IN THE COURT OF APPEALS OF IOWA

No. 2-472 / 91-1391

STATE OF IOWA,

Appellee,

vs.

ALFRED E. MYRE,

Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, Charles S. Smith III, Judge.

Myre appeals his conviction, following a jury trial, of murder in the second degree. **AFFIRMED.**

Drew H. Kouris, Council Bluffs, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Richard D. Crowl, County Attorney, and Charles J. Stolz, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

**HAYDEN, P.J.**

On March 9, 1991, Alfred Myre, Gary Carberry, Daniel Gilley, and Patrick Hall decided to go "four-wheeling" in a wooded area near the Missouri River. They stopped for gas, beer, and whiskey. After four-wheeling for some time in Carberry's truck, Carberry and Gilley got into a verbal argument. Carberry stopped the truck, and a fistfight ensued. At some point, Myre began fighting with Gilley as well. Gilley died from multiple head wounds received during the struggle. Hall eventually escaped from Myre and Carberry after viewing the incident.

The State charged Myre and Carberry with the first-degree murder of Gilley and the attempted murder of Hall. The district court granted a motion to sever their trials. Hall agreed to be a witness for the State in exchange for his immunity. Carberry's trial began before Myre's trial, and the jury convicted Carberry of first-degree murder and attempted murder.

Prior to his trial, Myre filed a motion in limine seeking to prevent, inter alia, the State from introducing portions of Carberry's trial testimony into evidence. Myre alleged Carberry's testimony constituted inadmissible hearsay, completely lacked any indicia of reliability, and violated his right to confrontation. Myre also sought to prevent the State from introducing any evidence concerning a previous, unrelated fistfight he had had with Gilley on a prior occasion. The trial court denied these portions of the motion in limine.

At trial, Hall testified the verbal exchange between Carberry and Gilley lead to a fistfight. Myre joined in, and he and Gilley rolled down an embankment to the river's edge. Hall then saw Carberry hit Gilley with a large branch and kick him in the face and head. He also saw Carberry hit Gilley with at least one rock. Hall testified, in alleged contradiction of a prior sworn statement, he observed Myre throwing rocks at Gilley as well.

The trial court admitted the evidence of Myre's previous fight with Gilley and portions of Carberry's trial transcript testimony. The court also allowed the jury, over Myre's objection, to view a picture of Myre as he looked at the time of the incident. The court denied several motions for mistrial based upon prosecutorial misconduct.

Myre testified he only landed one punch and his role in the battle ended when he and Gilley rolled down the bank. He denied hitting Gilley with any branches or rocks.

At the end of all evidence, the trial court refused Myre's proposed instruction on "reasonable doubt" and gave a different version over Myre's objection. The court also refused the jury's request, during deliberations, for equipment necessary to view a videotape exhibit.

On August 7, 1991, the jury found Myre guilty of second-degree murder and not guilty on the attempted murder count. The trial court denied Myre's motion for new

trial. On September 4, 1991, the court entered judgment and sentenced Myre to an indeterminate prison term not to exceed fifty years. Myre appeals.

I. Testimony of Co-defendant.

At trial Myre called several inmate-witnesses who claimed Carberry admitted to them he had killed Gilley himself. Myre contends the trial court erred in admitting into rebuttal evidence portions of Carberry's trial testimony. Carberry had exercised his Fifth-Amendment right and was unavailable for purposes of the confrontation clause. State v. Kellogg, 385 N.W.2d 558, 560 (Iowa 1986) (citations omitted).

The defendant "opened the door" for the admission of Carberry's testimony by calling witnesses who testified Carberry claimed he was solely responsible for the death of Gilley. The limited portions of Carberry's testimony were properly admitted as rebuttal testimony. The trial court has considerable discretion in admitting rebuttal evidence. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978) (citation omitted). Its ruling will not be disturbed in the absence of a clear abuse of discretion. Id.

The trial court took precautions to limit the jury's consideration of Carberry's testimony. The court cautioned the jury it could consider Carberry's testimony for testing "the credibility of statements attributed to Gary Carberry in this trial" by the defense's inmate-witnesses.

The court properly limited the use of Carberry's testimony and admitted it into evidence. We hold the admission of this evidence did not violate defendant's constitutional rights. See Tennessee v. Street, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985). We affirm the decision of the trial court.

II. **Jury Instruction on Reasonable Doubt.**

The trial court instructed the jury on reasonable doubt as follows:

> The burden is on the State to prove the defendant guilty beyond a reasonable doubt.
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
>
> But if, after a full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.

Myre contends the reasonable doubt instruction was inadequate because it failed to set out a standard for measuring the reasonableness of the jurors' doubt.

The jury instruction given at trial is not exactly similar to Iowa Criminal Jury Instruction 100.10. However, no particular model or form is required in advising the jury concerning the meaning of reasonable doubt as long as a suitable standard is given. State v. Finnegan, 237 N.W.2d 459, 460 (Iowa 1976) (citing State v. McGranahan, 206 N.W.2d 88, 91, 92 (Iowa 1973)). The instruction sets out a suitable standard by using "firmly convinced."

An error in instructing the jury does not necessitate reversal unless it is prejudicial. State v. Gibb, 303 N.W.2d 673, 686 (Iowa 1981). Even if there was an error in the definition it could not have been prejudicial. See State v. Harris, 97 Iowa 407, 410 (1896). The trial court's instruction does not constitute reversible error. We affirm the trial court on this issue.

**III. Viewing Evidence During Jury Deliberations.**

Evidence shows the jury, after beginning its deliberations, requested to view a videotape of the murder scene. Myre argues the trial court abused its discretion in refusing the jury access to equipment used for viewing videotape.

Iowa Rule of Criminal Procedure 18(5)(3) provides the submission of exhibits to the jury is in the trial court's discretion. Iowa R. Crim. P. 18(5)(e); State v. Baumann, 236 N.W.2d 361, 366 (Iowa 1975) (trial court has considerable discretion to either grant or deny submission of exhibits to jury); State v. Jackson, 387 N.W.2d 623, 629 (Iowa App. 1986) (citations omitted).

Appropriate considerations in the exercise of this discretion are:

> (i) whether the material will aid the jury in a proper consideration of the case;
> (ii) whether any party will be unduly prejudiced by submission of the material; and
> (iii) whether the material may be subjected to improper use by the jury.

Jackson, 387 N.W.2d at 629 (quoting State v. Thompson, 326 N.W.2d 335, 337 (Iowa 1982) (citation omitted)). Reversal is warranted only if the trial court abuses its discretion and prejudice results. See State v. Shea, 218 N.W.2d 610, 615-16 (Iowa 1974). In order to show an abuse of discretion, the defendant must prove the judge's discretion "was exercised on grounds clearly untenable or to an extent clearly unreasonable." State v. Hicks, 277 N.W.2d 889, 893 (Iowa 1979) (citation omitted). We hold defendant was not prejudiced as a result of the trial court's denial.

Defense counsel also objected to allowing the jury to view the videotape in the jury room. Defense counsel would only agree to a replaying of the videotape if the jury was returned to the courtroom and the audio tape was played simultaneously.

We hold the trial court did not abuse its discretion in denying the jury's request to view the videotape during deliberations.

IV. **Prosecutorial Misconduct.**

Myre raises several incidents of alleged prosecutorial misconduct. He contends the trial court erred in overruling his three motions for mistrial regarding some of these alleged incidents of misconduct. In order to be granted a mistrial based on prosecutorial misconduct, defendant must prove misconduct on part of the prosecutor and such misconduct prejudiced defendant. State v. Barrett, 445 N.W.2d 749, 753 (Iowa 1989) (citation

omitted). Prosecutorial misconduct does not require a new trial unless it appears to have been so prejudicial as to deprive the defendant of a fair trial. State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982) (citations omitted). The trial court has considerable discretion in determining whether a mistrial is warranted. Id.; State v. Mattingly, 220 N.W.2d 865, 870 (Iowa 1974) (citations omitted). The general rule is improper testimony or prosecutorial inquiry is not unduly prejudicial if the court admonishes the jury. State v. Burrell, 255 N.W.2d 119, 122 (Iowa 1977) (citing Mattingly, 220 N.W.2d at 871). Only in exceptional cases in which the prejudicial effect of the testimony cannot be eliminated will such an admonition be insufficient. Williams, 315 N.W.2d at 56; Mattingly, 220 N.W.2d at 870-71.

A. At trial Myre objected to a question posed by the county attorney, claiming he was improperly inquiring into the defendant's character. Defendant also objected when the county attorney also questioned Gilley's mother regarding Myre's feelings about the relationship between Gilley and Hutton. Both of defendant's objections were made prior to the witnesses' answers. The trial court sustained both objections.

The defendant has not persuaded this court the questions were so prejudicial as to deprive him of a fair trial. We affirm the trial court.

B. Defendant contends the trial court erred in refusing to grant a mistrial after Detective Lyle Brown testified concerning a matter which had been suppressed by a motion in limine. Defendant objected when Brown testified Hall feared for his life.

The trial court judge sustained defendant's objection and admonished the jury to disregard the witness's answer. Improper testimony or prosecutorial inquiry is not unduly prejudicial if the court admonishes the jury. Burrell, 255 N.W.2d at 122 (citing Mattingly, 220 N.W.2d at 871).

We do not find the question asked by the county attorney so inflammatory or prejudicial as to cause a jury to disregard the court's instruction. We find no abuse of discretion in the trial court's denial of a mistrial.

C. Myre alleges the State attempted to shift the burden of proof to defendant while questioning Detective Brown regarding the boots worn by defendant on the day of the murder. The trial court sustained defendant's objection but overruled defendant's subsequent motion for mistrial on this question.

The defendant has not persuaded this court the question was so prejudicial as to deprive him of a fair trial. The trial court did not abuse its discretion in denying a mistrial. We affirm the trial court on this issue.

D. Myre also contends the trial court erred in refusing to grant a mistrial after Melissa Hutton, a former girlfriend of Myre's, testified concerning a matter which

had been suppressed by a motion in limine. Defendant alleges Hutton improperly referred to Myre's previous incarceration.

The record shows the State asked how close Hutton and Myre were in their relationship. The witness's answer, which was cut off by defense counsel's objection, does not reveal any information of Myre's incarceration or refer to it. Later in her testimony the county attorney asked Hutton how long she had lived with Myre. In response, Hutton began to explain they lived together "off and on, because he [Myre] had just got out of a facility." At that point defendant objected, and proceedings were held outside the presence of the jury. The county attorney advised Hutton not to refer to Myre's incarceration. The question posed to Hutton does not constitute misconduct which warrants a reversal; Hutton's inclusion of "facility" was unsolicited. Later defendant admitted he had prior felony convictions.

We hold the trial court properly denied defendant's motion for mistrial. We affirm the trial court on this issue.

E. At trial the county attorney asked Hutton if she and Myre ever discussed the events which occurred on the day of Gilley's death. Defendant objected, claiming there was nothing in the minutes of testimony to apprise him of such testimony. The county attorney, however, chose not to continue with questioning. We hold defendant was not prejudiced by this question. We affirm on this claim.

We have concluded none of the alleged acts of prosecutorial misconduct were so prejudicial individually as to deprive defendant of a fair trial. We reach the same conclusion after considering the effect of this conduct in sum. "It is not a prosecutor's misconduct which entitles defendant to a new trial; it is the prejudice which results therefrom and which prevents the trial from being a fair one." Williams, 315 N.W.2d at 57 (State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976)). There is substantial evidence of Myre's guilt, which may be taken into consideration when considering the prejudicial effect of alleged prosecutorial misconduct. Webb, 244 N.W.2d at 333. We find no abuse of discretion on part of the trial court.

V. Previous Relations between Defendant and Victim.

Myre contends the trial court erred in admitting evidence he and Gilley engaged in a fistfight approximately six weeks before Gilley's murder. Hutton and Gilley's mother provided testimony regarding the fight.

The determination of whether evidence is relevant is largely one for the trial court. State v. Kellogg, 263 N.W.2d 539, 542 (Iowa 1978); State v. Plowman, 386 N.W.2d 546, 549 (Iowa App. 1986). Such a determination is reversible only if the trial court abuses its discretion. Plowman, 386 N.W.2d at 549 (citing Kellogg, 263 N.W.2d at 542).

Our courts have recognized an exception to Iowa Rule of Evidence 404(b) regarding the admissibility of evidence of other bad acts. Id. The exception allows the prosecution to show prior relations between the accused and the victim to show malice aforethought. Id. (citing State v. Johnson, 318 N.W.2d 417, 438 (Iowa), cert. denied, 459 U.S. 848 (1982)); see also Kellogg, 263 N.W.2d at 542; State v. Cole, 63 Iowa 695, 697, 17 N.W. 183, 184 (1883); State v. Moelchen, 53 Iowa 310, 314, 5 N.W. 186, 189 (1880).

> Evidence of the relations existing between the defendant and the victim prior to the crime is relevant. Thus, it may be shown that the defendant and the victim had prior quarrels; that the defendant had committed acts of violence upon the victim shortly before the commission of the crime; or that the defendant had repeatedly mistreated the victim.

1 Charles E. Torcia, Wharton's Criminal Evidence § 137, at 581 (14th ed. 1985) (citations omitted).

In the present case the six-week lapse between the similar violent act between the victim and defendant and the murder was not so remote as to bar admissibility. See State v. Emerson, 375 N.W.2d 256, 260 (Iowa 1985). We determine there was no abuse of discretion in admitting testimony regarding the previous fight between the victim and defendant.

**VI. Photograph of Defendant.**

Defendant contends the trial court erred in admitting a photograph of him which was taken at the time of his arrest. The photograph depicts defendant with longer hair, a mustache, and wearing a bandanna around his head.

A photograph of defendant taken at the time of his arrest is normally relevant to the issue of identification. State v. Ostrand, 219 N.W.2d 509, 513 (Iowa 1974). Myre argues identity was not at issue. The record, however, shows defendant questioned Hall as to whether it was him or Carberry he witnessed beating Gilley. Defendant made identification an issue.

Even if the photograph should not have been received in evidence, its admission in itself does not constitute reversible error. Id. We would not reverse based on the admission of this photograph because the trial court has considerable discretion in such matters. Id. (citing State v. Youngbear, 202 N.W.2d 70, 71 (Iowa 1972)). There is nothing inflammatory or prejudicial about the photograph. We affirm the trial court on this issue.

**AFFIRMED.**