

IN THE COURT OF APPEALS OF IOWA

No. 0-716 / 90-513

FILED

FEB 26 1991

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DERB LEN CHERRY,

Defendant-Appellant.

410

Appeal from the Iowa District Court for Tama County,
William R. Eads, Judge.

Defendant appeals his conviction, following a jury trial, for the crime of willful injury. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.**

Jeffrey L. Stein of Brooks, Ward & Trout, Marshalltown,
for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber,
Assistant Attorney General, Brent D. Heeren, County
Attorney, and Richard Vander Mey, Assistant County
Attorney, for appellee.

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

SACKETT, J.

Defendant Derb Len Cherry appeals his conviction for willful injury in violation of Iowa Code sections 702.18 and 708.4. He contends he should be granted a new trial. He also contends there is not substantial evidence to support the conviction. We agree defendant should have a new trial. We find the record contains substantial evidence to support the conviction. We affirm in part, reverse in part, and remand for a new trial.

The State charged defendant with the willful injury of Karin Schuldt. Karin suffered a ruptured spleen. The State contended defendant ruptured Karin's spleen when during the evening hours of August 6, 1989, he threw her down and kicked her. Allegedly later that evening, Karin fell from a hayrack. Defendant's defense at trial was that Karin injured her spleen when she fell from a hayrack rather than in the altercation with defendant.

At trial, Karin appeared as a witness for the State. Karin testified she did not know how she sustained her injuries. She indicated they could have come from the fall from the hayrack. She said she fell while attempting to climb on the hayrack, and in the fall her torso struck the tongue of the hayrack. She also testified she had told the Assistant Tama County Attorney, who was trying the case, about her fall from the hayrack during a phone conversation in November 1989, more than three months prior to the time

of trial. The assistant county attorney then denied Karin had told him about the hayrack fall and repeatedly indicated in the presence of the jury the first time Karin had said that she fell off of the hayrack was during the trial.

The assistant county attorney also attempted to impeach Karin's testimony, asking why she had not told him the hayrack story earlier. In closing argument, he argued Karin had not told the story before trial but had concocted it to protect the defendant.

After trial, Karin gave a tape recording to defendant's mother. Defendant's mother gave it to defendant's counsel. The tape was a recording of two telephone conversations between Karin and the assistant county attorney. The conversations took place on November 16, 1989. In these conversations Karin referred to the fall from the hayrack and to her uncertainty concerning the cause of her injury.

Defendant moved for a new trial, contending in part that the tape recording was newly discovered evidence he could have used to rehabilitate Karin's credibility after the State's attempted impeachment of the hayrack story. The trial court overruled defendant's motion, holding it was not probable the new evidence would have changed the outcome of the trial because the State had presented other eyewitness testimony concerning the assault on Karin.

Defendant on appeal contends he should have been granted a new trial because of the newly discovered evidence, prosecutorial misconduct and the trial court's failure to find he was denied a fair trial. Defendant contends the conversation between Karin and the assistant county attorney should have been divulged by the State in response to a request for exculpatory evidence and the assistant county attorney should not have repeatedly suggested to the jury the conversations did not take place. Defendant complains about the State's having Karin arrested to assure her testimony at trial. These arguments all center around witness Karin Schuldt, the alleged victim. We consider the arguments collectively.

Defendant contends the trial court abused its discretion in denying his motion for new trial. The State claims the newly discovered evidence was for impeachment and had no bearing on defendant's guilt or innocence, thus it did not form a basis for a new trial. The State also argues the evidence would not have produced a different result.

Iowa Rule of Criminal Procedure 23(b)(8) provides the trial court may grant a new trial on the basis of newly discovered evidence. The trial court has wide discretion in ruling on a motion for a new trial based on alleged newly discovered evidence. State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983). Such motions are not favored and

should be closely scrutinized and sparingly granted. Id.; State v. Davis, 442 N.W.2d 134, 135 (Iowa App. 1989). To prevail on a motion for a new trial based on alleged newly discovered evidence, the defendant must show (1) the evidence could not have been discovered earlier in the exercise of due diligence, (2) the evidence is material and not merely cumulative or impeaching, and (3) the admission of the evidence would probably change the result if a new trial were granted. State v. Whitsel, 339 N.W.2d at 156. Trial courts are generally in the best position to determine whether newly discovered evidence would probably lead to a different verdict on retrial. State v. Overstreet, 243 N.W.2d 880, 886 (Iowa 1976). We will uphold the trial court's ruling unless it is clearly erroneous. State v. More, 382 N.W.2d 718, 723 (Iowa App. 1985).

On September 9, 1989, defendant filed a motion for the State to produce any exculpatory evidence. The motion asked for current data and was made a continuing request. If the State suppresses exculpatory evidence, defendant is entitled to appropriate relief, including a new trial; State v. Van Rees, 246 N.W.2d 339, 345 (Iowa 1976); State v. Hummell, 228 N.W.2d 77, 80-81 (Iowa 1975); State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974). A convicted party is entitled to a new trial if he or she proves the State intentionally or inadvertently failed to correct

materially false testimony relevant to credibility of a key State witness. State v. King, 256 N.W.2d 1, 15-16 (Iowa 1977). See also Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959); United States v. Sutton, 542 F.2d 1239, 1243 (4th Cir. 1976); Boone v. Paderick, 541 F.2d 447, 450-51 (4th Cir. 1976); United States v. Harris, 498 F.2d 1164, 1168 (3rd Cir. 1974), cert. denied, 419 U.S. 1069, 95 S. Ct. 655, 42 L. Ed. 2d 665 (1974).

The tape recordings show (1) exculpatory evidence was withheld (the statement of the victim that the injury could have come from something other than defendant's actions was clearly exculpatory), and (2) the prosecutor at trial had sought to prove and argue a point clearly contrary to the discovered evidence (that the victim did not tell the story earlier, therefore, she made it up to help the defendant).

The evidence was material. To show willful injury, it was necessary the State show the spleen injury was the result of defendant's actions. The credibility of the victim's statement on the hayrack fall was crucial. The victim had not wanted to testify and was arrested as a material witness. This shows the State was well aware of Karin's reluctance to testify.

We find the information from Karin's phone calls should have been divulged as exculpatory evidence in response to

defendant's continuing request. The phone calls were not divulged. The assistant county attorney, through his own statements before the court and jury, made it clear he denied the conversations Karin had recorded had ever taken place. It is not easy to understand, considering the nature and length of the two telephone conversations, how the assistant county attorney failed to divulge the calls as exculpatory evidence and then contended the calls had not taken place. From reading the transcript of the taped calls with Karin, we learn the assistant county attorney was extremely interested in prosecuting this case. We find it unnecessary to determine whether the assistant county attorney was guilty of misconduct. We would caution the assistant county attorney to be more attentive to such factors in the future. Considering the record on this issue as a whole, we find a cumulative effort to deprive this defendant of a fair trial. See State v. Carey, 165 N.W.2d 27, 36 (Iowa 1969). We find a new trial should have been granted.

II.

Defendant next contends the evidence was not sufficient to support the conviction. The principles which guide our review of challenges to sufficiency are well established. See State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984); State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984); State v. Schrier, 300

N.W.2d 305, 306 (Iowa 1981). There was evidence defendant kicked Karin and the spleen injury could have come from the kicking. There was substantial evidence to support a conviction. We affirm on this issue.

III.

Defendant also contends he was entitled to a new trial because the trial court failed to give certain of his requested jury instructions. Because we have remanded for new trial, we need to address this issue. Defendant claims the instructions given were inadequate considering the particular facts of this case and as a result he was denied a fair trial.

A trial court is not bound to any particular model or form in wording its instructions. State v. Lindsey, 302 N.W.2d 98, 104 (Iowa 1981). The court may properly deny a requested instruction if the points raised are otherwise substantially covered by the court's own instructions. Id. A party cannot complain if the instructions fail to emphasize circumstances favorable to him. Lindsey, 302 N.W.2d at 102.

Where the trial court determines the adequacy or inadequacy of the instructions solely as a matter of law, its decision to grant or refuse a new trial on the basis of the instructions is reviewable for errors of law. Id. at 101-02. Defendant's claim is based on the trial court's

refusal to give several of his proposed instructions. We will address them individually.

In instructing the jurors concerning the factors which they could consider in determining the credibility of witnesses, the court instructed the jury in pertinent part:

There are many factors which you may consider in deciding what testimony to believe, for example:

* * *

3. The witness's appearance, conduct, age, intelligence, sobriety and memory and knowledge of the facts.

4. The witness's interest in the trial, their motive, candor, bias and prejudice.

Defendant's proposed instruction read:

The witness's appearance, conduct, age, intelligence, memory and knowledge of the facts, and the witness's mental state or state of intoxication at the time he or she observed the things they testified about.

The language of the court's instruction was adequate to instruct the jurors that they could properly consider the factor of intoxication in determining the credibility of witnesses. The instruction given was adequate. We find no error.

Defendant proposed the jury be instructed:

The witness's own personal interest in the trial, their motive for testifying, candor, bias and prejudice. This includes whether or not the witness now faces criminal charges themselves, their desire to testify, and reasons why testimony would be given by the witness.

This proposed language is subsumed within the language of the instruction given by the court, which directed the jury to consider the "witness's interest in the trial,

their motive, candor, bias or prejudice." There is no error here.

Defendant asked the court to add to its instruction on the probative value of inconsistent statements the following language:

You may also consider the state of mind and state of intoxication of the witness at the time he or she made the earlier statements in determining what weight to give those statements. Statements made under duress or while under the influence of intoxicants should be considered in helping you decide if you believe the witness's earlier statements, or the statements made at trial.

Defendant's proposed language is substantially subsumed within the language of a jury instruction given by the court, which directed the jurors to consider the evidence on the basis of common sense and experience, taking into account such factors as the witnesses' sobriety, interest in the trial, and motive. The court did not err in refusing to give this requested instruction.

Defendant asked the court to add the following language to its instruction concerning the probative value of the expert testimony:

Medical opinions of doctors as to a patient's condition, or as to what might have happened to the patient if they did not get treatment, are merely speculation. Medicine is not an exact science, and you should give the speculative opinions of such experts as much weight as you think it deserves.

This clause basically duplicated the instruction given. We find no error on this issue.

Costs on appeal are taxed one-half to the State and one-half to defendant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.