IN THE COURT OF APPEALS OF IOWA

No. 3-167 / 92-64

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

WILLIAM CORY SCOTT,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, Judge.

Scott appeals his conviction, following a jury trial, of first-degree murder in violation of Iowa Code section 707.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, and Thomas S. Tauber, Assistant Attorney General, Thomas S. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

000308

SCHLEGEL, P.J.

The defendant, William Cory Scott, appeals his conviction, following a jury trial, of murder in the first degree. Scott contends the court erred in: (1) failing to properly instruct the jury on the lesser-included offense of involuntary manslaughter; (2) failing to admonish the jury after allegedly improper closing remarks by the prosecutor; and (3) permitting hearsay testimony. Scott also contends he received ineffective assistance of counsel.

Scott, a twenty-one-year old male, had a history of confrontations with the man he shot and killed, Willie Guyton. In early 1991 Scott and his brother-in-law, Raymond Birden, had an argument with Guyton in the parking lot of a bar. Scott and Guyton were in another aborted argument in a bar in early April 1991. Shortly thereafter the two met in a convenience store, and a fight ensued. The fight ended when Guyton slashed Scott across the shoulder and chest with a knife, seriously wounding him. Scott was taken to the emergency room.

A few days later Scott and his mother went to the police station to report the stabbing and demand Guyton's arrest. The police stated that based on the information they had received, Scott, rather than Guyton, was likely to be arrested. An officer testified Scott was extremely upset and said, "That's okay, I'll get the motherfucker myself."

000909

Eight days after Scott had been in the police station, Scott was with Birden and others in the parking lot across from the West Coast Connection bar when they saw Guyton again. Birden shouted at Guyton as he was leaving the bar that he would need his knife that night. Scott left to get the gun he had purchased eighteen days earlier, a Ruger Mini-30 semi-automatic rifle.

Guyton subsequently went home and called 911. He told the dispatcher he was fearful someone he had cut on a prior occasion would be waiting for him when he returned to the bar to pick up his brother. The dispatcher told Guyton not to return to the bar, but Guyton drove there shortly after hanging up.

Outside the bar, Scott was in the back seat of Birden's car with his gun. When Birden saw Guyton's van, he turned his car to face Guyton. When the vehicles passed each other, Birden stopped and got out of his car, and Guyton slowed down. Scott allegedly saw Guyton reach down and pull out a shiny object, possibly a gun. Scott got out of the car and fired four shots in rapid succession towards the back of the van.

Two of the shots missed the van completely. One went through the bottom of the driver's door and lodged in the steering column. The fourth shot went through the middle of the side of the van, was deflected at a sharp angle, and passed through the back of the driver's seat, fatally wounding Guyton. Guyton did not die immediately and drove

000310

a few blocks away. Scott apparently left the scene without realizing Guyton had been injured and cried when he was told Guyton had died, saying he only meant to shoot in the area and scare Guyton.

At trial, the State introduced evidence that shortly after Scott had purchased the gun, he had been in police custody on a traffic violation and had bragged about how shots from semi-automatic rifles could penetrate vehicles. The following testimony of a police officer was admitted without objection:

> [H]e started up the conversation mainly by talking about our guns. Our Glocks. Said he didn't like that gun. He talked about the AK-47 he and his friends had, and he told me that he and his friend went to a junk yard and were shooting cars at the junk yard with the AK-47. He went on to talk about how an AK-47 could rip through a squad car. We wouldn't be safe in there because a bullet from an AK-47 would go through the door and kill whoever is inside.

The State charged Scott with first-degree murder. Scott filed a notice of intent to rely upon a justification defense. Scott also filed a pretrial motion in limine seeking to exclude hearsay statements and any statements he had made regarding the possible effects of firing an "AK-47" rifle into a vehicle. The district court overruled the motion as to the "AK-47" statements and sustained the motion as to the hearsay statements, unless the State established the evidence was admissible under a recognized exception to the hearsay rule.

000911

At the close of the evidence, Scott objected to the district court's proposed instructions on the grounds that the instructions failed to include the lesser-included offense of involuntary manslaughter based on an act likely to cause death or serious injury under Iowa Code section 707.5(2) (1991). The instructions included involuntary manslaughter under section 707.5(1), unintentionally causing death while committing a public offense, and instructed the jury that discharging a firearm within city limits was a public offense. The court denied Scott's objections.

During his closing argument, the prosecutor argued Scott and Birden acted in concert to kill or injure Guyton. Scott objected that this was a new conspiracy argument unsupported by the evidence, but the court overruled the objection. Scott also complains that he was prejudiced when the prosecutor began giving a "civil duty" argument.

Scott was convicted of first-degree murder in violation of Iowa Code section 707.2 (1991) and sentenced to life imprisonment. Scott appeals. He contends, among other things, that he was entitled to an instruction of involuntary manslaughter under section 707.5(2) and, further, that the court erred in instructing the jury regarding section 707.5(1) because discharging a firearm is not a public offense as defined under section 701.2 because it is prohibited by city ordinance, not statute.

The defendant's first assignment of error involves his contention that the district court erred by failing to properly instruct the jury on the lesser-included offense of involuntary manslaughter. Appellate review with respect to this issue is for errors of law. Iowa R. App. P. 4; State v. Wallace, 475 N.W.2d 197, 199 (Iowa 1991).

By statute, involuntary manslaughter is a lesser-included offense of first-degree murder. Iowa Code § 707.5(2) (1991). When an offense is made a lesser-included offense of another by statute, the court must apply the factual basis test to determine whether to submit the lesser offense to the jury. State v. Jeffries, 430 N.W.2d 728, 736-37 (1988).

If the court errs in determining which lesser-included offenses to submit, the error does not entitle the defendant to reversal unless it is prejudicial. State v. Negrete, 486 N.W.2d 297, 299 (Iowa 1992). Ordinarily, if the court submits a principal offense and at least one lesser-included offense, and the jury rejects the lesser-included offense and convicts the defendant of the principal offense charged, erroneous failure to submit a still lesser-included offense is not prejudicial and does not justify reversal. Id.

However, this principle is subject to an exception: if the court's refusal to instruct on a lesser-included offense deprives the defendant of the chance to have the jury consider a verdict which is consistent with his theory

000913

of defense, then the refusal is prejudicial, and the defendant is entitled to reversal. Id.; State v. Mikesell, 479 N.W.2d 591, 592 (Iowa 1991).

In the present case, the State concedes that sufficient evidence exists in the record to support the submission of involuntary manslaughter based on recklessly discharging a firearm within city limits as a lesser-included offense of first-degree murder. Therefore, the factual basis test is satisfied. The State also acknowledges that an instruction on this lesser-included offense is consistent with Scott's theory of defense. The State's primary argument on appeal is that the trial court's failure to submit an instruction specifically addressing this lesser-included offense did not prejudice the defendant. We agree.

In Negrete, the supreme court stated:

> This court has a long history of not reversing on the ground of technical defects in procedure unless it appears in some way they have prejudiced the complaining party or deprived him or her of full opportunity to make defense to the charge presented in the indictment or information.

Negrete, 486 N.W.2d at 299 (citing State v. Smith, 282 N.W.2d 138, 141 (Iowa 1979). The court continued:

> We have followed the general rule that the jury's rejection of a greater-included offense negates a defendant's claim of prejudice due to a trial court's failure to submit an instruction on a lesser-included offense. [Citations omitted.] It is true that we did not follow this rule in [State v. Mikesell, 479 N.W.2d 591 (Iowa 1991)]; however, we reasoned that prejudice was present because submission of the omitted lesser-included offense was the only opportunity for the jury to consider defendant's theory of defense.

000914

Negrete, 486 N.W.2d at 299.

In the present case, the jury considered and rejected second-degree murder and voluntary manslaughter, both of which are lesser-included offenses of higher degree than involuntary manslaughter. Furthermore, submission of the omitted lesser-included offense was not the only opportunity for the jury to consider Scott's defense theory. Jury instructions thirty-six and thirty-seven gave the jury ample opportunity to consider a verdict consistent with Scott's defense theory that he unintentionally caused Guyton's death by commission of the crime of discharging a firearm within the city limits.

Jury instruction thirty-six provided:

> The State must prove both of the following elements of Involuntary Manslaughter:
>
> 1. On or about the 20th day of April, 1991, the defendant recklessly committed the crime of discharging a firearm within the city limits as explained in Instruction No. 37.
>
> 2. When the defendant committed the crime, the defendant unintentionally caused the death of Willie Douglas Guyton, Sr.
>
> If the State has proved both elements, the defendant is guilty of Involuntary Manslaughter. If the State has failed to prove either of the elements, the defendant is not guilty of Involuntary Manslaughter and you will then find the defendant not guilty.

Jury instruction thirty-seven stated:

> You are instructed that discharging a firearm within the limits of a city is a crime.

Jury instruction thirty-six is based on the "public offense" alternative of involuntary manslaughter under Iowa Code section 707.5(1) (1991):

> A person commits a class "D" felony when the person unintentionally causes the death of another person by the commission of a public offense other than a forcible felony or escape.

It is clear from the language used by the district court in discussing the court's proposed instructions that the court intended to instruct the jury on the "public offense" form of manslaughter, even though the language of the instruction differs from the statute in using the word "crime" rather than the phrase "public offense."

Scott argues the court should not have given an instruction based on Iowa Code section 707.5(1) (public offense) because the underlying conduct--discharging a firearm within the city limits--is a violation of a municipal ordinance rather than a statute. Scott contends that the act of unintentionally causing a person's death by discharging a firearm within the city limits--conduct which may be illegal but which is not a public offense--constitutes a wrongful "act" within the meaning of Iowa Code section 707.5(2) (1991), which provides:

> A person commits an aggravated misdemeanor when the person unintentionally causes the death of another person by the commission of an act in a manner likely to cause death or serious injury.

Scott argues not only that the court erred in giving an instruction based on section 707.5(1) (public offense), but also that the court erred in refusing to give an instruction based on section 707.5(2) (act). Alternatively, Scott argues the court should have given an

000916

instruction based on section 707.5(2) (act) because, he claims, the jury could have found that Scott was justified in discharging the firearm, so that his action was legal rather than criminal, but that he performed that legal action in a reckless manner, thereby committing a wrongful "act" within the meaning of section 707.5(2).

Scott argues he was prejudiced by the court's failure to administer an instruction based on section 707.5(2) (act) because the court thereby deprived him of the opportunity to have the jury consider two of his theories of defense: (1) that he unintentionally caused Guyton's death by discharging a firearm within the city limits--an act which was an ordinance violation but not a public offense--and (2) that he unintentionally caused Guyton's death by committing a justified, and therefore legal, action in a reckless manner.

Having reviewed the above jury instructions and having carefully studied the defendant's arguments, we conclude that whether the "crime" of discharging a firearm within city limits is an ordinance violation rather than a public offense is unimportant with respect to determining whether Scott was prejudiced by the court's failure to instruct on the "act" alternative of involuntary manslaughter. Similarly, whether the submitted involuntary manslaughter instruction should have been based on Iowa Code section 707.5(1) (act) instead of section 707.5(2) (public offense) is unimportant.

The operative question in light of the supreme court's decisions in Mikesell and Negrete is whether "submission of the omitted lesser-included offense was the only opportunity for the jury to consider [Scott's] theor[ies] of defense." Negrete, 486 N.W.2d at 299. In other words, we must ask whether Scott had the benefit of a jury instruction which permitted the jury to render a verdict consistent with his defense. Clearly, the answer to this question is a resounding "yes." Jury instructions thirty-six and thirty-seven gave the jury ample opportunity to consider a verdict consistent with the crux of Scott's creative but convoluted defense theory, the essence of which is that Scott unintentionally caused Guyton's death by commission of the crime of discharging a firearm within the city limits.

This fact, in addition to the fact that the jury failed to convict Scott of any of the lesser-included offenses of second-degree murder, voluntary manslaughter, or the "public offense" alternative of involuntary manslaughter, strongly supports a determination that Scott suffered no prejudice. Accordingly, we conclude that the evidence presented affirmatively establishes that the district court's failure to instruct on the omitted lesser-included offense did not prejudice Scott.

Scott's second assignment of error on appeal involves his contention that the district court erred in overruling his objection to alleged improper comments uttered by the prosecutor during the prosecutor's closing argument.

000318

> 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." [Citations omitted.] The party claiming prejudice bears the burden of establishing it. [Citation omitted.] 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. [Citation omitted.] Trial courts are vested with broad authority to determine whether prejudice actually results from misconduct. [Citation omitted.] Appellate courts will overturn a trial court's ruling only upon finding an abuse of discretion.

State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989).

Scott claims the prosecutor's closing argument was improper in two respects. First, Scott argues that the prosecutor's closing argument presented a new theory to the jury for the first time which was unsupported by the evidence presented at trial: that Scott conspired with Raymond Birden to kill Guyton. Secondly, Scott argues the prosecutor impermissibly engaged in a "civic duty" argument by asking the jury to convict Scott in order to send a message to society that such actions would not be tolerated.

Having reviewed the record, we find these contentions to be without merit. With respect to the first contention, the record reveals the prosecutor drew conclusions and argued permissible inferences which were reasonably supported in the record. See State v. Odem, 322 N.W.2d 43, 47 (Iowa 1982). A theory asserted during closing argument need not be consistent with all of the evidence in the record. State v. Van Hoff, 371 N.W.2d 180, 186 (Iowa

1985). Here the record contained ample evidence inferentially supporting the prosecutor's argument that Scott and Birden acted together, pursuant to a prearranged plan, to effectuate Guyton's death or injury.

Regarding Scott's second contention, we conclude no prejudice resulted from the prosecutor's partial attempt to engage in a "civic duty" argument. The comments about which Scott complains in this regard are contained in the following excerpt:

> MR. WALTON (prosecutor): Lawyers sometimes tell juries their verdict will send messages, messages to the community about what will and will not be tolerated. And I submit to you, ladies and gentlemen of the jury, that a verdict of less than first degree --
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> MR. BRINER: Objection. I think this is specifically held to be improper argument. I ask for an admonition.
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> THE COURT: Counsel, approach the bench.
> (Whereupon an off-the-record discussion was had.)
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> THE COURT: You may continue.
>
> MR. WALTON: Ladies and gentlemen, think about your decision. Think very seriously about it and think how easy it is, how easy it is to claim because somebody was staring or somebody was leaning that there is justification for killing a person. Think about that. And think about if that's the case, if anyone can be convicted of First Degree Murder. Thank you.

Although we do not condone such unprofessional behavior on the part of the prosecutor, we cannot say the defendant was prejudiced in the present case. Here, the prosecutor made only a partial attempt to advance such an argument and did not return to the argument after defense counsel's

objection. In addition, the argument did not constitute an inflammatory appeal to the jurors' passions and fears, and the prosecutor did not depart from the facts of the case. Accordingly, we find Scott's contention to be unpersuasive under the facts present here.

Next, Scott contends the district court abused its discretion in admitting certain evidence by several witnesses which allegedly constituted hearsay testimony. We have carefully reviewed the enumerated instances of alleged hearsay testimony about which Scott complains and conclude no abuse of discretion occurred. Our review of the record reveals that the challenged testimony either does not constitute hearsay or is admissible pursuant to a recognized exception to the hearsay rule. As a result, no prejudice occurred.

Finally, Scott contends he was denied effective assistance of trial counsel. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain

000921

his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude the record is inadequate to adjudicate defendant's claim without counsel's opportunity to address Scott's claim of ineffective conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

For the reasons stated and discussed above, we affirm the defendant's conviction of first-degree murder.

AFFIRMED.