FILED
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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 2-214 / 91-681

**STATE OF IOWA,**

Appellee,

**vs.**

**DERRICK HOLMES,**

Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Joseph C. Keefe, Judge.

The defendant appeals his conviction, following a jury trial, of possession with the intent to deliver a controlled substance (cocaine), second-degree burglary, and third-degree kidnapping. **AFFIRMED.**

Alfredo Parrish and Andrew J. Dunn of Parrish & Kruidenier, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., Habhab, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

**SCHLEGEL, P.J.**

The defendant, Derrick Mayweather Holmes, appeals his conviction, following a jury trial, of possession with the intent to deliver a controlled substance (cocaine), in violation of Iowa Code section 204.401(1)(a) (1989); second-degree burglary, in violation of Iowa Code section 713.5 (1989); and third-degree kidnapping, in violation of Iowa Code section 710.4 (1989). Holmes contends the district court erred in: (1) refusing to dismiss the charges on double jeopardy grounds where the prosecutor's actions forced a mistrial in his previous trial; (2) allowing the alleged victim to testify despite an alleged recantation, inconsistent testimony, and alleged intimidation by the State; (3) refusing to grant a mistrial due to the State's alleged failure to disclose promises made to a witness; (4) refusing to grant a mistrial based on prosecutorial misconduct; (5) refusing to grant a directed verdict; and (6) failing to grant full credit on his sentences for time served in jail. Finally, Holmes claims he was denied a fair trial by the cumulative effect of the above errors.

In early January 1989 David Puckett stole a lockbox containing cocaine from his sister's house. The box belonged to Earl Harris. Puckett took the lockbox to get even with Harris for selling him soap instead of drugs. Puckett took the drugs to Brian Williams's apartment and shared them with the occupants. The next morning Earl

Harris and Holmes appeared at Puckett's house and found Harris's drugs. Puckett, Harris, and Holmes then allegedly broke into Williams's apartment and obtained the remainder of the cocaine. Puckett claims Harris and Holmes then tied him up in the basement of a house on Ricker Street. Puckett escaped and returned home.

On October 30, 1989, the county attorney charged Holmes with second-degree kidnapping, first-degree burglary, and possession with intent to deliver a controlled substance (cocaine). On December 13, 1989, Holmes filed a motion to produce exculpatory evidence, which the district court partially sustained. Holmes's trial began on April 24, 1990. On April 25, 1990, the assistant county attorney revealed to defense counsel for the first time Puckett had been granted limited immunity by the county attorney in exchange for his testimony against Holmes. Holmes immediately moved for a mistrial. Following an extensive hearing, the district court granted the motion.

Prior to the second trial, Holmes filed a motion to dismiss on double jeopardy grounds, alleging the prosecutor deliberately forced a mistrial in order to avoid an acquittal. The district court denied the motion after a hearing. On February 27, 1991, Holmes filed another motion to dismiss based upon an alleged recantation by Puckett. Similarly, Holmes filed a motion to suppress or prohibit Puckett's trial testimony due to the recantation, inconsistent statements, and alleged intimidation by the

State. On the morning of the trial, the district court denied the motion to dismiss and reserved the ruling on the motion to suppress.

Holmes's trial began on March 19, 1991, and Puckett was permitted to testify. During the trial, the district court sustained Holmes's hearsay objection to the State's attempt to elicit testimony regarding Harris's lack of remorse following the incident and admonished the jury. The prosecutor immediately indicated, in the jury's presence, he was trying to obtain the information to show a lack of remorse on Harris's part. The district court denied Holmes's subsequent motion for mistrial and again admonished the jury. The court also denied Holmes's motion for mistrial based upon the State's alleged failure to disclose witness Kolin Ransom had been offered a "deal" in exchange for his testimony against Holmes.

At the close of the evidence, Holmes moved for a directed verdict based upon the insufficiency of the evidence and a lack of corroboration of Puckett's testimony. The district court denied the motion. On March 27, 1991, the jury found Holmes guilty of possession with intent to deliver a controlled substance (cocaine), second-degree burglary, and third-degree kidnapping. On April 15, 1991, the court sentenced Holmes to concurrent, indeterminate ten-year prison terms on the three counts. Holmes filed a notice of appeal on April 22, 1991.

On May 31, 1991, Holmes filed an application to correct his sentence for time served. The district court denied the application on July 3, 1991. On August 20, 1991, Justice Schultz denied Holmes's motion for limited remand to expand the record on this issue.

Initially, Holmes argues the State deliberately forced a mistrial during Holmes's first trial in an effort to avoid an acquittal and abort the pending prosecution. As a result, Holmes contends a second trial on the same charges should have been barred based on the principles governing the double jeopardy bar under the fifth and fourteenth amendments of the United States Constitution and Article I, section 12 of the Iowa Constitution. Holmes cites Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982) to support his argument that where governmental misconduct is intended to "goad" the defendant into moving for a mistrial, the defendant may raise the double jeopardy bar to a second trial after having succeeded in aborting the first trial on his own motion. 456 U.S. at 675-76, 102 S. Ct. at 2089-90, 72 L. Ed. 2d at 424.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Holmes maintains the State first entered into a "deal" with Puckett when Puckett was being interrogated by police in connection with a different case. In attempting to elicit information from Puckett concerning the other case, a county attorney apparently told Puckett any statements he made would not be used against him unless independent evidence produced by other means would sustain a charge against him. This statement was apparently not meant to be a formal offer of immunity to Puckett. The county attorney who made this statement was not the same county attorney who actually prosecuted Holmes at trial. The trial prosecutor claims he was not aware of this statement until one month prior to Holmes's first trial, and he did not consider the statement to be an offer of immunity to Puckett at that time.

Holmes asserts the State next offered Puckett immunity on March 16, 1990, when the trial prosecutor confidentially assured Puckett during an intermission in the taking of Puckett's deposition the State was not going to use anything Puckett said against him so he should speak freely even if it made him "look bad." This statement was made after Puckett expressed his concern during the intermission his own testimony was casting him in a bad light. Holmes contends the prosecuting attorney assured him later on this same date no promises had been made to Puckett before he testified.

The prosecutor did not inform Holmes's defense counsel of this statement until the second day of the first trial after the State's direct examination of Puckett and prior to Puckett's cross examination. Holmes contends on appeal the prosecuting attorney disclosed this "promise" to him after Puckett's credibility had been severely damaged in an effort to force the defendant into requesting a mistrial.

In light of this evidence, the trial court granted Holmes's motion for a mistrial primarily based on its finding Puckett had been given a "deal" prior to trial and the defendant had not been afforded the opportunity to investigate the matter and prepare accordingly. The court did not believe the prosecuting attorney's violation arose to a constitutional level. We agree.

Certainly failure by the State to disclose any promise or inducement made to a witness in order to secure the witness's testimony mandates a new trial. State v. Burkett, 357 N.W.2d 632, 635 (Iowa 1984); State v. King, 256 N.W.2d 1, 15 (Iowa 1977). However, even where a mistrial motion results from a clear prosecutorial overreaching, the public interest in allowing a retrial outweighs the double jeopardy bar. Oregon v. Kennedy, 456 U.S. 667, 675-76, 102 S. Ct. 2083, 2089-90, 72 L. Ed. 2d 416, 424 (1982). The double jeopardy bar will attach, however, if the court finds it was the intention of the prosecution to deliberately force a mistrial situation with the aim of aborting the pending prosecution. Id.

The Iowa Supreme Court recognized these standards for applying the double jeopardy bar of the federal constitution in State v. Chase, 335 N.W.2d 630, 632 (Iowa 1983), and in State v. Bell, 322 N.W.2d 93, 94 (Iowa 1982). See State v. Rademacher, 433 N.W.2d 754, 757 (Iowa 1988). "In the Bell decision, we also declared that the same principles are applicable in applying the double jeopardy protection afforded under the Iowa Constitution." Rademacher, 433 N.W.2d at 757. Also in Rademacher, the court stated:

> Federal and state courts which have decided cases under the "intentional provoking of a mistrial" standard following the Oregon v. Kennedy opinion have agreed that the finding of subjective intent, which that standard calls into play, must be made in the first instance by the trial court. (Citations omitted.)

Rademacher, 433 N.W.2d at 757.

In the present case the district court found it was not the intention of the prosecution to deliberately force a mistrial situation with the aim of aborting the pending prosecution. The district court stated in its ruling on the defendant's motion to dismiss: "Just the opposite is true in this case. Mr. Walton fought from the beginning against any [c]ourt ruling granting a mistrial." Accordingly, no subjective intent was found, and the double jeopardy bar does not attach in this case.

In a similar vein, Holmes argues the State failed to notify him prior to the second trial that a different "deal" had been entered into with another witness, Kolin

Ransom. Holmes claims the State violated his due process right to exculpatory evidence under Brady v. Maryland, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215, 218 (1963), and he contends the district court erred in denying his motion for a second mistrial. The State counters by arguing no suppression occurred here since Holmes knew, and used at trial, the same information he now claims was suppressed. Having made an independent evaluation of the totality of the relevant circumstances, we conclude the district court correctly denied defendant's motion.

The Iowa Supreme Court has stated:

> Several requirements attend any Brady challenge. First, the prosecution must have withheld evidence from the defendant; second, the evidence must be favorable; and third, the evidence must be "material," that is, "such that there is a reasonable probability its disclosure would have changed the outcome." State v. Schatz, 414 N.W.2d 840, 841 (Iowa App. 1987)(citing United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3382, 87 L. Ed. 2d 481, 494 (1985)); see also State v. Anderson, 410 N.W.2d 231, 232-34 (Iowa 1987). A defendant asserting a Brady violation must shoulder the burden of establishing proof of materiality. Anderson, 410 N.W.2d at 235.

State v. Brewer, 444 N.W.2d 77, 82 (Iowa 1989).

The exculpatory evidence claimed to have been suppressed is a police officer's statement to Ransom, "you're not in any trouble." Holmes argues this statement constitutes a "deal" made to Ransom when combined with the fact the prosecution did not charge Ransom with any offenses. However, as the defendant points out in his own brief, "what the police had promised Mr. Ransom was

irrelevant since the police do not have the authority to grant immunity or file charges." Even if the statement could somehow be construed as an offer of immunity, the statement was not withheld from the defendant. The State sent this information to defendant's counsel in a letter well in advance of the second trial.

Furthermore, the fact that Ransom was not charged with any offenses was thoroughly established by defendant's counsel in front of the jury during the defendant's cross examination of Ransom. As a result, the defendant cannot plausibly argue a reasonable probability existed that disclosure of this same evidence would have changed the outcome of Holmes's trial. The fact is the jury knew about this evidence and had the opportunity to assess the weight and credibility of Ransom's testimony accordingly. On this record the materiality of the evidence has not been established. The requirements of Holmes's due process challenge under Brady are not present.

Next, Holmes claims the alleged victim, Puckett, should have been precluded from testifying in the second trial based on his alleged recantation, his inconsistent testimony, and the State's alleged intimidation of Puckett. Holmes argues a letter Puckett wrote to Harris's attorney claiming Harris was being "wrongly accused" constitutes a recantation by Puckett. Holmes states in light of this letter Puckett's testimony is absurd and self-contradictory and should have been excluded under Iowa

Rule of Evidence 403 because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice to Holmes.

Generally, there are no limitations on the rule that the credibility of a witness is to be determined by the jury. State v. Frank, 298 N.W.2d 324, 329 (Iowa 1980). Holmes, however, contends the exception established in Graham v. Chicago & Northwestern Ry. Co., 143 Iowa 604, 119 N.W. 708 (1909), is applicable in this case. In Frank the court declared:

> In Graham this court stated:
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> > This court has gone its full length to protect the right of the jury trial against encroachment by the courts under any guise, and one of the rights of jury trial is the right to have the credibility of the witness determined by the jury. Generally speaking there are no limitations upon this rule, but there are limitations upon the application of it. The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court. Id. at 615, 119 N.W. at 711. Graham involved a witness'[s] testimony concerning events surrounding an accidental death. Although the witness had been fully interrogated about the details of the accident in the first trial, he gave a different and self-contradictory account of certain facts during a second trial. The only explanation given for the change of testimony was that the witness had not been asked at the first trial, which was untrue. This court found that absent explanation the witness'[s] testimony was "so manifestly insincere and absurd that no person could candidly believe it." Id. at 614, 119 N.W. at 711.

Frank, 298 N.W.2d at 329.

The court in Frank continued, "[w]e need not determine whether the Graham limitation applies to recanted, as opposed to merely self-contradictory, testimony in this case because, even if applicable, the recantation here does not fall within that limitation." Frank, 298 N.W. at 329. We find the same to be true in the present case. Here, Puckett wrote the letter to Harris's attorney after Harris had spoken to Puckett. Puckett testified in the second trial that after talking to Harris, Puckett was concerned someone in Harris's family would "get mad" and "try to get even with [him] or something." Puckett further stated, "[l]ike I said, didn't nobody threaten me. It was just the way I was thinking at the time when I wrote this letter." This testimony offers a plausible explanation why Puckett wrote the letter prior to the second trial: Puckett feared retaliation.

Even more importantly, Puckett's testimony in the second trial concerning the critical facts surrounding the alleged crimes was consistent with his earlier statements. While the defense counsel's vigorous cross-examination did reveal some inconsistencies, the basic facts of the crimes remained consistent throughout his testimony. Any conflicts which arose in the particulars of Puckett's testimony were properly left for the jury to resolve. "The very function of the jury is to sort out the evidence and place credibility where it belongs." State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984).

Furthermore, Puckett was questioned about the letter during the State's direct examination in the second trial. He testified he thought Harris's actions constituted false imprisonment, not kidnapping. This testimony further explains--from Puckett's point of view--why he wrote Harris had been "wrongly accused." In any event, Puckett's letter claiming Harris had been "wrongly accused" does not render Puckett's testimony so impossible and absurd and self-contradictory that it should be deemed a nullity by the court under the Graham limitation. Having so held, we find Holmes's argument regarding Iowa Rule of Evidence 403 unpersuasive.

Similarly, the defendant's contention the State coerced Puckett into testifying is entirely without merit. The extent of the State's attempts to procure Puckett's testimony consisted of issuing him a subpoena and informing him he had to testify. The State's actions clearly do not constitute a denial of due process.

Holmes next claims the trial prosecutor engaged in prosecutorial misconduct during the trial which prejudiced the jury. Accordingly, Holmes contends the district court erred in denying his motion for a mistrial. In State v. Anderson, 448 N.W.2d 32 (Iowa 1989), the court stated:

> A prosecutor's misconduct will not warrant a new trial unless the conduct was "so prejudicial as to deprive the defendant of a fair trial." State v. Lyons, 210 N.W.2d 543, 549 (Iowa 1973); State v. Harless, 249 Iowa 530, 536, 86 N.W.2d 210, 213-14 (1957), cert. denied, 357 U.S. 908, 78 S. Ct. 1154, 2 L. Ed. 2d 1158 (1958). The party claiming prejudice bears the burden of establishing it.

> State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986). It is not the prosecutor's misconduct which entitles a defendant to a new trial, but rather any resulting prejudice which prevents the trial from being a fair one. State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). Trial courts are vested with broad authority to determine whether prejudice actually results from misconduct. State v. Ruble, 372 N.W.2d 216, 218 (Iowa 1986). Appellate courts will overturn a trial court's ruling only upon finding an abuse of discretion. Id. An abuse of discretion appears only when it was "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id.

Anderson, 448 N.W.2d at 33.

In reviewing the district court's denial of Holmes's motion for a mistrial, we must consider the prosecutor's conduct and the whole trial, including the court's admonition to the jury. Id. at 33. Here, the prosecutorial misconduct involved the prosecutor's comment, in the presence of the jury, that he was offering evidence of Harris's prior statements not to show the truth of the matter asserted, but to show Harris "wasn't genuinely sorry" for what happened to Puckett. The prosecutor made the comment after the trial judge had already sustained defense counsel's hearsay objection, following a bench conference concerning the matter.

We do not condone the prosecutor's conduct. Under the circumstances, his statement was improper. The statement came close to representing prejudicial misconduct. Following the incident the trial judge dismissed the jury from the courtroom, instructed the prosecutor that any further similar conduct would not be tolerated, and later admonished the jury as follows:

> Ladies and gentlemen of the jury, just before you left Mr. Walton had stood up and made some comments. I want you to totally disregard those comments. You won't consider them for any purpose in this trial. It would not be something that you could consider in reaching your verdict.

With the trial court's curative actions and admonition, we do not believe the court abused its discretion in refusing to declare a mistrial. The trial court is better equipped than appellate courts can be to determine whether prejudice occurs because the trial court is a firsthand observer of both the alleged misconduct and any jury reaction to it. See Anderson, 448 N.W.2d at 34. We find no abuse of discretion in the overruling of Holmes's motion for a mistrial.

Holmes's fifth claim on appeal is the evidence at trial was insufficient to convict him of possession of cocaine with the intent to deliver and second-degree burglary. When determining sufficiency of evidence to support a guilty verdict, the following principles must be considered:

> We view the evidence in the light most favorable to the State; all inferences that are fairly and reasonably deducted from the evidence are accepted; and all the evidence, not just that supporting the verdict is considered. Furthermore, the verdict will be upheld if supported by "substantial" evidence, i.e. evidence which would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt.

State v. Wilkens, 346 N.W.2d 16, 20 (Iowa 1984) (citing State v. Freie, 335 N.W.2d 169, 171 (Iowa 1983)). Applying these principles we find the evidence sufficient to support the jury's verdict.

Holmes contends the only evidence tending to link him to the charges was the uncorroborated testimony of Puckett. Holmes argues Puckett was an accomplice to these crimes, and he directs the court's attention to Iowa Rule of Criminal Procedure 20(3) (1992). This rule provides:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

With this rule in mind, Holmes cites State v. Berney, 378 N.W.2d 915, 917 (Iowa 1985) to support his contention that the general rule for determining whether a witness is an accomplice is determining whether the person could be charged with and convicted of the specific offense for which an accused is on trial.

Having thoroughly reviewed the record, we conclude ample independent evidence exists connecting Holmes with the commission of these offenses regardless of whether Puckett is deemed to be an accomplice.

Next, Holmes argues the district court failed to grant him full sentence credit for the time he was confined in the Black Hawk County Jail prior to his sentencing. At the time of the events leading up to the instant appeal, Holmes had four separate criminal matters pending, including the instant case. On May 18, 1990, the district court ordered the other three criminal cases continued until after trial on the instant case was completed.

Iowa Code section 903A.5 (1991) provides direction on calculating the days credited to an inmate for time served prior to sentencing. It states in pertinent part:

> However, if an inmate was confined to a county jail or other correctional or mental facility at any time prior to sentencing, or after sentencing but prior to the case having been decided on appeal, because of failure to furnish bail or because of being charged with a nonbailable offense, the inmate shall be given credit for the days already served upon the term of the sentence.

(Emphasis added.) In construing this code section the Iowa Supreme Court has stated, "[t]o be entitled to sentence credit for presentence time served, the defendant must have been detained for the offense of which he ultimately is convicted." (Emphasis added.) Walton v. State, 407 N.W.2d 588, 591 (Iowa 1987).

In the present case, Judge Keefe made the following finding in an order filed July 3, 1991:

> The first motion was the request by the Defendant for additional credit on the time served on these charges. However, review of the file indicates that on December 14, 1989, Defendant filed a bail bond in the amount of $50,000 and on the same date filed an additional bond of $25,000, both in this case which released him. Thereafter, he was held on bonds in other cases which did not affect this case. Therefore, Defendant was not held through this 18-month period on these charges and he is only entitled to credit for the time he actually served while being held on these specific charges and no other.

(Emphasis added.)

We agree. After Holmes filed the $75,000 bail in the immediate case on December 14, 1989, he was no longer being held in the Black Hawk County Jail for these offenses.

Instead, the time he spent detained in jail after posting the bond for this case was time toward the other three criminal cases which were pending at the time. Holmes will be credited for the presentence time served on these other pending criminal cases in accordance with Iowa Code section 903A.5 (1991) when and if Holmes is sentenced on these other crimes. Until that time, Holmes should not receive a "windfall" of additional credit in this case for time served on unrelated charges. Because Holmes has already received a fifty-day full credit for the time he served on the charges in the instant case, no error occurred.

Finally, Holmes argues the cumulative effect of all the claimed errors was prejudicial denying him a fair and impartial trial. We conclude the defendant has failed to demonstrate errors sufficient to assert their "cumulative effect." Accordingly, we affirm Holmes's conviction.

**AFFIRMED.**