IN THE COURT OF APPEALS OF IOWA

No. 2-389 / 91-1202

STATE OF IOWA,

Appellee,

vs.

CLYDE PHILLIP COX,

Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, A. M. Critelli, Judge.

Defendant appeals, following a second jury trial, his conviction of murder in the first degree in violation of Iowa Code section 707.2(1) (1989). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, John Sarcone, County Attorney, and Odell McGhee, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

OXBERGER, C.J.

Clyde Cox was convicted of the first-degree murder of Kenny Jackson stemming from a shooting in a parking lot outside a Des Moines bar, the Knights of Pythias. The shooting occurred at approximately 1:45 a.m. on June 2, 1990, Jackson's birthday. An argument had erupted in the bar between Dollie Fields, Cox's girlfriend, and Kenny Jackson. Fields and Jackson took their argument outside. Fields fired a warning shot from a .32 caliber pistol over Jackson's head. Then Cox joined in and began to fight with Jackson. Jackson and Cox were rolling around on the ground when Art Chaney broke up the altercation.

Chaney, a large man, picked up Jackson and took him to a Volvo in a parking lot located on the north side of the bar. Cox's vehicle was parked near the Volvo. When Fields walked by the Volvo, she had a short argument with Jackson. Jackson then tore his shirt off and advanced on Fields. Fields again took out her gun. Jackson, who was intoxicated, said that he was not afraid of the gun so Fields fired another warning shot above his head. Jackson grabbed for the gun. When Chaney saw Jackson grab the gun, Chaney also reached for it. The three struggled for the gun and were all pushed against the car in the shape of a "C". The gun was up in the air above Chaney's shoulders and he was able to put his finger on the trigger. Chaney fired off a shot in an attempt to empty the gun so that no one would be harmed by it.

Meanwhile, Cox returned to his vehicle, retrieved a pistol and, according to the State's eye witness Tony Dameron, Cox shot Jackson in the face. Chaney, who also testified for the State, said while the three were struggling, he saw a white hand with a gun and saw the gun fire to his side or over his shoulder. Chaney said the bullet hit Jackson in the face and Jackson slumped to the ground. As Chaney turned around he saw Cox was the person who had fired the gun. Cox was the only person at the scene whose hands are white.

In the first trial, Cox did not testify. The district court declared a mistrial after the jury could not reach a verdict. The bullet which killed Jackson was fired from a .32 caliber pistol, but was so badly damaged the experts could not positively identify which weapon had fired it. Fields had testified that her weapon had fallen on the ground during the struggle, had discharged, and had shot Jackson. Fields' son testified to the same scenario. Fields indicated that after the shooting, she must have dropped the gun because she did not take it with her. The pistol was never found.

At the second trial, Cox testified that when the struggle for the gun began between the three, he went to his vehicle and pulled out his .38 caliber pistol from the console. By the time he returned to the group, Jackson had already been shot. Over Cox's objection, the State read

into evidence Tony Dameron's testimony from the first trial after making a record that Dameron was unavailable for the second trial. The State also introduced evidence that Cox owned a .32 caliber pistol which police officers had previously seen in his vehicle.

The second jury found Cox guilty as charged. The district court sentenced him to serve life imprisonment. Cox appeals.

I. Inadmissibility of Nature of Prior Convictions of Witness

The district court allowed testimony that Tony Dameron had been convicted of a felony, but refused testimony regarding the nature of the offense. Cox contends the district court erred in refusing to allow testimony regarding Dameron's convictions of two counts of burglary and one count of theft.

Admissibility of evidence lies within the sound discretion of the trial court. State of Latham, 366 N.W.2d 181, 184 (Iowa 1985). We will not interfere absent an abuse of discretion.

Iowa Rule of Evidence 609(a) provides:

> For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime involving dishonesty or false statement shall be elicited from the witness or established by public record during cross-examination, but only if the crime constituted a felony, aggravated misdemeanor, or other crime punishable by imprisonment in excess of one year pursuant to the law under which he [or she] was convicted, and the court determines that the probative value of admitting this evidence

outweighs its prejudicial effect. (Emphasis supplied.)

Evidence of a prior criminal conviction is admissible if (1) the crime involved dishonesty or false statement, and (2) the trial court determines any danger of unfair prejudice does not substantially outweigh the probative value of the prior conviction. Latham, 366 N.W.2d at 184.

Inquiry into the nature of previous felony convictions is also admissible during cross-examination for the purposes of impeachment. State v. Griffey, 457 N.W.2d 13, 16 (Iowa App. 1990); State v. Willard, 351 N.W.2d 516, 518-19 (Iowa 1984). Factors which the trial court may take into account include "(a) the nature of the conviction, (b) its bearing on veracity, (c) its age and (d) its propensity to improperly influence the minds of the jurors." Id.

We find no abuse of discretion on the part of the trial court in refusing testimony regarding the nature of the witness's prior convictions. The jury was fully aware that Dameron had a prior felony conviction. The conviction was based on a guilty plea to two counts of burglary eight years prior to this trial. The trial court properly instructed the jury to consider the witness's prior felony conviction for the purposes of assessing his credibility.

II. Admissibility of Witness's Prior Trial Testimony

Cox next contends the district court erred in admitting Dameron's former trial testimony in evidence after the

State was unable to locate Dameron to testify at trial. Cox claims the State failed to show Dameron was unavailable as a witness.

Iowa Rule of Evidence 804(b)(1) expressly permits the admission into evidence of testimony given at a former trial by an unavailable witness, over any hearsay objection, if the opposing party "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Iowa Rule of Evidence 804(a)(5) defines an "unavailable" witness to include one who "is absent from the trial . . . and the proponent of his [or her] statement has been unable to procure his attendance by process or other reasonable means."

The trial court held three hearings throughout this trial in an attempt to resolve this issue. The prosecutor and law enforcement officers testified Dameron informed them he planned to move to Davenport, Iowa, to reside with his brother. He failed to fulfill his promise to provide a current address. The State attempted to reach Dameron through his girlfriend, relatives, and his employer and had contacted Scott County and local authorities for assistance. A subpoena was sent to Scott County. Scott County and local authorities reported Dameron had been missing for some time.

We hold the State's efforts to locate Dameron constituted an attempt to procure his attendance by both

process and reasonable means. Accordingly, we hold the admission of Dameron's prior trial testimony did not constitute reversible error.

III. Sufficiency of Evidence

Cox contends the evidence was insufficient to convict him of murder in the first degree. Cox's chief complaints center on the credibility of two key State's witnesses: Art Chaney and Tony Dameron.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

We also note the jury has the liberty "to believe or disbelieve the testimony of witnesses as it chooses." State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984).

Substantial evidence supports the jury's guilty verdict. Cox testified he was at the scene with a

handgun. Two eyewitnesses testified seeing Cox shoot Dameron. A firearms expert testified the victim had been shot with a .32 caliber bullet which probably had been fired from a .32 caliber handgun but may have been fired from a .38 caliber handgun. Cox owned both a .32 caliber and .38 caliber handgun. Cox's .32 caliber handgun was never located. Cox's testimony explaining the incident, his flight from the scene and subsequent concealment was inconsistent with the other witnesses' testimony.

Accordingly, we affirm the trial court.

AFFIRMED.