IN THE COURT OF APPEALS OF IOWA 000443

No. 7-134/ / 96-0368

FILED
MAY 29 1997
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICKY DEE DEE SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Montgomery County, Timothy O'Grady, Judge.

Defendant appeals from judgment and sentences entered, following a jury trial, for attempted murder, in violation of Iowa Code section 707.11 (1995), and going armed with intent, in violation of Iowa Code section 708.8. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant State Appellate Defender, until withdrawal, and then Troy R. Smith, Des Moines, until withdrawal, and then Troyce A. Wheeler, Council Bluffs, until withdrawal, and then Drew H. Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, and Bruce E. Swanson, County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

Defendant appeals from judgment and sentences entered, following a jury trial, for attempted murder, in violation of Iowa Code section 707.11 (1995), and going armed with intent, in violation of Iowa Code section 708.8. He argues his trial counsel was ineffective for: (1) failing to file a motion for change of venue; (2) failing to move for a mistrial due to prosecutorial misconduct during opening statements; (3) failing to object to improper character evidence; (4) failing to object to improper comments made by the prosecutor; (5) failing to assert the defense of diminished responsibility; and (6) failing to present ballistic evidence. He also contends the court erred in allowing: (1) his son to testify defendant "looked like he wanted to kill" the victim; and (2) the victim to testify about what the medical personnel told her about her injuries.

On the morning of May 30, 1995, the defendant and Christina Smith attended a custody hearing. Christina was awarded primary physical care of their four children, and the defendant was ordered to pay child support. After the hearing, the parties argued. That evening, the defendant drove to Christina's residence. The couple argued at the defendant's pickup truck. As Christina walked away, the defendant shot her four times with a .22 caliber handgun, once in her arm and three times in her back. The defendant told a deputy sheriff he shot her.

The State charged Ricky Smith with attempted murder and going armed with intent on June 5, 1995. Prior to trial, the court granted the defendant's application for a psychiatric evaluation. Defense counsel did not file a notice of intent to rely on the defense of diminished responsibility. Jury trial commenced in December 1995. Defense counsel did not file a motion for change of venue due to pretrial publicity; however, the trial court determined the jurors were suitable and not prejudiced.

The State did not present any expert medical testimony, but Christina testified about the injuries she sustained. Christina also testified about Smith's temper, and both parties' infidelities. Michael Smith, the Smiths' fourteen-year-old son, testified he heard the shots, and saw Smith standing with the gun "look[ing] like he wanted to kill her." The court overruled defense counsel's objections to lack of foundation and competency to give such an opinion.

The jury returned verdicts of guilty. The court sentenced the defendant to concurrent, indeterminate twenty-five and five-year terms of imprisonment on the attempted murder and going armed with intent charges respectively.

Ricky Smith appeals.

I. Ineffective Assistance of Counsel. In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability , but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *McKettrick*, 480 N.W.2d at 56. Such claims may be decided on direct appeal, however, if the defendant fails to show one of the two prongs. *State v. Walker*, 538 N.W.2d 316, 322 (Iowa App. 1995); *State v. O'Donnell*, 533 N.W.2d 576, 579 (Iowa App. 1995).

A. Change of Venue. Smith contends trial counsel was ineffective for failing to move for change of venue. His argument centers on the pretrial publicity surrounding the case and because of the coverage, he could not receive a fair trial in the county.

Asking for change of venue is a matter of professional judgment about which experienced trial lawyers frequently disagree. *Karasek v. State*, 310 N.W.2d 190, 191 (Iowa 1981). It does not reflect on competency nor indicate ineffectiveness. *Id.* In this case, *voir dire* examination of the prospective jurors was done by interviewing each juror singly, so as not to taint the rest of the jury panel if a prospective juror

disclosed information garnered from pretrial publicity. During *voir dire*, counsel for defense moved for a change of venue because a number of jurors said they had some knowledge of the case, and two jurors tried to ask the county attorney questions. The court noted any change of venue issues should have been raised before trial, but rejected the motion on its merits.

Upon reviewing the record, there was no evidence the jury selected was affected by any pretrial publicity. Moreover, defense counsel's failure to seek a change of venue does not reflect on competency, nor is it indicative of ineffectiveness. *Fryer v. State*, 325 N.W.2d 400 (Iowa 1982); *Karasek*, 310 N.W.2d at 191. We find the trial counsel's decision not to motion for change of venue before trial was proper in the light of the fair and impartial jury impaneled.

B. Prosecutorial Misconduct. Smith next contends his attorney failed to move for a mistrial due to prosecutorial misconduct during opening statements when the prosecutor commented on the defendant's right against self-incrimination. He also claims his attorney failed to object to other improper comments made by the prosecutor. In order to determine if Smith's trial counsel was ineffective, we must first determine whether there was prosecutorial misconduct.

Smith must prove, by a preponderance of the evidence: (1) the prosecutor was guilty of misconduct; and (2) he was prejudiced thereby. *Gordon v. State*, 450 N.W.2d 265, 268 (Iowa App. 1991). Since his claim of prosecutorial misconduct

involves constitutional challenges, we review de novo. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994).

Smith argues his right to remain silent was violated by the State, when it stated in its opening statement:

> I have been in this business, the criminal law, for 15 years, just going into my 16th year, and I've though often and long about what -- what is Mr. Smith's defense? . . . I don't know what his defense is going to be. And I'm - - I'm as anxious as you are to hear what he has to say or hear what his defense is through his counsel. He doesn't have to take the stand. I have no idea whether he will or not and we will not use that against him. He has the right to remain silent.

"[A] prosecutor's comment on the defendant's failure to testify violates a defendant's due process rights." *Brewer v. State*, 444 N.W.2d 77, 84 (Iowa 1989). In this case, the prosecutor should have thought more often and longer about his opening statement. After he stated he was anxious to hear what defendant "has to say," he further stumbled by stating alternatively he was anxious to hear what "his defense is." Both parts of the statement were impermissible comments of the defendant's right not to testify and shifts the burden to the defendant to muster a defense.

A prosecutor's misconduct will not warrant a new trial unless the conduct was "so prejudicial as to deprive the defendant of a fair trial." *State v. Lyons*, 210 N.W.2d 543, 549 (Iowa 1973). Smith must prove more than a mere possibility of prejudice.

He must show the misconduct "worked to his . . . actual and substantial disadvantage . . . ." *Finnel*, 515 N.W.2d at 43.

We find considering the whole trial and the evidence presented, the outcome of this case would not have been different. The misconduct was harmless. *See* Dick R. Schlegel, *The Evolution of Harmless Error in Iowa*, 43 DRAKE L. REV. 547, 573-79 (1995). It is not the prosecutor's misconduct which entitles a defendant to a new trial, but rather any resulting prejudice which prevents the trial from being a fair one. *See State v. Anderson*, 448 N.W.2d 32 (Iowa 1989). The evidence was overwhelming in this case. It is our conclusion, the prosecutor's inappropriate statements did not contribute to the convictions. Therefore, we determine there was no ineffective assistance for failure to make a motion for mistrial.

The other prosecutor comment the defendant complains of does not rise to the level of prosecutorial misconduct. While questioning a police officer about gun residue tests, an objection was launched by defense counsel regarding an answer by the witness stating the gun residue tests were insignificant. Defense counsel asked the response be stricken as outside the scope of the minutes of testimony. The prosecutor responded with "[f]air enough. We don't need scientific evidence on this one anyway." Defense counsel did not object.

Defendant asserts the comment implied the evidence was overwhelming and the defendant was guilty. The defendant has failed to show the prosecutor was acting

in bad faith. *See State v. Parsons*, 401 N.W.2d 205, 210 (Iowa App. 1986) (Iowa courts hold where prosecutorial questions lacked a proper foundation and therefore appeared questionable, a reversal will not be granted unless bad faith of the prosecutor appears); *see also Wycoff v. State*, 382 N.W.2d 462, 467 (Iowa 1986). The prosecutor's comments imply a concession the evidence was not necessary, and he need not argue the point with the judge and defense counsel. To the extent the statement argued the weight of the evidence to the jury, it was an impermissible, puerile, reaction to the defense's objection. There is nothing to substantiate defendant's claims the prosecutor's comment was intended to impress upon the jury the weight of inadmissible evidence against the defendant. To the extent the prosecutor was not going to push the issue with the court, it was a waiver of legal grounds allowing the evidence. In any event, the statement would not have affected the outcome of the proceedings.

Since we find there was not prosecutorial misconduct, defendant's trial counsel was not ineffective for failure to object to the prosecutor's comments.

C. Character Evidence. Smith also claims his attorney failed to object to improper character evidence brought out during testimony of the victim, Christine Smith. Christine Smith testified during the parties' marriage, the defendant had a temper, but was not physically abusive toward her. She also testified that while the

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parties were separated during their marriage, ten to twelve years ago, both of them had an affair with another person.

Defense counsel did not object to this testimony. Counsel used the testimony instead in cross-examination to introduce favorable testimony defendant had no history of physical violence toward his wife and one of Christine's sons was not fathered by the defendant, but was conceived during the affair. Even though defendant knew he was not the father, he went ahead and raised the child as his own.

Iowa Rule of Criminal Procedure provides, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, ..." *See also State v. Nebinger*, 412, N.W.2d 180, 187 (Iowa App. 1987). We think the challenged evidence with regard to the defendant's temper could have been objected to and excluded by the district court. The jury was allowed to infer Smith acted in conformity with his temper when he shot Christine. Such evidence is precisely the type of evidence which rule 404(a) was enacted to prohibit.

In order to find ineffective assistance, though, we must also find the deficient performance so prejudiced the defendant as to give rise to a reasonable probability , but for counsel's errors, the result of the proceedings would have been different. At the scene of the crime, defendant confessed he shot Christine Smith in the back at close range. The jury was presented with overwhelming evidence defendant

committed the act. We find the defendant has failed to establish he was prejudiced by counsel's error in failing to object to the challenged testimony.

D. Diminished Responsibility. Defendant claims counsel was ineffective for failing to file a notice of diminished responsibility or to request a jury instruction on said defense. He claims he suffered memory lapse, emotional upset and used unprescribed tranquilizers prior to the shooting. The defendant testified he did not remember pulling the trigger. Although defendant did undergo a psychiatric evaluation, no evidence of the evaluation was presented at trial.

Both attempted murder and going-armed-with-intent are specific intent crimes. *See* Iowa Code §§ 707.11, 708.9 (1997). Diminished responsibility goes to the issue of defendant's capacity to form specific intent due to the defendant's mental condition. *State v. Collins*, 305 N.W.2d 434, 436 (Iowa 1981). We reserve this issue for post-conviction relief to determine why trial counsel did not file a notice of the diminished responsibility defense or request a jury instruction of the defense.

E. Ballistic Evidence. Finally, the defendant claims his counsel was ineffective for not requesting a forensic examination of the firearm used in the shooting, or calling a state forensic expert to testify. He claims the gun fires more than one shell with one pull of the trigger, although it is not a fully automatic weapon. The defendant argues if he pulled the trigger once in an attempt to scare the victim

rather than to kill her, he would not be guilty of attempted murder nor going armed with intent.

The defendant testified the gun fires three rounds with a single pull of the trigger. The defendant's son testified he had fired the gun and once in a while it would fire two shells instead of one. Police officer Powers stated although he did not fire the gun himself, to his knowledge the gun was not fully automatic. Victor Murillo, a criminalist with the DCI, examined and test-fired the gun before trial and his report did not find the gun fired more than one bullet at a time.

The victim was shot four times at close range. Even if the court were to minutely believe some credibility as to defendant's story he was firing a warning shot, his testimony still does not explain how four shots fired off at once. The defendant has not shown expert testimony would have benefitted his case. The withholding of cumulative testimony is not a sufficient showing of prejudice under the standards the Iowa Supreme Court adopted in *State v. Miles*. *See Schrier v. State,* 347 N.W.2d 657, 664 (Iowa 1984); *State v. Miles,* 344 N.W.2d 231, 234-235 (Iowa 1984). We find there was more than enough testimony about the firearm used in the shooting for the jury to determine if the defendant was truly shooting a warning shot and the gun fired four shells or if the defendant pulled the trigger four times to shoot the victim.

We find no ineffective assistance of counsel in this case.

II. Opinion Testimony. Defendant also claims the district court abused its discretion in allowing his son to testify defendant "looked like he wanted to kill" the victim and allowing the victim to testify about what the medical personnel told her about her injuries. The State contends error is not preserved regarding the improper opinion testimony of Michael because defense counsel only objected on the basis of competency and foundation. The State also contends the court properly limited the victim's testimony about her injuries and the defendant has failed to establish reversible error.

The admissibility of evidence at trial generally lies within the discretion of the trial court as framed by the rules of evidence. *See State v. Williams,* 305 N.W.2d 428, 432 (Iowa 1981). We will not reverse absent an abuse of discretion. *State v. Hubka,* 480 N.W.2d 867, 868 (Iowa 1992). Moreover, a manifest abuse of discretion must be found before we will interfere with a trial court's ruling on the admissibility of opinion testimony. *Sonnek v. Warren*, 522 N.W.2d 45, 50 (Iowa 1994).

The defendant argues Michael's opinion testimony is an improper opinion about the defendant's state of mind at the time of the shooting. Even if this ground was not raised specifically before the district court, the challenged evidence is admissible.

Lay witnesses may give opinion testimony when the opinions or inferences are: (a) rationally based on the perception of the witness; and (b) helpful to a clear

understanding of the witness's testimony or the determination of a fact in issue. Iowa R. Evid. 701. A wide range of discretion is accorded to the trial court. *State v. Kinsel,* 545 N.W.2d 885, 889 (Iowa App. 1996).

We are unable to conclude the trial court abused its discretion. Michael's opinion describes the defendant's appearance at the time of the shooting. He did not state anything regarding the defendant's intent or mental state. The victim's testimony was also largely fact-based, and focused on her personal knowledge of the her injuries and medical treatment. The trial court acted within its discretion in permitting the opinion testimony of the victim and the defendant's son.

AFFIRMED.