

FILED

JAN 26 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

CHARLES R. BRADFORD,

)

Defendant-Appellant.

)

Filed January 26, 1983

2-331
67087

00166

Appeal from Polk District Court, Rodney J. Ryan, Judge.

Defendant appeals from his convictions of second-degree robbery, a violation of Iowa Code sections 711.1(1) and 711.3 (1981), and assault, a violation of Iowa Code section 708.1(1)(1981). AFFIRMED.

Francis Hoyt, Appellate Defender, and Patrick R. Grady, Assistant Attorney General, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

On March 18, 1981, defendant Charles Bradford was charged, by trial information, with the offenses of second-degree robbery and assault while participating in a felony (robbery and sexual abuse). Pursuant to defense counsel's request, however, the assault charge was submitted to the jury only insofar as the assault was committed in the perpetration of a sexual abuse, because "the assault while participating in the felony of robbery would be merged into and part of the robbery itself." The jury returned verdicts of guilty of second-degree robbery and assault while participating in a felony. Judgment was entered and defendant was sentenced to a term of imprisonment not to exceed ten years on the robbery conviction and a concurrent thirty-day jail sentence on the assault conviction.

Defendant now appeals from this conviction and presents four arguments in support of its reversal. Our scope of review in this case is on assigned error, except with regard to allegations of constitutional violations, which we review de novo, making an independent evaluation of the totality of circumstances. State v. Cullison, 227 N.W. 121, 126-27 (Iowa 1975).

I. Defendant first argues that the trial court abused its discretion and violated his right to due process of law by failing to order a competency hearing in accordance with Iowa Code § 812.3 (1981). Our task in deciding this issue on appeal is to review the record de novo to determine whether it contained information "from which a reasonable person would believe a substantial question of the defendant's competency exists." State v. Kempf, 282 N.W.2d 704, 706-07 (Iowa 1979).

Our application of this standard leads us to the conclusion that a formal competency hearing was not warranted under the facts of this case. Defendant cites the following particulars as indicia of his incompetence: his confusion about

the charges and procedures at arraignment; his testimony at the preliminary hearing that he was the person who had received money from Ms. Jiminez, the victim; his statements that God made him strike the victim, that the entire incident was a set-up, and that he intended to defend under another name; and his behavior at trial, including attempting to object, question witnesses, and make himself an exhibit. While we recognize that defendant's behavior prior to and at trial may demonstrate a lack of understanding of the technicalities involved in legal proceedings and a natural desire to avoid conviction, we cannot agree that it poses a "substantial question" of competency requiring a competency hearing under Iowa Code § 812.3. Kempf, 282 N.W.2d at 706, or rises to the level required by § 812.3:

If at any stage of a criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents him or her from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, further proceedings must be suspended and a hearing had upon that question.

(emphasis added).

On the contrary, psychological and psychiatric examinations of defendant which were conducted throughout the three months prior to trial revealed that defendant was "aware of the implications of his offenses as charged," "extremely conversant with the legal system," and "functioning intellectually in the upper average range." In addition, a psychiatric examination conducted on March 26, 1981, less than two weeks before trial, found defendant entirely competent to stand trial. Our examination of the record reveals nothing occurring subsequent to this examination which raised an issue of competency not already disposed of by the report submitted to the court in conjunction with this examination. Cf. State v. Jackson, 305 N.W.2d 420, 425 (Iowa 1981)(once defendant is found competent, presumption of competency continues until contrary evidence is produced).

In a similar case, State v. Lyon, the Iowa Supreme Court sustained the trial court's determination of defendant's competency despite the lack of a separate §812.3 hearing where the court had personally interrogated the defendant, obtained opinions from two psychiatrists who testified that defendant was competent to stand trial, and offered defendant an opportunity for psychiatric examination. 293 N.W.2d 8, 12 (Iowa 1980). The court stated:

It is apparent from the foregoing that defendant was a troubled person concerning only the Sorenson incident. If this were the entire record, there would be a serious question about his competency under section 812.3. However, the trial court also had the benefit of two psychiatrists, one a witness for the State, the other for defendant.

Id. at 11-12. In making its determination of competency, the court in the instant case also had the benefit of the opinions of a psychiatrist and two clinical psychologists, as well as his own opinion from personal discussions with defendant.

The psychological evaluation of defendant was ordered initially at the request of defense counsel. Counsel never requested further inquiry into defendant's competency throughout the proceedings. The Lyon court also spoke to this type of situation:

Even though the matter was discussed by court and counsel several times, at no time did defense counsel object to the procedure being followed. It is, of course, the court's responsibility to make proper inquiry under the statute; but we may consider counsel's failure to object in deciding if the procedure followed was proper.

We have considered circumstances such as defendant's intelligence and counsel's failure to ask for a competency hearing. In the present case, defendant has above normal intelligence; and although his attorneys raised the competency issue, they made no objection to the procedure followed, even though afforded every opportunity to do so.

293 N.W.2d at 12 (citations omitted). Upon our independent evaluation of the totality of the circumstances, we cannot conclude that a competency hearing was required.

II. Defendant further argues that the failure of trial counsel to request a § 812.3 hearing, and defendant's inability to cooperate with counsel, resulted in his being deprived of effective assistance of counsel. We agree with the State's reasoning that counsel's behavior in these respects may have been the result of his exercise of professional judgment, and therefore not properly the subject of an ineffective assistance attack. State v. Aldape, 307 N.W.2d 31, 41-42 (Iowa 1981); Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972). We therefore refuse to address the ineffective assistance allegations on the basis of the record before us. See State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980); State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1971).

III. Defendant's next contention on appeal is that the trial court erred in admitting testimony regarding allegedly inculpatory statements that defendant made at the time of his arrests because these statements "were not made with a knowing, intelligent, and voluntary waiver of defendant's rights against self-incrimination." We disagree.

Our review of the record reveals that defendant was orally advised of his Miranda rights twice at the time of his arrest. When he responded that he did not understand some of the points, an arresting officer further explained those points to him, particularly stressing his right to remain silent. Defendant then indicated that he understood his rights, and proceeded to tell the officers that God made him commit the robbery. Approximately one hour later at the police station, defendant was again advised of his rights, said he understood his rights, signed a written waiver of those rights, and repeated that he committed the robbery and that God made him do it.

Defendant cites Tague v. Louisiana, 444 U.S. 469, 100 S. Ct. 652, 62 L. Ed. 622 (1980) in support of his statement that the State did not meet its burden of proving a valid waiver. In that case, however, "no evidence at all was introduced to prove that petitioner knowingly and intelligently waived his rights before making the inculpatory statement." 444 U.S. at 471, 100 S. Ct. at 653, 62 L. Ed. at 625. The situation before us is quite different. Evidence was introduced that defendant was advised of his rights at least three times, that they were explained to him in detail, that he said he understood them, and that he executed a written waiver of them. Defendant was thirty-five years old, and psychiatric and psychological examinations found him to be functioning in the upper average range of intellectual ability, suffering from no mental disabilities, and "extremely conversant with the legal system." Our review of the totality of the circumstances leads us to the conclusion that the trial court properly admitted the allegedly inculpatory statements. See State v. Jump, 269 N.W.2d 417, 424 (Iowa 1978)(court found that defendant knowingly, intelligently, and voluntarily relinquished his Miranda rights where defendant was eighteen years old and a high school senior, his rights had been explained to him in detail, there was no evidence that he had been deceived into waiving his rights, and defendant exercised his right to counsel).

IV. The final argument asserted by defendant on appeal is that the trial court erred in entering judgment of conviction of both the second-degree robbery and assault convictions because the assault was a lesser included offense of the robbery, and to sentence for both would violate double jeopardy principles. See Iowa Code § 701.9 (1981).

We think that defendant has misapplied the law to the facts of this case. We have before us a sequence of events in which two assaults transpired, one in the perpetration of a robbery and the other in the perpetration of a sexual abuse. At trial Ms. Jiminez, the victim, testified as follows:

Q. So you testified you came back and had trouble starting the car and a man approached? A. Yes.

Q. What happened after that? A. He asked me if I needed some help. And I said sure. So he came around the passenger side and opened the hood.

Q. What did you do when he went to the hood? A. He just looked at it, and I really couldn't see because he had the hood up and I couldn't see. And then he came around to the driver's side.

Q. Is that where you were sitting? A. Yes. And said that he wanted to take a look at the starter.

Q. Did you let him? A. I said no, that I would do it. Because I really didn't feel comfortable with a strange man in my car.

Q. What do you mean by the starter? A. Well, the ignition.

Q. Okay. A. And—

Q. Did you let him in? A. No. I said I would do it. And I tried it, and it didn't work. Then he said he wanted to try it. And I resisted. He wanted to open the door, and I tried to close it. And he pulled it open and hit me on the side of my face. And he slid in and—

Q. Were you resisting this? A. Yes. When he hit me, I was really stunned. I couldn't do nothing. So he slid in and locked the door on the passenger side.

Q. Where were you at that time? A. In the car. He had his arm around me. Well, when he locked the door, he put his arm around me so I couldn't get out.

Q. What happened then? A. Then he asked me, he said, "Do you have some money?" or, "Give me some money."

Q. Did you have any money? A. Yes. I grabbed my purse. And I was so scared, I didn't know what the heck he was going to do next, and I thought if I gave him some money he would leave.

Q. Did you give him any money? A. Yes. I pulled a twenty dollar bill out of my purse. And he grabbed it from my hand and stuck it in his pocket.

Q. Did anything happen after that? A. Yes. He said—he said he wanted to have oral sex.

Q. Is that the word he used? A. No. He said he wanted a blow job.

Q. Okay. What happened? A. Than I don't know how it happened, but the inside light had somehow got turned on and the knob fell off.

Q. Was the dome light on then? A. Yes.

Q. While this was happening? A. Yes.

Q. Did you see the person that was in the car with you? A. Yes. And I told him that we better shut the light off so nobody could see us.

Q. What happened then? A. And so I leaned over to look for the knob. And then he hit me again, and I fell back towards the passenger side and unlocked the door and got out and ran.

Q. Okay. Why did it appear that he had hit you? A. Pardon?

MS. SHEPARD: I will object to this question. It is calling for an opinion and conclusion beyond the expertise of this witness, surely, as to motivation of any other person.

THE COURT: Well, rephrase your question.

Q. Why do you think he hit you?

MS. SHEPARD: Objection, Your Honor. That is irrelevant.

A. Because he wanted to—

THE COURT: Just a moment now.

MR. MONTGOMERY: Wait a minute, Josi.

THE COURT: It will be sustained in that form.

Q. Do you have an opinion as to why he hit you?

A. I sure do.

MS. SHEPARD: Same objection, Your Honor.

THE COURT: That just calls for a yes or no at this point. Overruled.

A. Yes, I do.

Q. What do you base that opinion on? A. He wanted to get in and take control over me.

It is clear from the preceding testimony that defendant committed an assault "while participating in the felony" of robbery, in violation of Iowa Code sections 708.1(1) and 708.3. The trial court correctly declined to submit this assault offense to the jury on the ground that

to the degree that an assault would be shown by the evidence to have been connected with the direct commission of the crime of Robbery in the Second Degree, if the jury were to find that, the assault while participating in the felony of robbery would be merged into and part of the robbery itself.

See State v. Law, 305 N.W.2d 756, 758 (Iowa 1981). It is equally clear, however, that defendant committed a second assault, subsequent to the completion of the robbery offense, "while participating in the felony of sexual abuse." Cf. State v. Holderness, 301 N.W.2d 733, 740 (Iowa 1981)(where sufficient evidence of separate offense of kidnapping existed, convictions for both second-degree sexual abuse and first-degree kidnapping were substantiated). Jiminez testified that after she gave defendant the twenty dollar bill, he "said he wanted a blow job," and hit her again because he "wanted to get in and take control of me." Contrary to defendant's claim that the jury did not find that defendant assaulted Jiminez during the perpetration of a sexual abuse, we conclude that this must have been precisely what they found. The jury returned a verdict of guilty of the crime of assault "under Count II of the Trial Information," and since the robbery assault had merged into the second-degree robbery charge, the assault "while participating in the felony of sexual abuse" was the only charge left under Count II, and the only assault charge upon which the jury was instructed. This second assault would not have merged into the robbery offense, because it was not "a lesser included offense" of the robbery, as the first assault was. See Iowa Code § 701.9; State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982) (greater offense includes lesser offense only if lesser offense is composed solely of some of elements of greater offense, and if it is impossible to commit greater offense without committing lesser). The

mere fact that the jury did not have the opportunity to find defendant guilty of the general offense of sexual abuse did not preclude their finding that he was guilty of an assault "while participating in the felony of sexual abuse." See Iowa Code § 702.13.¹

Having considered and rejected each assigned error on appeal, we affirm the decision of the trial court.

AFFIRMED.

¹ A person is "participating in a public offense" during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be. A person is "participating in a public offense" during this period whether the person is successful or unsuccessful in committing the offense. (emphasis added).