IN THE COURT OF APPEALS OF IOWA

No. 0-576 / 99-373
Filed January 10, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONN MARCUS MOLLOY,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer Judge.

Defendant appeals following his conviction for first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

Defendant Jonn Marcus Molloy appeals following his conviction for first-degree murder. Molloy contends he was provided ineffective assistance of counsel due to counsel's failure to preserve error on the voluntariness of Molloy's *Miranda* rights waiver and his confession. Molloy also asserts he was deprived of constitutional and statutory rights by the trial court's failure to inform him and his counsel of a note from the jury expressing jury safety concerns. We affirm.

During the evening of August 3, 1998, Molloy and two friends, Thomas Bennett and Tony Vang, made plans to rob Terry Spradau, who lived in the same neighborhood as Molloy and had sold marijuana to the men before. Around 2:00 or 3:00 a.m. on the morning of August 4, Bennett asked the other two, "Are you ready?" and Vang replied, "Yes." Molloy and Vang wore black trench coats and bandannas over their faces. Molloy also carried a .22-caliber, pump-action rifle in a pool cue case tied under his arm.

Molloy, Bennett and Vang walked to Spradau's house. On the way, Bennett did the talking, saying he would enter Spradau's residence first. The other two were to wait five minutes and then come in. According to plan, Molloy and Vang waited until Molloy said it was time to go inside. Molloy entered the house and shot Spradau who was sitting on the couch. Bennett told Molloy to shoot Spradau several more times and Molloy complied. Spradau suffered four gunshot wounds, three of which were fatal and located in the head and neck area. The three men fled Spradau's house through the back door. While running down the alley, Bennett took the rifle from Molloy and threw it aside.

Police were led to Molloy by a friend of his who suspected he was

involved in Spradau's murder. On August 5, Lieutenant Randy Dawson of the Des Moines Police Department went to Molloy's house and told him he wanted to speak to him about the murder; Molloy agreed. Dawson also told Molloy that they needed to find the rifle. Molloy said, "Okay. I'll take you and show you where the gun is." The two men went to the alley and Molloy showed Dawson where Bennett had thrown the rifle. Later testing revealed that Molloy's rifle was the murder weapon. Dawson then took Molloy to the police station. He read Molloy his *Miranda* rights and gave him a rights form to read and sign. In the ensuing ten-minute interview, Molloy confessed that he, Bennett, and Vang went to Spradau's house to rob him and that he shot the victim several times.

Molloy filed a pre-trial motion to suppress his August 5 confession on the grounds that he had not effectively waived his *Miranda* rights and had not voluntarily confessed. This motion was overruled. Trial commenced on February 8, 1999. At trial, the State offered a tape recording of Molloy's confession. Molloy's counsel did not object to this evidence. The case was submitted to the jury on February 11. The jury returned a guilty verdict the next day.

Molloy now appeals. He asserts he was denied effective assistance of counsel because counsel failed to preserve error on his challenge to the voluntariness of his *Miranda* waiver and his confession. He also argues the trial court denied him his statutory and constitutional rights to be present at all stages of trial and to the assistance of counsel when the trial court failed to inform him and his attorney about a note to the judge from the jury expressing a juror's safety concerns.

I. Scope of Review. We review de novo the record concerning issues of voluntariness of confessions, making our own independent evaluation of the totality of the relevant circumstances. *State v. Vincik,* 398 N.W.2d 788, 789 (Iowa 1987). Claims of ineffective assistance of counsel are also afforded a de novo review. *State v. Oetken,* 613 N.W.2d 679, 683 (Iowa 2000).

II. Ineffective Assistance of Counsel. Molloy asserts that the waiver of his *Miranda* rights was not knowing, voluntary and intelligent. He also contends his confession was involuntary in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. These errors were initially preserved by Molloy's pre-trial motion to suppress. However, when the confession was offered at trial, defense counsel stated he had "no objection" to the evidence. The failure to renew the objection to the confession at trial waives error on the previous unsuccessful suppression challenge. *See State v. Terry,* 569 N.W.2d 364, 369 (Iowa 1997). Molloy contends his trial counsel's waiver of the error denied him effective assistance of counsel.

In determining whether trial counsel was ineffective, we look at "'whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence.'" *State v. Artzer,* 609 N.W.2d 526, 531 (Iowa 2000) (quoting *Snethen v. State,* 308 N.W.2d 11, 14 (Iowa 1981)). In order for Molloy to prevail, the record must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Artzer,* 609 N.W.2d at 531 (citation omitted). Prejudice is found where there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Id.* (citation omitted). Ordinarily, ineffective assistance of counsel claims are

reserved for postconviction relief actions. *Id.* (citation omitted). However, when the appellate record is sufficient to permit a ruling, we will address the claims on direct appeal. *Id.* We deem this record sufficient.

Molloy contends this was a case of police using standard isolation interrogation of a low-functioning youth to obtain a confession. He asserts Dawson's methods of having Molloy take him to the weapon and using leading questions during interrogation took advantage of Molloy's dependent nature, his below-average intelligence, and his propensity for impulsive behavior. However, we agree with the State that Molloy's confession was not subject to suppression either under *Miranda* or the Due Process Clause of the Fourteenth Amendment. Therefore, counsel breached no duty by failing to renew the objection to it at trial.

A. Miranda Waiver. The State bears the burden to prove by a preponderance of the evidence that a defendant knowingly, intelligently, and voluntarily waived his or her *Miranda* rights. *Vincik,* 398 N.W.2d at 789. A *Miranda* waiver is involuntary only when it is the product of police misconduct or overreaching. *State v. Countryman,* 572 N.W.2d 553, 559 (Iowa 1997). Molloy read and signed a waiver of rights; Dawson also verbally informed Molloy of his rights. A written waiver of constitutional rights is not alone sufficient to establish the waiver as knowing, intelligent, and voluntary. *Id.* However, it is usually strong proof of its validity. *Id.* Furthermore, the record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the waiver. Molloy was not worn down by abusive interrogation tactics, lengthy questioning, or deceit. The interrogation lasted approximately ten minutes and was conducted solely by Dawson who did not appear in uniform. He did not

make any threats or promises to Molloy. Molloy himself was not influenced by drugs or alcohol. Dawson testified that he believed Molloy understood the questions and was responsive.

Molloy points to the testimony of defense witness Dr. Dan Rogers, a clinical psychologist, to bolster his assertion that he was not capable of making an intelligent, voluntary waiver. Rogers testified that Molloy was of low-average intelligence but not retarded. He was somewhat "street smart" but less mature than most people his age (eighteen). Rogers also stated Molloy suffered from learning disabilities which made it difficult for him to understand material written at the level of *Miranda* rights. We do not find that learning disabilities alone can invalidate a defendant's waiver of *Miranda* rights. One of the State's witnesses, psychiatrist Dr. Michael Taylor, concluded Molloy was fully capable of comprehending his *Miranda* rights and knowingly waiving them. While Molloy has some mental deficiency, defendants with more severe deficiencies have been found capable of waiving their rights. *See, e.g., State v. Rhomberg,* 516 N.W.2d 803, 806-07 (Iowa 1994) (defendant was fifteen and had I.Q. of 80); *State v. Reid,* 394 N.W.2d 399, 401-04 (Iowa 1986) (defendant had I.Q. between 74 and 77 and had second-grade reading level). Since the waiver of *Miranda* rights was valid, the statements were admissible and there was no breach of duty in failing to preserve the objection at trial.

B. Due Process. Molloy also asserts his confession was involuntary within the meaning of the Due Process Clause of the Fourteenth Amendment. The State has the burden of establishing by a preponderance of evidence that a confession is voluntary. *State v. Brown,* 589 N.W.2d 69, 73 (Iowa App. 1998)

(citations omitted). In determining whether a confession is voluntary, we look at all the circumstances under which it was given. *Id.* (citation omitted). No one factor is determinative. *Id.* (citation omitted). We look at all of the following circumstances in determining voluntariness of confessions:

> . . . the defendant's age, experience, prior record, level of education and intelligence; the length of time the defendant is interrogated; whether physical punishment was used; defendant's ability to understand the questions; defendant's physical and emotional condition; whether any deceit or improper promises were used in gaining the admission; and any mental weaknesses the defendant may possess. . . . In the event the questioning was custodial, defendant's knowledge and waiver of his Miranda rights and the length of his detention would also be considered. . . .

Id. (quoting *State v. Davis,* 446 N.W.2d 785, 789 (Iowa 1989)).

Molloy points out that he was eighteen years old at the time of the police questioning. Although he had some 'street smarts,' he was basically immature and low functioning. He also had a significant learning disability and had failed several grades in school. In particular, according to Dr. Rogers, Molloy does not process information very well and will jump to conclusions before he can process information. Dr. Rogers also indicated Molloy suffered from depression and alcoholism. After a long evaluation of Molloy, Rogers concluded Molloy was dependent, impulsive, and easily pressured. Molloy contends police took advantage of these weaknesses by having him lead them to the weapon and asking leading questions during the interview.

We disagree. Molloy does have a learning disability. However, this alone cannot serve to invalidate a confession as involuntary. A defendant's mental subnormality is only a *single* factor for us to consider. *See Reid,* 394 N.W.2d at 402 (emphasis added). Alone, it is not sufficient to render a person incapable of

making a voluntary statement. *Id.* at 403. The same factors which show Molloy validly waived his *Miranda* rights also show he voluntarily confessed. He was interviewed for ten minutes by one officer in plain clothes. He was not subjected to threats, promises, or deprivations. There is no indication he was under the influence of drugs or alcohol. Because Molloy's confession was not subject to suppression on this ground, his counsel had no duty to renew at trial the pre-trial suppression motion. Counsel was not ineffective.

III. The Jury Note. The jury submitted several handwritten questions to the trial judge during deliberations. One of the notes to the judge from the jury's foreperson read: "I have a juror who is concerned about the safety of herself and all the jurors because of the location of the crime to this area. Can I talk to you?" The foreperson drew a smiley face at the bottom of the note. The crime scene was approximately ten to twelve blocks from where the trial was held. The trial court did not advise counsel or defendant of the note and did not communicate with the jury about the note. After the verdict was received, the court did advise the jury that a deputy would be available to escort them to their vehicles.

Molloy contends the trial court was required to consult with the defense to decide how to respond to the note. He asserts the safety concern was not strictly a jury management issue and there should have been inquiry into whether the safety concern had impaired the ability of the juror to render an impartial verdict. He further contends that he would have had the right to be present and receive the assistance of counsel at any hearing the court might have held on the issue. By failing to consult with the defense, Molloy claims the trial court violated his statutory and constitutional rights. The State argues that the court may deal with

jury management issues without consulting the parties. The State also maintains any error was harmless. This case raises two issues: (1) whether this was a jury management issue or an issue where the trial court was required to consult with defendant and his counsel; and (2) if the court was required to consult, whether it was also required to then respond to the question and inquire about the jurors' continued impartiality.

Iowa Rule of Criminal Procedure 18(5)(g) requires the presence of the defendant and counsel for both sides for certain jury communications:

> After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required may be given, in the discretion of the trial court. Where further information as to the testimony which was given at trial is taken by the jury, this shall be accomplished by the court reporter or other appropriate official reading from the reporter's notes. Where the court gives the jury additional instructions, this shall appear of record. Provided, that the procedures described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

The nature of the jury's question determines the procedure which is required. *State v. Griffin,* 323 N.W.2d 198, 200-01 (Iowa 1982). If the jury's question does not deal with a point of law or disagreement over trial testimony, then it does not fall within rule 18. *Id.* at 201. Questions dealing only with jury management may be decided by the trial court without the presence of the defendant or counsel. *Id.* (citation omitted). We need not decide whether this was a jury management issue or an issue falling within the purview of rule 18. Even if the court had consulted with defense counsel, we find no authority requiring the court to have addressed the jury, even if counsel had asked it to do so.

While we encourage trial courts to communicate with counsel on jury questions,[1] any alleged error in this case was harmless because it would have been well within the trial court's discretion to refuse to conduct the inquiry which Molloy suggests. *See State v. Atwood,* 602 N.W.2d 775, 780 (Iowa 1999). In *Atwood,* the court did communicate with jurors, but on appeal, the defendant claimed that communication did not go far enough. An anonymous caller made death threats against the trial participants. After consulting with the parties, the court informed the jurors of the threat. On appeal, the defendant argued that the court should have done more than mention the threat, it should have inquired of the effect the threat had on them. The Iowa Supreme Court rejected this argument, noting that the court's refusal to examine jurors was within its discretion and any question would have magnified the event and exacerbated any effect the threat had on jurors.

In very similar factual circumstances, federal courts have also indicated it is within a trial court's discretion to conduct such an inquiry when jurors express concern about their safety. For example, in *United States v. Thornton,* 1 F.3d 149 (3d Cir. 1993), a trial judge learned through his court clerk that some jurors had expressed "a general feeling of apprehensiveness about their safety." Defense counsel asked the court to conduct a colloquy to determine the basis of the apprehension and whether it would be impossible or difficult for the jurors to

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[1] As our supreme court has pointed out, It would be best for trial courts to conduct most matters involving jury inquiry in the presence of the defendant and counsel. *State v. Griffin,* 323 N.W.2d 198, 201 (Iowa 1982) (citations omitted). There is good reason for this practice. *Id.* It provides an adequate record on appeal; it allows counsel an opportunity to argue for or against the giving of additional information to the jury; and it gives the parties, both the defendant and the State, notice of the jury's request which otherwise might go undisclosed, *id.*, as it did in this case, necessitating a remand to obtain information about the note which was first discovered by Molloy's appellate counsel.

remain fair. The trial court refused. This decision was affirmed on appeal. The Third Circuit Court of Appeals noted that the trial court's discretion is especially broad in determining whether a colloquy should be held because "'[a] trial judge is usually well-aware of the ambience surrounding a criminal trial and the potential for juror apprehensions.'" *Id.* at 155 (quoting *United States v. Eufrasio,* 935 F.2d 553, 574 (3d Cir. 1991)). The Third Circuit also noted that questioning the jury could have made matters worse and exaggerated the jurors' apprehension. *Id.*

In the case at hand, there was no evidence the jury had been subject to any outside, improper influence. There was no indication the juror's concerns had affected her ability to be fair. The foreperson did not appear overly concerned since he drew a smiley face on the note. On the other hand, inquiry into the particular juror's apprehensions might well have exaggerated her fears, aroused fear in other jurors, and generally made the situation worse, as our supreme court observed in *Atwood.* The lack of consultation did not prejudice Molloy in any way because he had no right to question the jurors, even if there had been a consultation with counsel about the note. Therefore, we affirm his conviction.

AFFIRMED.