IN THE COURT OF APPEALS OF IOWA

No. 2-009 / 90-1880

FILED
MAR 24 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

WILLIAM JOSEPH RAYMOND, JR.,

Appellant.

Appeal from the Iowa District Court for Polk County, Ray Hanrahan, Judge.

Defendant appeals from his conviction of second-degree murder stemming from the shooting death of his uncle. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John Burns , Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant County Attorney, for appellee.

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

OXBERGER, C.J.

William Raymond and his half-brother, Timothy Webber, had worked with Gary Van Gundy. Van Gundy was their uncle. On the day that Raymond shot Van Gundy, Van Gundy arrived at Raymond's residence around 9:00 in the morning without their paychecks. Raymond lived with Webber. Van Gundy left in a vain attempt to retrieve the checks from his boss. Van Gundy arrived back at Webber's house between 11:00 and 11:30 and had been drinking. Van Gundy continued to drink throughout the day and eventually Van Gundy, Raymond, and Timothy Webber went to another bar to continue drinking.

During their stay at the bar, Bud Cleghorn and Van Gundy got into an argument in which Webber also joined to defend Cleghorn. Raymond and Webber left the bar at about 12:30 a.m. to return to their residence. Once they arrived at home, Van Gundy pulled up in his truck. Webber went outside to see what Van Gundy wanted and was told "I'm going to jump out, rip your head off, and kick your ass." Van Gundy then got out of his truck and grabbed Webber by the throat. While Webber attempted to get away, Van Gundy grabbed him by the coat and pulled it over Webber's face. While these events occurred, Raymond got Webber's rifle and went out to confront Van Gundy. According to Raymond, Van Gundy threatened to shoot him, and as Van Gundy moved his hands up to his chest, Raymond shot Van Gundy.

At trial, Raymond sought to introduce into evidence records from Broadlawns Medical Center showing that Van Gundy was hospitalized when he was swinging a shotgun and threatening to blow himself up. Raymond believes this showed Van Gundy's propensity for violence and was material given Raymond's defense that the shooting was justified for self-protection.

Raymond also insists the trial court erred because the prosecutor learned that Vicky Davis had divulged to an undercover police officer that she had drugs available in Webber's house. Raymond believes the undisclosed evidence was favorable to his case because a fight involving a quantity of drugs would create a far more serious and violent fight than the fight the State depicted between drinking relatives. Finally, Raymond submits that the introduction of his mug shot was prejudicial because it depicted him with long hair and a mustache from which the jury could infer that Raymond was attempting to hide something by his clean shaven appearance with short hair at trial. Additionally, the mug shot would infer that Raymond is a bad person and guilty of the crimes charged.

Although Raymond had been charged with first-degree murder, the jury convicted him of second-degree murder. The district court sentenced him to a term of incarceration not to exceed fifty years. Raymond appeals.

Scope of Review: We review for corrections of errors at law. Iowa R. App. P. 4. As a general proposition, the admissibility of evidence is a matter for the exercise of the trial court's discretion. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). Absent an abuse of discretion, we will not disturb the trial court's discretion as to the admissibility of the challenged evidence. State v. Parsons, 401 N.W.2d 205, 207 (Iowa Ct. App. 1986).

Character Evidence: We first consider whether the district court erred in not allowing Raymond to introduce evidence of Van Gundy's conduct on September 22, 1979, to show a propensity for violence and Raymond's state of mind.

Iowa R. Evid. 404(a)(2)(A) provides:

> a. Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (2) Character of victim
> (A) In Criminal cases. Subject to Iowa R. Evid. 412, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in any case where the victim is unavailable to testify due to death or physical or mental incapacity to rebut evidence that the victim was the first aggressor.

Iowa R. Evid. 405(b) provides for methods of proving character and states:

> b. Specific instances of conduct. In cases in which character or a trait of character of a

> person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct.

Raymond claimed he shot Van Gundy because he was afraid his uncle would hurt his half-brother, T.J., or Raymond. He asserts evidence of Van Gundy's conduct in 1979 is highly relevant to Van Gundy's propensity of violence and Raymond's state of mind.

The evidence presented in the offer of proof established that Van Gundy was brought into Broadlawns Medical Center by the Des Moines Police Department on September 22, 1979. Van Gundy allegedly had been swinging a shotgun and threatening to blow himself up. Raymond accompanied Van Gundy at that time.

The State asserts that Raymond's claim is meritless. The State argues Raymond cannot establish that the instance at Broadlawn's shows Van Gundy's propensity for violence. The State argues that the whole point of the medical record was evidence only of a suicide threat or attempt and therefore was not relevant to show Van Gundy's character for violence <u>to</u> <u>others</u>. In this context, the State contends having suicidal tendencies twelve years earlier should not be equated with a propensity for violence against others.

Violence is commonly defined as an unjust or unwarranted exercise of force, usually with the

accompaniment of vehemence, outrage or fury. Black's Law Dictionary 811 (5th ed. 1983). Raymond accompanied Van Gundy on the day he was taken to Broadlawns. He was aware Van Gundy was swinging a shotgun and threatening to blow himself up.

The trial court in its ruling on Motion for New Trial, found a plethora of evidence of other incidents was admitted from which the jury could have believed he was an aggressive and violent person. Evidence was admitted showing Van Gundy got in arguments at the bar, threatened his wife's father, grabbed his nephew by the throat, kept a baseball bat behind his seat, pulled a gun on a person and had thrown various objects at Raymond in the past which could have killed him. In light of the amount of evidence admitted, we find the trial court's refusal to admit evidence of Van Gundy's conduct in 1979 was within its discretion.

We stress that the extent to which Raymond reacted would reasonably be related to his state of mind and perception of Van Gundy's character for violence. Even more importantly was Raymond's perception of the degree of violent conduct anticipated from Van Gundy. Evidence showing Raymond's state of mind at the time he shot Van Gundy was essential to his defense and an explanation for the extent of his reaction to Van Gundy's conduct. We find it a very close question regarding whether this evidence

should have been admitted. We however conclude the ruling was within the trial court's broad discretion.

Exculpatory Evidence: Raymond asserts the trial court erred in refusing to grant a new trial, where evidence existed that drugs were available in the house at the time of the shooting incident. Raymond argues the State suppressed evidence in violation of his rights under both the United States Constitution and Iowa Constitution.

Because Raymond asserts a constitutional violation, we review de novo. State v. Davis, 304 N.W.2d 432, 435 (Iowa 1981). The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963). Iowa accepts the three-prong test advanced by Brady. See State v. Brown, 377 N.W.2d 507, 509 (Iowa 1983). The test is as follows:

1. A proper defense request for the evidence;

2. A showing that the evidence would be favorable to the defendant;

3. A showing the evidence would be material.

Id.

There is no dispute that Raymond can satisfy the first prong of the Brady test and establish that a proper request was made by the defense. The prosecutor learned two days before trial that witness Vicky Davis was involved in a potential drug purchase at the house where Raymond was staying. The prosecutor argues she did not share this information with the defense because it was not thought to be relevant, exculpatory, or admissible.

The second prong of the exculpatory evidence test in Brady is whether the evidence was material to the defense. Evidence is "material" for Brady purposes only if the defendant shows a reasonable probability that if the evidence had been produced, the outcome of the trial would have been different. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989).

Raymond argues the evidence would have served as a basis for the fight between Van Gundy and Webber. He contends a fight involving a quantity of drugs would create a far more serious and violent fight than the State's version advancing a fight between relatives. We find the suggestion that this woman's drugs in the home would intensify the fight is too speculative to conclude the outcome of the trial would have been affected. Raymond's argument fails to meet the materiality requirement. We therefore affirm the trial court's refusal to grant a new trial on this issue.

Admission of the "Mug Shot": We next consider whether the trial court erred in allowing the State to introduce a "mug shot" of Raymond into evidence. During the testimony of Officer James Rowley, the State was allowed, over defendant's objection, to admit Raymond's photograph taken at the police station. To obtain admission of a photograph into evidence: (1) the picture must be relevant to the controversy, and (2) the picture must fairly represent what it shows. See State v. Holderness, 293 N.W.2d 226, 230 (Iowa 1980).

We concern ourselves with only the first prong of this test. The State argues the photograph was relevant. Relying upon State v. Holderness, at 234, the State argues that photographs can be used in two ways: as substantive proof of a fact, or to illustrate the testimony of a witness. The State argues that the photograph was used to illustrate Officer Rowley's testimony. It is argued that the photograph reflected how Raymond looked the night of the incident. We find the admission of the photograph was within the trial court's discretion.

AFFIRMED.