IN THE COURT OF APPEALS OF IOWA

No. 3-461 / 92-1095

FILED
DEC 29 1993
CLERK SUPREME COURT

000781

STATE OF IOWA,

Appellee,

vs.

MICHAEL DWAYNE HOLMES,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

The defendant appeals his conviction, following a jury trial, of first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, Thomas N. Bower and Peter B. Newell, Assistant County Attorneys, for appellee.

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

SCHLEGEL, J. 000782

The defendant, Michael Dwayne Holmes, appeals his conviction, following a jury trial, of first-degree murder. He argues: (1) Iowa should adopt the independent felony rule to the felony murder doctrine; and (2) the district court erred in failing to strike the jury panel, alleging a portion of the panel was selected on a nonrandom basis.

On November 13, 1991, Holmes went to a tavern with his friend, Deshone Outlaw. Outlaw got into an argument with Patrick Adams, and Adams was asked to leave. Several hours later, at closing time, Adams returned to the tavern and attempted to coax Outlaw into fighting him. Outlaw borrowed a handgun from Holmes. According to some witnesses, Outlaw told Adams that Outlaw would not fight Adams, but would shoot Adams instead. In the parking lot outside the tavern, Adams and Outlaw taunted each other with insults. When Outlaw handed the gun back to Holmes, Adams began taunting Holmes and daring him to shoot. Holmes shot Adams five times.

The State charged Holmes and Outlaw with murder in the first degree in violation of Iowa Code section 707.2(1) (1991). Before trial, the State was permitted to amend the trial information and to charge Holmes and Outlaw in the alternative under section 707.2(2), felony murder.

Holmes made a pretrial motion challenging the demographics of the jury pool. At a hearing, one of the three jury commissioners testified that in a conscious

effort to increase the number of African-Americans in the jury pool she drew up her jury list from African-American church membership lists. The jury commissioner then added the names of individual African-Americans her mother knew. The district court overruled Holmes' challenge because the jurors were randomly selected out of the total pool and only one-third of the pool had been skewed.

The trial court instructed the jury on alternative theories of premeditated murder and felony murder predicated upon willful injury as the underlying felony. The jury convicted Holmes of murder in the first degree and Outlaw of murder in the second degree. Holmes appeals. We affirm. Our review of district court decisions regarding jury instructions is generally for an abuse of discretion. State v. Kimball, 176 N.W.2d 864, 869 (Iowa 1970); State v. Cunningham, 463 N.W.2d 887, 889 (Iowa App. 1990).

Holmes first contends the Iowa courts should adopt an independent felony rule to the felony murder doctrine of Iowa Code section 707.2(2) (1991). Specifically, the defendant asks this court to rule that the felony murder doctrine should not apply where the underlying felony is a felonious assault, such as willful injury. He contends an independent felony rule should be adopted under which the appropriate predicate felonies would include robbery, burglary, sexual abuse, and other felonies which are not solely of an assaultive nature and which are not an integral part of the homicide.

The Iowa Supreme Court has previously and unequivocally rejected contentions similar to those made by the defendant. See State v. Ragland, 420 N.W.2d 791, 793 (Iowa 1988) (willful injury may constitute basis for murder felony conviction); Heaton v. State, 420 N.W.2d 429, 430-31 (Iowa 1988) (willful injury may constitute underlying felony for felony-murder conviction); State v. Mayberry, 411 N.W.2d 677, 682 (Iowa 1987) (assault with intent to commit sexual abuse sufficient to support finding of felony murder); State v. Beeman, 315 N.W.2d 770, 777 (Iowa 1982) (legislature intended that felonious assaults, including willful injury, be felonies that may serve as the basis of a felony-murder and that the merger doctrine does not apply to such assaults).

In Beeman, the supreme court stated:

> Defendant contends that the giving of the felony-murder instruction based on willful injury was improper. The basis for defendant's contention is that the principle of merger prevents the use of felonious assault as the felony underlying a felony-murder instruction. We are not so persuaded.

Id. at 776. The supreme court reaffirmed its position in Ragland:

> Defendant challenges the application of the felony-murder rule to the instant case. He urges that the underlying felony of willful injury cannot be used to support the felony-murder charge under the merger doctrine and the independent felony rule. We do not believe that these arguments are consistent with our legislative scheme.
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> We see no reason to retreat from our previous decisions.

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Ragland, 420 N.W.2d at 793.

The Iowa Supreme Court has clearly rejected the argument advanced by the defendant that the elements of a felonious assault should be deemed to have merged with the elements of murder and that such an assault should not, therefore, be used as the predicate or underlying felony for a first-degree murder conviction based on felony murder. Iowa does not apply the "merger doctrine" or the "independent felony rule." We find the defendant's argument to be misplaced.

Next, Holmes contends one of the three Black Hawk County jury commissioners did not use a random procedure when compiling the portion of the list of potential jurors for which that commissioner was responsible. One of the jury commissioners testified that the commissioners were charged by the district court to select a jury reflecting differences in ages, occupations, geographical differences, and minorities in an effort to achieve equal representation across the board of people that could serve on the jury.

To accomplish that end the commission utilized voter registration lists, the Cedar Falls City Directory, the telephone directory, driver's license lists, and the University of Northern Iowa student directory. The jury commissioner about which the defendant complains also relied upon her mother, "who knew a lot of the parents, the children that were out of my range kind of," as well as her son, "who got around a lot and he knew a lot of people."

The record reveals that the one-third portion of the jury pool which this jury commissioner was responsible for compiling was not chosen randomly.

The total list compiled by the three jury commissioners contained 7,500 names. From this list, the clerk of court, the auditor, and the recorder selected 500 names at random for summoning persons for jury service. The defendant argues African-Americans were handpicked purposely by the jury commissioner for inclusion in the jury pool. He contends this procedure violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Iowa Code section 607A.1 (1991).

However, we find the applicable constitutional rule in the present case to be the Sixth Amendment requirement that the petit jury be drawn from a jury pool which reflects a fair cross section of the community. See State v. Watkins, 463 N.W.2d 411, 414 (Iowa 1990). When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Although the Sixth Amendment does prohibit the exclusion of members of a distinctive group in an amount which is not fair and reasonable in relationship to the members of that group in the community, it does not

prescribe a detailed code of procedure as to how juries shall be drawn consistent with the fair cross-section requirement. See Taylor v. Louisiana, 419 U.S. 522, 537-38, 95 S. Ct. 692, 701, 42 L. Ed. 2d 690, 702 (1975); State v. Williams, 243 N.W.2d 658, 662 (Iowa 1976). The Sixth Amendment regulates the result of drawing a jury from a jury pool; it does not regulate every detail of the process of compiling the jury pool itself. The defendant makes no attempt, in terms of the Sixth Amendment's fair cross-section requirement, to demonstrate any significant underrepresentation of a distinctive group in the jury pool, and we find none.

The defendant also claims the jury selection procedure violated Iowa Code section 607A.1 (1991). This section provides in relevant part: "It is the policy of this state that all persons be selected at random from a fair cross-section of the population of the area served by the court . . . ." Having reviewed the record in the present case, we find no violation of this provision under the facts of this case. While it is true that one of the jury commissioners engaged in nonrandom procedures in compiling the list of one-third of the 7,500 prospective jurors from which Holmes' jury was ultimately picked, we find the pool of prospective jurors constituted a fair cross section of the population of Black Hawk County.

The parties stipulated at the hearing held to address the defendant's jury challenge that the 500 people selected

from the prospective juror pool were chosen randomly. Therefore, we conclude that the jurors ultimately chosen to serve on Holmes' jury were in fact "selected at random from a fair cross section of the population of the area served by the court." Accordingly, we do not agree with the defendant's contention that the selection procedure violated section 607A.1.

Therefore, we affirm the defendant's conviction for first-degree murder in accordance with the above discussion.

AFFIRMED.