IN THE COURT OF APPEALS OF IOWA

No. 0-424 / 89-0875

FILED
FEB 26 1991
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

475

ROBERT DARNELL WISE,

Appellant.

Appeal from the Iowa District Court for Scott County, J. L. Burns, Judge.

Wise appeals his conviction, following a jury trial, for second-degree robbery. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, Acting State Appellate Defender, and Andi S. Lipman, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Amy M. Anderson, Assistant Attorney General; and William E. Davis, Scott County Attorney, for appellee.

Considered en banc.

SACKETT, J.

Defendant Robert Darnell Wise appeals his conviction of robbery in the second degree. He contends: (1) certain evidence should be suppressed because it was the result of a warrantless search, (2) the trial court should not have admitted certain evidence, (3) there was not sufficient evidence to support the verdict, and (4) defendant was denied his right to be present at all stages of trial. We affirm the trial court on all issues except the exclusion of defendant from parts of the trial. We affirm in part, reverse in part, and remand for new trial.

A pizza delivery person delivering an order to 206 E. 12th Street in Davenport, Iowa, claimed when leaving his car to make the delivery he was approached by two men. One man pulled what appeared to be a small pistol and demanded money. The other man took the pizzas and $42 in cash. Defendant was later located in the upstairs story of a duplex at 302 E. 13th Street on the night of the robbery. Both halves of the duplex were searched. The search of the upper half of the duplex yielded, among other things, $28 in cash, three jackets and two pizza boxes, which were later identified as the stolen pizza boxes by the delivery labels attached. Jodi Suiter, the tenant in the upper duplex consented to the search.

Defendant filed a motion to suppress evidence seized as a result of the search of Suiter's unit. Defendant claims the search which was warrantless violated his right to be

free from unreasonable searches and seizures under both the United States and Iowa Constitutions. See U.S. Const. amend. IV and Iowa Const. art. I, § 8. These constitutional sections encompass the same protections. We find them identical in scope and purpose. See State v. Boley, 456 N.W.2d 674, 677 (Iowa 1990). In assessing alleged violations of constitutional rights, we make an independent evaluation of the totality of the circumstances as shown by the entire record. Boley, 456 N.W.2d at 677.

The fourth amendment protects an individual's legitimate expectations of privacy from government intrusion. State v. Flynn, 360 N.W.2d 762, 764 (Iowa 1985). The question on which we focus is whether defendant had a constitutionally protected reasonable expectation of privacy in Suiter's duplex unit. The trial court concluded defendant did not.

An overnight guest has a legitimate expectation of privacy in his or her host's home. Minnesota v. Olson, 110 S. Ct. 1684 (1990). This expectation of privacy has not been extended to a casual visitor. United States v. McNeal, 735 F.Supp. 738, 742 (N.D. Ohio 1990). Defendant was a guest of the tenant of the lower duplex unit. He was there to attend a birthday party. While defendant attempts to establish an expectation of privacy in Suiter's unit as an occasional overnight guest, he does not claim he was an overnight guest on the night in question. He does not claim to have an intimate relationship with Suiter. He did

not have clothes or other personal belongings at Suiter's residence.

The trial court was correct in finding defendant did not have a reasonable expectation of privacy. Suiter consented to the search. Defendant had no standing to challenge the consent. We affirm the trial court on this issue.

Defendant contends the trial court abused its discretion in admitting photographs of three jackets seized during the search. Defendant contends the photographs were not relevant. The second person charged with the robbery admitted the jackets were his and he wore one during the robbery. A citizen who saw two men running near the robbery scene testified the jackets looked familiar. The question of whether the evidence was relevant is within the discretion of the trial court. We will reverse only if that discretion has been abused. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984). We find no abuse of discretion in the admission of the photos.

Defendant argues there is insufficient evidence to establish he was one of the robbers. Our standard of review on this issue is clearly established. See State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987).

The victim described the robbers to the police shortly after the incident and several hours later picked defendant's picture from a five-picture array, and he said

he was certain the chosen picture was of one of the robbers. The victim also identified the pizza boxes found in the duplex as the ones stolen. He identified the gun seized as looking like the one used in the robbery.

A neighbor in the area saw two men running in the area of the robbery with something under their coats. He saw them enter Suiter's duplex at 302 E. 13th. A fifteen-year-old boy admitted the robbery and initially told police defendant participated in the robbery with him. There is sufficient evidence to support the conviction.

Defendant contends he was denied the right to be present at all stages of the trial. Defendant was arrested at the apartment of Jodi Suiter. At trial, Suiter testified for the State. She testified about the search. She also testified she had known the defendant for three to five years and at times he stays at her home. After Suiter's testimony, the following proceedings were held in the court's chambers. Defendant was not made aware of the proceeding.

> (. . . The following proceedings were held in the Court's chambers. Present were Assistant County Attorney Pries, Attorney Tyler and Juror Jerome Arguello.)
>
> THE COURT: This is in the case of State of Iowa vs. Robert Darnell Wise, No. 137582. We are in chambers, both sides represented by counsel. I don't know if you want your -- I don't think we want the defendant in at this particular time.
>
> MS. TYLER: I don't think he needs to be here.
>
> THE COURT: What is your name, sir?

MR. ARGUELLO: Jerry Arguello.

THE COURT: And I believe that you mentioned to the court attendant that you did recognize or had some knowledge of one of the witnesses?

MR. ARGUELLO: When I heard testimony, Judge, then I knew who she was.

THE COURT: And that was who?

MR. ARGUELLO: Jodi Suiter.

THE COURT: And what do you know about her?

MR. ARGUELLO: She's either the ex-wife of my nephew -- I don't know whether they are still married or not. I believe she said she was still married.

* * *

THE COURT: Either of you want to ask Mr. Arguello anything?

MR. PRIES: State has no problem. State has no objection.

MS. TYLER: Just one small question.

Then you have never even had any personal conversation with her?

MR. ARGUELLO: No just the twins and the name Dennis Suiter, that rang a bell.

MS. TYLER: Defense has absolutely no problem at all with this.

THE COURT: We appreciate you bringing that to our attention and being candid. And you understand why we had to ask about it?

MR. ARGUELLO: Yes.

THE COURT: Okay, very good, sir, you may go back to the jury room. Thank you very much.

Defendant contends he had a right to be present at the hearing and the right could not be waived by defense counsel.

A defendant in a felony case has a right to be present at every stage of his criminal trial, from the selection of the jury through the return of the verdict. Iowa R. Crim. P. 25(1); State v. Foster, 318 N.W.2d 176, 179 (Iowa 1982). This right stems from the defendant's sixth amendment right to confrontation and his fourteenth amendment right to due process. See U.S. Const. amend. VI and amend. XIV; Iowa Const. art. I, §§ 9 and 10; State v. Meyers, 426 N.W.2d 614, 616 (Iowa 1988); State v. Anderson, 308 N.W.2d 42, 49 (Iowa 1981); State v. Gruber, 281 N.W.2d 636 (Iowa 1979). The right arises whenever the court communicates with the jury. State v. Blackwell, 238 N.W.2d 131, 136 (Iowa 1976).

A defendant has a constitutional right to be present during the court's examination of jurors in determining whether the jurors' ability to be fair and impartial has been affected during the trial. Blackwell, 238 N.W.2d at 136; see also State v. Epps, 313 N.W.2d 553, 556, n. 1 (Iowa 1981) (examination of an alternate juror by trial court is stage of trial within meaning of rule 25(1)). In Blackwell, the court noted an examination of the jury to ascertain its impartiality requires the defendant's presence since such a determination is extremely important to the defendant's right to a fair trial. Id at 137.

In State v. Snyder, 223 N.W.2d 217, 221 (Iowa 1974), the presence of the accused is of importance since he or she may be able to suggest to the court or his or her counsel some information that would throw additional light on his or her defense. Id. The defendant should also be present so that he or she may except to the ruling of the court. Id. at 221.

The failure of a defense attorney to protest a defendant's right to be present does not necessarily serve as a waiver of the right. See State v. Foster, 318 N.W.2d 176, 187 (Iowa 1982). The presence of the defendant's counsel does not eliminate the prejudice caused by the defendant's absence. Snyder, 223 N.W.2d at 221.

The absence of the defendant gives rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows there is no prejudice to the defendant. See State v. Meyers, 426 N.W.2d 614, 616 (Iowa 1988); State v. Griffin, 323 N.W.2d 198, 201 (Iowa 1982). The burden is on the State to demonstrate the constitutional violation was harmless beyond a reasonable doubt. See Meyers, 426 N.W.2d at 616. The State has not demonstrated the violation was harmless beyond a reasonable doubt.

Defendant associated with Suiter and had had a relationship with her. The juror discovered Suiter had been married to a relative. The juror obviously had some opinion of Suiter, and the opinion may have colored his

opinion of persons she associated with. The juror was obviously a conscientious person who didn't want his knowledge to affect the outcome of the trial or be perceived as affecting that outcome. He obviously was bothered by this information.

It is possible to say that it may have made no difference in the court's ruling on the qualification of the juror whether the defendant was present or not, but we cannot predict that it would not have affected the court's ruling beyond a reasonable doubt. We will not strain to find forgiveness for the violation of a rule. To do so would have the effect of encouraging lack of compliance with the rule.

Costs are taxed one-half to the State and one-half to defendant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.

All judges concur except Donielson and Habhab, JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent. I disagree with the majority's conclusion that defendant's conviction must be reversed and a new trial must be granted. Our supreme court has indeed recognized that the defendant has a statutory and constitutional right to be present during the court's examination of jurors in determining whether their ability to be fair and impartial had been affected. See State v. Blackwell, 238 N.W.2d 131 (Iowa 1976). The majority omits the following bolded portions of the interaction between the court and the juror which I find important to our determination:

> (. . . The following proceedings were held in the Court's chambers. Present were Assistant County Attorney Pries, Attorney Tyler and Juror Jerome Arguello.)
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> THE COURT: This is in the case of State of Iowa vs. Robert Darnell Wise, No. 137582. We are in chambers, both sides represented by counsel. I don't know if you want your -- I don't think we want the defendant in at this particular time.
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> MS. TYLER: I don't think he needs to be here.
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> THE COURT: What is your name, sir?
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> MR. ARGUELLO: Jerry Arguello.
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> MR. ARGUELLO: When I heard testimony, Judge, then I knew who she was.
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> THE COURT: And that was who?
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> MR. ARGUELLO: Jodi Suiter.
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> THE COURT: And what do you know about her?
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> MR. ARGUELLO: She's either the ex-wife of my nephew -- I don't know whether they are still married or not. I believe she said she was still married.
>
> **THE COURT: Okay.**
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> **MR. ARGUELLO: Now, I have never -- she didn't know me and I didn't know her, and until I heard about the twins, which I remember -- and**

then when they said it was -- she was still married to Dennis Suiter, which is a nephew of mine, the two I put together. And I remembered the name Jodi, which is the same as my wife's name. Which that's when I realized I do know -- we have never even spoken, I don't believe. But I do know who she is.

THE COURT: The question, then becomes, at this point, whether or not the fact that you know who she is, she may have been married or may still be married to a nephew of yours, does that affect you in any way in serving as a juror on this case?

MR. ARGUELLO: I don't believe it will.

THE COURT: You wouldn't tend to take her testimony any more or any less than any other witness?

MR. ARGUELLO: No, sir.

THE COURT: Either of you want to ask Mr. Arguello anything?

MR. PRIES: State has no problem. State has no objection.

MS. TYLER: Just one small question. Then you have never even had any personal conversation with her?

MR. ARGUELLO: No just the twins and the name Dennis Suiter, that rang a bell.

MS. TYLER: Defense has absolutely no problem at all with this.

THE COURT: We appreciate you bringing that to our attention and being candid. And you understand why we had to ask about it?

MR. ARGUELLO: Yes.

THE COURT: Okay, very good, sir, you may go back to the jury room. Thank you very much.

I do not accept the majority's characterization of the juror's state of mind. It is not obvious to me that the juror "had some opinion of Suiter," maj. op. at 8; that that "opinion" colored his opinion of persons she associated with, id. at 8-9; or that the juror was bothered by his knowledge of Suiter, id. at 9. I find nothing to support the majority's characterizations.

In Blackwell our supreme court found the following factors important in determining whether the absence of the

defendant prejudiced his right to a fair trial: whether defendant's absence (1) prejudiced his case, (2) weakened his defense, (3) was otherwise harmful to his interests, or (4) in some manner influenced the verdict. 238 N.W.2d at 137. I find nothing in this record establishing that defendant's case was prejudiced or weakened in any manner due to his absence in the questioning of this juror. Rather, I believe the court was careful to ensure the juror's impartiality and to protect defendant's right to a fair trial. Defense counsel was present and active at the interaction between the court and the juror, a full record was made of the proceedings, and the court questioned the juror concerning his ability to render an impartial decision in the case. In circumstances quite similar, the Blackwell court concluded, beyond a reasonable doubt, the communications between the court and jurors did not create any reasonable possibility of prejudice. Id. I would hold that the State has rebutted any presumption of prejudice in this case.

Finding no reversible error, I would affirm defendant's conviction.

Habhab, J., joins this dissent.

HABHAB, J. (dissenting)

I join the dissent of Judge Donielson. I would but add that the ground relied upon for reversal was not assigned as error in the defendant's motion for new trial. Thus the trial court was denied the opportunity to review this issue.

I am not convinced that error on this issue has been preserved. I recognize that if the assignment of error should have been raised and was not, we will eventually be faced with an ineffective assistance of counsel claim. If indeed error was not preserved, I believe it would be much better to look at this matter on an ineffective assistance of counsel claim. At least at that time we will be afforded the opportunity to hear why the defendant's attorney waived his client's right to be present at the time of the disputed conversation.