



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

JOE EDWARD NUZUM, JR.,

Appellant.

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Filed September 9, 1977

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Appeal from Pottawattamie District Court - Paul H. Sulhoff, Judge.

Defendant appeals his convictions of robbery with aggravation, assault with intent to murder, and murder in the second degree and the resulting sentences of 25 years, 30 years, and life in the penitentiary. Affirmed.

John W. Logan, of Logan & Schulte, of Council Bluffs, for appellant.

Richard C. Turner, Attorney General, Raymond W. Sullins, Assistant Attorney General, and David E. Richter, Assistant Pottawattamie County Attorney, for appellee.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Defendant, Joe Edward Nuzum, Jr., appeals his convictions of robbery with aggravation, assault with intent to murder, and murder in the second degree and the resulting sentences of 25 years, 30 years, and life in the penitentiary. Defendant challenges the competence of his trial counsel and Instruction No. 4 as commenting on his failure to testify, contrary to Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

I. Factual background.

John Lucey was the proprietor of a jewelry store in Council Bluffs known as Lucey Jewelers. Defendant was a former jewelry store employee who had worked for Lucey for approximately five years. For several weeks prior to August 7, 1975, Mr. and Mrs. Joe Fuhrmann of Omaha, Nebraska, had been dealing with Lucey concerning the purchase of some diamonds. A meeting between them was scheduled on the evening of August 7 at 7:00 P.M. in the store. On that evening, Mrs. Lucey, also present in her office at the store, saw Mr. & Mrs. Fuhrmann enter the store and go into a sales room with Mr. Lucey. Shortly thereafter, Mr. Lucey came down a hall to the office and said, "Jean, hit the floor. It is Joe Nuzum. It's a rip-off and we have really been had." Mrs. Lucey slid face-down on the floor and heard other people enter. Mr. Lucey was forced to tie Mrs. Lucey's hands behind her back. Mrs. Lucey heard Mr. Fuhrmann ask if the little safe in the shop was open. Mr. Lucey said it was not. The robbers then took Mr. Lucey with them to the room identified as the shop. Someone came back and struck Mrs. Lucey on the head, but she did not lose consciousness. Meanwhile she could hear someone in the sales room going through merchandise trays and throwing them on the floor. Other statements of the robbers overheard by Mrs. Lucey indicated a considerable knowledge of the inner workings of Lucey Jewelers. She also heard her husband say, "Joe, please don't do this. You know it's insured. Just take it." Later Mrs. Lucey heard a muffled shot from a back room. Just before the shot, she heard Mr. Lucey plead, "Please, please, Joe. Don't do this to me."

The robbers next reentered Mrs. Lucey's office. She felt a heavy person on her back who pressed a gun into the back of her head. She heard Mr. Fuhrmann say, "Do it, do it." The gun discharged. The robbers left, evidently believing she was dead. Fortunately, Mrs. Lucey's hairstyle apparently confused her would-be killer's aim and

the bullet only grazed her. She was able to call the police, who found Mr. Lucey's body shot through the back of the head. His hands were tied behind him. Subsequent recovery and examination of two bullet slugs and casings revealed they were .38 caliber bullets, probably discharged from the same weapon, and that they could have been fired from a Beretta automatic pistol. An inventory determined that in excess of \$139,000 worth of jewelry was missing from the store.

John Peters, a friend of the Fuhrmanns and defendant, received a note from the Fuhrmanns in the early morning hours of August 8, asking him to come to their apartment. He did so and following some visiting the Fuhrmanns took him into the countryside. There Mr. Fuhrmann searched through an area of brush and retrieved numerous packets which he put into a steel box. He then placed the box in Peters's car. Peters returned home and examined the packets, at least one of which had the name 'Lucey Jewelleries' on it, and found them to contain assorted jewelry. Later in the morning, Peters received a phone call from a person who identified himself as Joe Nuzum. The caller told Peters that a key to a locker at the airport was outside his house on a brick. The caller asked Peters to retrieve the key and go to the airport to remove the contents of the locker. Peters, believing he had already received the goods, did not do so. Three days later Peters went to the police with this information.

Peters also informed the police that prior to August 7 he had observed Joe Nuzum in possession of a Beretta automatic pistol. He was aware that Mr. Fuhrmann carried a revolver, a .38 caliber 'snubnose'. Police also discovered that Mrs. Fuhrmann had recent permits from the City of Omaha to possess concealable firearms: one for a .38 Beretta automatic with a three-inch barrel and another for a .38 caliber Smith and Wesson revolver with a two-inch barrel.

Police questioned defendant on August 8, 1975. Nuzum told the officers that he had been in Kansas City at the time of the robbery. Investigation by officers determined that Nuzum had checked in at a Ramada Inn in Overland Park, Kansas, on the afternoon of August 7. However, further investigation revealed a car registered to Nuzum had parked in lot A of the Kansas City Airport terminal at 4:39 P.M. on the day of the murder and had been checked out at 1:17 the next morning. Officers found that Frontier Airlines had a plane that left the Kansas City terminal at 5:15 P.M. on August 7

and which arrived in Omaha at 5:58 P.M. Officers further determined Frontier Airlines had a flight 564, which departed Omaha for Kansas City at 12:31 A.M. the evening of the murder. A stewardess on flight 564 positively identified Nuzum as being on board the plane.

Finally, the police also learned that Lisa Kahn, a 14 year old girl, had tended the Fuhrmanns' child the evening of the robbery. She told investigators that when the Fuhrmanns picked her up at home at 6:40 P.M., Joe Nuzum was with them. Later during the evening when looking for food she noticed that the Fuhrmanns' two handguns were not in their usual place.

On the basis of this evidence Nuzum was arrested for the robbery at Lucey Jewelers, the attempted murder of Mrs. Lucey, and the murder of John Lucey.

II. Effective assistance of counsel.

On appeal, Nuzum alleges he was deprived of effective assistance of counsel as guaranteed by the sixth amendment and section one of the 14th amendment to the Constitution of the United States, and article one, sections nine and ten of the Constitution of Iowa. See *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *Scalf v. Bennett*, 260 Iowa 393, 399, 147 N.W.2d 860, 864 (1967).

In Iowa, any accused is entitled to effective assistance of counsel. See *Wycoff v. State*, 226 N.W.2d 29 (Iowa 1975); *Kime v. Brewer*, 182 N.W.2d 154, 156 (Iowa 1970). The test whether counsel has been ineffective or incompetent is whether, considering all the circumstances, counsel's performance was within the range of normal competence. *Zacek v. Brewer*, 241 N.W.2d 41, 51 (Iowa 1976); *State v. Townsend*, 238 N.W.2d 351, 357 (Iowa 1976); *State v. Dee*, 218 N.W.2d 561, 563 (Iowa 1974). In addition, an affirmative factual basis demonstrating counsel's inadequacy of representation is a prerequisite to the establishment of incompetence. *State v. Massey*, 207 N.W.2d 777, 780 (Iowa 1973).

Defendant complains that while the State introduced over 50 exhibits during the four day trial, his trial counsel only objected to one such exhibit. While appellate counsel concedes that almost all of these exhibits were in fact admissible, nevertheless he argues in written brief "vigorous advocacy would seem to demand that the defense attorney attempt to keep certain arguably prejudicial evidence, such as pictures of

blood and tissue from the victim's head, from the jury." Unquestionably the pictures of Mr. Lucey's body taken at the store were admissible in evidence. *State v. Nowlin*, 244 N.W.2d 596, 600-601 (Iowa 1976). We will not compel trial counsel to perform a futile gesture, particularly when counsel may well have in mind the effect upon the jury of repeatedly overruled defense objections. See *State v. Kendall*, 167 N.W.2d 909, 911 (Iowa 1969).

Appellate counsel also points to the fact that trial counsel made but five objections during the course of the entire trial. Yet it again is apparent that objections would have been unavailing. Virtually all of the evidence offered by the State would have withstood any objection. See *State v. Kendall*, *supra*. The only specific incident which defendant has raised is trial counsel's failure to object to certain testimony of Sgt. Larry Williams. Officer Williams in detailing his interrogation of Nuzum on August 8 mentioned that he had asked Nuzum to take a polygraph examination and Nuzum had refused. While a proper objection may have resulted in this evidence being stricken, we do not believe this failure to object shows incompetence of counsel. Because the officer's statement could not have been anticipated, counsel may well have had reservations about drawing the jury's attention to the statement by voicing an objection even though it might subsequently have been stricken. We cannot say that this failure in the course of a lengthy trial demonstrates incompetence.

Defendant challenges trial counsel's failure to make a motion for a directed verdict at the close of the State's case or file any post-trial motions. It is apparent that any motion for directed verdict based on factual grounds would have been futile given the strength of the State's case. Similarly the grounds of a post-trial motion would have been untenable.

The complaint regarding lack of motion for change of venue is founded upon a statement of trial counsel, during the sentencing hearing, in which he referred to the popularity of Mr. Lucey. This isolated comment, with nothing more, neither establishes that a motion for a change of venue should have been made nor demonstrates incompetence. Moreover, in context, the remark was a part of a general statement pertaining to the jury's apparent lack of bias in reaching a verdict of second degree murder rather than first degree murder.

Finally, defendant points to his attorney's statement at sentencing: "I believe the court will agree that the defendant made no objections to any of the evidence, and in fact, aided in producing evidence of his involvement." Defendant vigorously argues this declaration demonstrates his counsel had abandoned his role of advocate. But it must be remembered this comment made at the time of sentencing was a part of trial counsel's statement urging imposition of a sentence of less than life imprisonment for Mr. Lucey's slaying. Trial counsel was attempting to impress upon trial court defendant's acceptance of responsibility for his role in the crime as well as his contrition and sorrow for what occurred. Trial counsel was pleading for leniency, certainly an advocate's role.

In this case the effectiveness of trial counsel's representation of defendant may be judged in light of the result attained under the circumstances with which he was confronted. Given the evidentiary collapse of defendant's clumsy alibi, combined with John Lucey's statement identifying defendant, and the incriminating testimony of John Peters and Lisa Kahn, there was little, if anything, any trial counsel could do to raise a reasonable doubt of defendant's innocence. The State's evidence presents an overwhelming case that the killing of John Lucey was first degree murder. We can hardly call counsel's strategy or tactics misguided or ill advised when the jury returned a verdict of murder in the second degree. Counsel did keep out evidence, some of which would have shown that after the robbery the Fuhrmanns told John Peters that Joe Nuzum "goofed" in not killing Mrs. Lucey. We have studied the transcript closely and have concluded that defendant had able, effective counsel. This assignment of error is without merit.

III. Instruction 4.

Nuzum challenges Instruction 4, given sua sponte by trial court, as denying a fair trial because it was an impermissible invasion of defendant's fifth amendment rights by commenting on his failure to testify. See Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Instruction 4 stated:

The defendant did not testify in this case on his own behalf. The failure of the defendant to testify does not deprive the defendant of the presumption of innocence, nor does it relieve the State of the burden of proving beyond a reasonable doubt the guilt of the defendant.

Further, you should draw no conclusions concerning his decision not to testify nor speculate on his motivation. The defendant's decision to remain silent should not be given any consideration whatsoever by you in your deliberations.

At the outset we observe that defendant did not object to this instruction in the trial court either by exception to the instruction or in a motion for new trial. Consequently, defendant did not preserve the alleged error. *State v. Cartee*, 202 N.W.2d 93, 97 (Iowa 1972).

Defendant argues, however, that this instruction invaded his fifth amendment rights and denied him a fair trial. Because of this allegation, we must examine the error in fulfillment of our statutory duties pursuant to section 793.18, The Code. See *State v. Cartee*, supra.

In *State v. Wallace*, 261 Iowa 104, 111, 152 N.W.2d 266, 270 (1967) the supreme court held that the giving of an instruction similar to Instruction 4 does not constitute prejudicial error absent objection by defendant. In *State v. Kimball*, 176 N.W.2d 864, 869 (Iowa 1970), the court reconsidered the issue and held the giving of this instruction to be error absent request of defendant. This position was reaffirmed in *State v. Cartee*, supra. On appeal, defendant argues the Kimball rationale is based upon fifth amendment considerations, rather than the permissible setting of a higher state standard. Defendant's argument finds no basis in language contained either in Kimball or Cartee. Neither case expressly placed their result upon the mandates of the fifth amendment. Furthermore, there is a great deal of authority which holds that this instruction is not violative of the fifth amendment. See *United States v. Bailey*, 526 F.2d 139, 142 (7th Cir. 1975); *United States v. Martin*, 511 F.2d 148, 152 (8th Cir. 1975); *United States v. Epperson*, 485 F.2d 514, 516 (9th Cir. 1973); *United States v. Houston*, 434 F.2d 613, 615 (5th Cir. 1970); *Sullivan v. Seafate*, 428 F.2d 1023, 1027 (1st Cir. 1970); *United States v. Carter*, 422 F.2d 519, 520-521 (6th Cir. 1970); *Auippa v. United States*, 393 F.2d 597, 602-603 (10th Cir. 1968); *United States v. Smith*, 392 F.2d 302 (4th Cir. 1968); *United States v. Woodmanese*, 354 F.2d 235, 236 (2d Cir. 1965); *Lyon v. United States*, 109 U.S. App. 103, 284 F.2d 237 (1961).

We do not need to decide whether Kimball rests upon fifth amendment considerations, for even assuming arguendo it is based upon the fifth amendment, the error here is harmless beyond a reasonable doubt. See *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 87

S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Blackwell*, 238 N.W.2d 131, 136-137 (Iowa 1976). The evidence of defendant's guilt is strong, if not overwhelming. See *Harrington v. California*, supra; see also, *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). Further, Instruction 4 is a correct statement of the law, and its factual recitation that defendant did not testify in his own behalf is something of which the jury is already aware. See *United States v. Van Drumen*, 501 F.2d 1393, 1395-1396 (7th Cir. 1974); *United States v. Garguilo*, 310 F.2d 249, 252 (2d Cir. 1962). We cannot assume that jurors would fail to understand or follow the clear import of the instruction. *Brumo v. United States*, 308 U.S. 287, 294, 60 S.Ct. 198, 200, 84 L.Ed. 257 (1937). Only by implication can we say the instruction violates *Griffin v. California*, supra. See *Becher v. United States*, 5 F.2d 45, 49 (2d Cir. 1924). In short we find:

Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face. *Schneble v. Florida*, supra, 405 U.S. at 432.

We are sensitive to the protection of a defendant's fifth amendment rights, *State v. Pierce*, 240 N.W.2d 678, 680 (Iowa 1976), yet this sensitivity cannot blind us to the harmless nature of the error in this case.

We conclude beyond a reasonable doubt the instruction in the case at bar did not create any reasonable possibility of prejudice so as to violate defendant's fifth amendment rights. See *State v. Blackwell*, 238 N.W.2d 131, 137 (Iowa 1976).

Parenthetically we note appellate counsel also cites as another example of incompetence of trial counsel the failure to object to Instruction 4. Whether counsel's lack of objection to the instruction was oversight or intentional, we do not know. We do know that lawyers disagree whether such an instruction is prejudicial or helpful. Again, under the circumstances of this case, we cannot say that the lack of an objection to Instruction 4, either alone or in combination with appellate counsel's other complaints about trial counsel, established ineffectiveness of counsel.

Trial court's judgment and sentences are affirmed.

OXBERGER, J., concurs; SNELL and CARTER, JJ., specially concur;
DONIELSON, J., dissents.

CARTER, J. (specially concurring)

I concur in the result reached in the opinion of Allbee, C.J., but cannot agree that the case can be disposed of under the doctrine of "harmless error."

"Harmless error" is legal error which, even if properly raised and preserved in the trial court, is not reversible because it obviously did not affect the outcome. I agree that under normal application of this doctrine the assigned error would be harmless. But I view the decision in *State v. Kimball*, 176 N.W.2d 864, 869 (Iowa 1970) as designating the type of error involved in the present case as reversible per se if properly raised and preserved. As the court characterized the *Kimball* holding in *State v. Pierce*, 240 N.W.2d 678, 680 (Iowa 1976):

"We have held, from sensitivity to a defendant's privilege against self-incrimination, that it is **reversible error** for a trial court to give such a cautionary instruction unless it is requested by the defendant." (emphasis added).

Nevertheless, for the reasons discussed by the court in *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974), I believe that a defendant's right to rely at the appeal stage upon rules of law which require sua sponte action by the trial court in formulating jury instructions is lost if such issues are not first asserted in the trial court. I would apply this rule in the present case and affirm the trial court.

SNELL, J., joins in this special concurrence.

DONIELSON, J. (dissenting)

I dissent. The views expressed in the majority opinion and special concurrence are unquestionably sound. This record fairly shrieks of the defendant's guilt. To describe the evidence adduced at trial as massive and overwhelming would perhaps be an understatement.

Unfortunately, I am forced to conclude that the supreme court has clearly and definitively expressed a view which, in my judgment, permits no latitude and makes our responsibility unequivocal. We are not free to select the cases to which various legal principles should be applied.

The law in Iowa regarding the use of the cautionary instruction under dispute here has been in nearly constant flux. In *State v. Wallace*, 261 Iowa 104, 111, 152 N.W.2d 266 (1967), a case in which no objection was made, the court expressed the early view that the giving of the cautionary instruction did not constitute error absent an objection by the defendant.¹ In 1970, the court decided *State v. Kimball*, 176 N.W.2d 864, 869 (Iowa 1970), in which objection was made after the instruction was given. There the court announced the new rule which was to be in effect from that day forward "in any trial started after the date this opinion is filed":

"Because of the divergent opinions in this sensitive area and as the giving of even a cautionary instruction favorable to defendant may violate the spirit of *Griffin v. State of California*, supra, we believe it is advisable for us to take a definitive position on this issue. We now hold that such instruction should not be given in any future trial unless it is requested by defendant, and that it will be considered error if it is given, absent such request, in any trial started after the date this opinion is filed."

A careful reading of this new rule indicates that the court has clearly and concisely expressed its view as to the state of the law in this area. As an appellate

¹ The unrequested instruction in the instant case read as follows:

The defendant did not testify in this case on his own behalf. The failure of the defendant to testify does not deprive the defendant of the presumption of innocence, nor does it relieve the State of the burden of proving beyond a reasonable doubt the guilt of the defendant.

Further, you should draw no conclusions concerning his decision not to testify nor speculate on his motivation. The defendant's decision to remain silent should not be given any consideration whatsoever by you in your deliberations.

court, we have no choice but to give force and effect to such an unequivocal expression, regardless of the discomfort such action may cause us in any given case.

Recent efforts by the supreme court to strengthen this view have further solidified my position that our duty is clear. In *State v. Pierce*, 240 N.W.2d 678, 680 (Iowa 1976), the court stated:

"We have held, from sensitivity to a defendant's privilege against self-incrimination, that it is reversible error for a trial court to give such a cautionary instruction unless it is requested by the defendant. *State v. Kimball*, 176 N.W.2d 864, 869 (Iowa 1970). Defendant did not request the instruction in this case. Hence he may not predicate reversible error on the trial court's failure to give it." (emphasis added).

Prior to *Pierce*, *State v. Cartee*, 202 N.W.2d 93 (Iowa 1972), a case in which no objection was made, was decided, in which the court reaffirmed the principles of *Kimball*, but, in dicta, made reference to the nature of review under § 793.18, The Code, the so-called "fair trial" section.

A survey of relevant cases indicates that there is authority that error must be preserved in order to obtain appellate review under § 793.18. *State v. Galvan*, 181 N.W.2d 147, 149 (Iowa 1970); *State v. Wisher*, 217 N.W.2d 618, 620 (Iowa 1974); *State v. Smith*, 228 N.W.2d 111, 112 (Iowa 1975); *State v. Miller*, 229 N.W.2d 762, 765 (Iowa 1975); *State v. Ware*, ____ N.W.2d ____, (Iowa, August 31, 1977). However, the Iowa court in *State v. Cartee*, *supra*, at 97, after noting that error had not been preserved, stated:

"... this court has repeatedly held a finding of guilt will not be permitted to stand if, upon examination of the record pursuant to Code § 793.18, it appears an accused was not accorded a fair trial ... [citations omitted] ... This necessitates a correspondent evaluation of the issue. ..."

The *Cartee* court then proceeded to discuss this particular issue and dispose of the case with reference to it. Although *Kimball* was specifically reaffirmed, the case was ultimately decided on the basis of *Wallace* which was controlling at the time of the trial.

I believe that the uncertainty in this area of the law is primarily caused by the interpretation of the possible interaction between the *Kimball* line of cases and § 793.18 alluded to in *Cartee*. However, I believe that the language of *Kimball* and *Pierce* is so strong and clear that no interpretation of § 793.18 which would effectively circumvent the court's expression in these cases is possible. See *State v. Ware*, *supra*, slip op. at 2-

3. Unmistakably, the giving of this unrequested cautionary instruction is simply reversible error, pursuant to Kimball.

It appears beyond question that the supreme court has carved out an exception to the general principle that any error regarding a jury instruction must be preserved in order to obtain any further review, *State v. Baskin*, 220 N.W.2d 882 (Iowa 1974) and that even constitutional considerations may not be raised for the first time on appeal. See *State v. Beer*, 193 N.W.2d 530, 532 (Iowa 1972); *State v. Greene*, 226 N.W.2d 829, 832 (Iowa 1975).

In conclusion, I hasten to add that if I thought that the dicta relating to § 793.18, The Code, contained in *State v. Cartee*, supra, at 97, was intended to modify Kimball, my view might well be different under the harmless error doctrine relied upon by the majority. Since I do not, I am compelled to dissent.