; and (b) his request was specific, therefore reversal is required if "the evidence might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104, 96 S. Ct. 2392, 2398, 49 L. Ed. 2d 342, 350 (1976); State v. Hall, 249 N.W.2d 843, 847 (Iowa 1977).

We are not convinced that Lingard's testimony was untruthful. Lingard told the police and the examiner that because of rumors he'd heard, he considered the possibility that one of the two men he saw that night could have possibly been Mexican. The examiner told the assistant county attorney later that Lingard's explanation was entirely consistent with the results of the polygraph. Defendant cites a great deal of authority, in support of his argument, that involves known perjured testimony used by the State. Because we are persuaded that Lingard was not lying, but rather expressing his true beliefs at trial, defendant's authority is unpersuasive. We are likewise convinced that the polygraph results were not suppressed. The State offered its files to defendant. Evidence is not suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence. United States v. LeRoy, 687 F.2d 610, 618 (2d. Cir. 1982), cert. denied, 459 U.S. 1174, 103 S. Ct. 823, 74 L. Ed. 2d 1019 (1983); State v. Todden, 364 N.W.2d 195, 199 (Iowa 1985). The rationale underlying Brady v. Maryland, 373 U.S. 83, 83 S.

Ct. 1194, 10 L. Ed. 2d 215 (1963), is not to supply a defendant with all the evidence in the government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence only known to the government. United States v. LeRoy, 687 F. 2d at 619.

Defendant's request, set out above, asked for "any statements . . . that are inconsistent statements of the witnesses listed by the State." He added another request for "any physical evidence exculpatory in nature . . . ." The language and specificity of defendant's request is relevant to its materiality, if omitted from trial, and therefore is determinative of whether or not a constitutional right has been denied. See United States v. Agurs, 427 U.S. at 111-114, 96 S. Ct. 2401, 2402, 49 L. Ed. 2d at 354, 355; State v. Hall, 249 N.W.2d at 846, 847. Here the language of the request does not alert the State that defendant desires specific information. See Hall, at 847. The request therefore amounts only to a general request, and a constitutional violation occurs only where "the omitted evidence creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112, 96 S. Ct. at 2401, 49 L. Ed. 2d 354, 355; 249 N.W.2d at 847. "[T]he omission must be evaluated in the context of the entire record." 427 U.S. at 112, 96 S. Ct. at 2401, 49 L. Ed. 2d at 355. We are satisfied that the omission of the results of the polygraph test do not create a reasonable doubt that otherwise did not exist, when evaluated in the context of the entire record. We therefore affirm the trial court's decision that defendant was not denied due process and a fair trial.

II. **Testimony of Twana Harris.** Twana Harris testified at trial that defendant arrived at their home at approximately three or four a.m. the night of the robbery and murder. She stated he was shaking and sweaty and he told her he had just robbed a place and someone had been shot. She then saw the

bank bag, with approximately two hundred dollars in it, and the gun defendant had with him.

Defendant claims that Ms. Harris's testimony is privileged based upon his common-law marriage to her. In In re Estate of Dallman, 228 N.W.2d 187, 190 (Iowa 1975), the supreme court outlined the elements a party asserting such a relationship must prove.

> The elements and conditions necessary to establish the existence of a common-law marriage have been outlined by this court as: (1) intent and agreement in praesenti as to marriage on the part of both parties together with continuous cohabitation and public declaration that they are husband and wife; (2) . . . (3) all elements of relationship as to marriage must be shown to exist; (4) a claim of such marriage is regarded with suspicion, and will be closely scrutinized; (5) when one party is dead, the essential elements must be shown by clear, consistent and convincing evidence.

In particular there must be a general and substantial "holding out" or open declaration to the public of such relationship by both parties thereto. Id.

Defendant has failed to carry his burden of proof on this issue. Although they cohabitated for over nine years and occasionally referred to one another in public in terms implying a husband and wife relationship, their "holding out" was not sufficient for purposes of the privilege asserted here. See In re Estate of Dallman, 228 N.W.2d 187 (Iowa 1975). Twana never considered herself legally married to defendant. They were engaged but had not yet gone through with the ceremony. She never used his last name and always referred to defendant as her fiance.

We hold, therefore, that no common-law marriage existed upon which privilege could be asserted.

We affirm the trial court on both the constitutional issue and the privilege issue.

AFFIRMED.