



IN THE IOWA COURT OF APPEALS

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed May 26, 1981

vs

)

1-46
 64569

FRANKLIN LEE HARRIS,

)

Defendant-Appellant.

)

)

Appeal from Polk District Court. Joel D. Novak, Judge.

Defendant appeals from his conviction of third-degree theft in violation of sections 714.1(1) and 714.2(3), The Code. AFFIRMED.

Robert A. Wright, Des Moines, Ia., and Ray Sullins, Des Moines, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant appeals from his conviction of third-degree theft in violation of sections 714.1(1) and 714.2(3), The Code. He argues that his right to be tried by a jury of twelve was violated when one of the jurors was incapacitated after trial but before deliberation began and when he was not informed by the court or his counsel that he could ask for a mistrial. He also claims that his right to a jury of twelve may not be waived by his attorney. We affirm.

Since defendant claims that his constitutional rights were abridged, we must make an independent evaluation of the totality of the circumstances to determine whether his rights were violated. State v. Fisher, 279 N.W.2d 265, 266 (Iowa 1979). The State claims that defendant made an effective waiver of his right to be tried by a twelve-person jury. Such a question is one of fact, and the State has the burden of proving by a preponderance of the evidence that the waiver was knowing, intelligent and voluntary. Id.

With these principles in mind, we examine the procedural background to this case. Defendant was charged by information with third-degree theft on October 2, 1979 and was found guilty by a jury verdict on December 12, 1979. Defendant then filed a motion for new trial alleging that after both sides rested but before the case was submitted to the jury, one of the jurors was involved in an automobile accident and was unable to participate any further. This situation was made known to defendant's attorney who, in chambers and not in defendant's presence, agreed to have the case submitted to the remaining eleven jurors. Defendant further asserts that he was not told by his attorney of his right to a mistrial and that his attorney could not waive his right to a twelve-person jury under these facts. Defendant's motion was overruled on January 11, 1980, and he was sentenced to imprisonment for fifteen months. This appeal followed.

It is clear that a criminal defendant in Iowa may waive the right to be tried by a twelve-member jury and may elect to proceed with a jury of eleven should the twelfth become indisposed for any reason. State v. Browman, 191 Iowa 608, 632-34, 182 N.W. 823, 833-34 (1921); State v. Kaufman, 51 Iowa 578, 2 N.W. 275 (1879). Defendant claims here that he did not effectively waive that right because he was not told that he could have a mistrial and because he did not personally waive his right to a twelve-member jury. We do not agree.

The following exchange occurred at the hearing on defendant's motion for a new trial:

BY THE COURT: Mr. Harris, the Court has taken the time to have a small transcript prepared concerning the issue of eleven jurors, and the Court remembers this incident very well in that when the Court was advised that one of the jurors had had an accident, the Court called both attorneys in the Court's Chambers and gave your counsel various options because one juror was gone. As the Court recalls, one option was to continue the case for a day because we thought we could get the juror back. Another option was to grant a mistrial, if that was the desire, and the third option was to continue with eleven jurors, if that was agreeable to you.

Your counsel then directed or advised the Court that he was going to go out and discuss the matter with you, which the Court believes that he did. He then came back into the Court's Chambers, advised the Court that you were agreeable to trying the matter or having it submitted to eleven jurors.

We then went back into the courtroom, as the Court recalls, and this would have been during the time that we were discussing Instructions, et cetera, and to make sure that you were in agreement to trying it to eleven jurors, the Court asked the question as follows:

This took place, I think, approximately two in the afternoon. I said, "Gentlemen, I will make a statement now and again at the time in the presence of the jury, and that is it is agreed by the parties that this matter may be tried by eleven people on the jury since one of our jurors has had an accident and will not be returning."

A. No.

Q. "Is that correct?" To that, Mr. Wright responded, and you were present at the time, "May the record reflect that I have discussed the matter with the Defendant, Mr. Franklin Harris, and I'm making a statement in his presence now that we are going to proceed, that it is agreeable that we proceed with eleven jurors for determination in this case."

Now, were you present when the Court asked the question of Mr. Wright?

A. Yes.

Q. And did you hear Mr. Wright, in your present, advise the Court that he had discussed the matter with you, and that it was agreeable that we proceed to have the matter submitted to eleven jurors?

A. Yes, but I didn't know there could be no mistrial. (Emphasis added)

We think it is clear from the foregoing that defendant knew what the situation was regarding the incapacitated juror, he discussed his options with Mr. Wright, his attorney, and he acquiesced in proceeding with a jury of eleven. The trial court,

however, went even further and asked Mr. Wright in the presence of both the jury and defendant whether proceeding with an eleven-person jury was agreeable. Mr. Wright responded that he discussed the matter with his client and both agreed to proceed with eleven jurors. Under these circumstances, we need not consider defendant's claim that his attorney may not waive the right for defendant to a twelve-person jury since the record clearly shows that defendant in fact agreed to a jury of eleven and personally waived his right. See Murphy v. State, 347 So.2d 1369, 1370 (Ala. Cr. App. 1977) cert. den. Ex Parte Murphy, 347 So.2d 1371.

The evidence is in conflict as to whether defendant was specifically informed of his right to a mistrial after the injured juror was excused. Defendant claims that he was never so informed. However, the court indicated that it discussed the various options, including mistrial, with the attorneys from both sides after which Mr. Wright "discuss[ed] the matter" with defendant. Absent defendant's assertion to the contrary, we think it would be reasonable to infer that Mr. Wright discussed the mistrial option with defendant.

Even if defendant is correct in claiming that he did not know he could have a mistrial, we do not think that would warrant reversal of his conviction. This case is very similar to People v. Evans, 8 Cal. App.3d 152, 87 Cal. Rptr. 315 (1970). In that case the court held that defendant was not denied his right to a jury trial on the ground that the court failed to advise him of his right to a mistrial after a juror became ill where it appeared that defendant and his attorney consented in open court to trial by a jury of eleven. See also State v. Ellard, 95 N.H. 217, 222, 60 A.2d 461, 464-65 (1948) cert. den. 335 U.S. 904, 69 S. Ct. 400, 93 L.Ed. 438.

We conclude that the State has sustained its burden of proving that defendant's waiver of his right to a twelve-person jury was knowing, intelligent and voluntary. We therefore affirm his conviction.

AFFIRMED.