

IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed September 23, 1980

vs.)

PAUL D. QUICK,)

Defendant-Appellant.)

0-251

63300

Appeal from Polk District Court - A. B. Crouch, Judge.

Defendant appeals from conviction of second degree murder in violation of section 707.3, supplement to the Code 1977. AFFIRMED.

Martha Shepard, Polk County Offender Advocate Office, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Douglas F. Staskal, Assistant Attorney General; and Dan Johnston, Polk County Attorney; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals from conviction of second degree murder in violation of section 707.3, supplement to the Code 1977.

The sole issue argued by defendant on appeal in support of a reversal is stated as follows: "Did the trial court err in overruling defendant's motion for new trial made on the basis that the knowing and reckless use of false and perjured testimony by the prosecution violated his right to a fair trial and due process of law as guaranteed by the fifth and fourteenth amendments to the United States Constitution."

On July 12, 1978, defendant was indicted by a grand jury for first degree murder in connection with the May 28, 1978 shooting of Gary Haley. The matter was tried commencing February 5, 1979, and on February 16 the jury returned a verdict of guilty of second degree murder. Defendant filed a motion for new trial on March 14 asserting the ground now argued on appeal. The motion was denied by the trial court.

There was conflicting testimony at trial concerning the events surrounding the shooting that gave rise to the instant criminal prosecution. The record indicates that there were at least twelve eyewitnesses, all of whom were called to testify during the State's case in chief. The record further reflects that there was some inconsistency in the testimony of these witnesses with respect to (a) the level of intoxication of the victim and his companions; (b) the location of the victim and his companions with respect to defendant's property; and (c) the existence, if any, of verbal threats or aggressive advances toward defendant by the victim or his companions.

After the jury returned its verdict, counsel for defendant made the following record with respect to comments which allegedly were made to the jury during closing arguments by assistant county attorney Robert Blink.

[Mr. Blink stated] [I]t was his opinion that John Wallace, a witness for the State; Sherry Timblin, a witness for the State; Brenda Timblin, a witness for the State, were—and this is a quote—had used in his initial argument "allergic to the truth" and I'd also like the record to reflect that in his rebuttal argument or statement that Mr. Blink did inform the jury that he felt or thought, or it was his opinion that these three State's witnesses referred to were or had lied in their testimony in this trial.

Mr. Blink's response to this assertion by defendant's counsel was:

As I recall it, I don't think that is completely accurate. In the rebuttal, I made reference to the fact that I thought Mr. Wallace had lied. It was done in response to Mr. Wellman's comments in his closing argument why I would not say that and, therefore, in response to that, I did in fact state that.

It is the foregoing colloquy upon which the defendant seeks to posit his claim that his conviction was based on the knowing and reckless use of false and perjured testimony. It is claimed this entitles defendant to a reversal of his conviction under the holding of the Supreme Court in Napue v. Illinois, 260 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). We disagree. In Napue, the prosecutor knowingly allowed a key witness to falsely deny that promises had been made to him in exchange for his testimony. This was held to be a violation of the defendant's due process rights. Nothing akin to the Napue violation occurred in the present case. The inconsistencies among the various eyewitness accounts were plainly presented to the jury. The prosecutor cautioned prospective jurors to scrutinize the testimony carefully.

The mere fact that there are inconsistencies in eyewitness testimony cannot compel the prosecutor to abandon certain eyewitnesses where the prosecutor does not know what the truth is. It is for the jury to make this determination. As the trial court noted in the present case:

Some witnesses denied emphatically that they drank beer while other witnesses said they were intoxicated, but this is a typical situation where you have ten to twelve, fourteen people present when a controversy occurs, and during the course of the controversy, there's language back and forth among the participants, and the recollections of the various people as to who said what and whether or not something was said is very difficult and different, and that is not an unusual situation.

Given this situation, the assistant county attorney was called upon to give the jury some explanation as to the conflict in testimony. He candidly admitted that some of the discrepancies could only be explained on the ground that the witnesses had testified falsely. There is nothing in such concession, however, which suggests that these witnesses were testifying falsely as to the existence of those material facts necessary to sustain defendant's conviction. As to this matter, we agree with the State's contention that the most blatant inconsistency in the testimony is between defendant's version of the events that took place, and the testimony of all of the other witnesses. We have reviewed all contentions made and find no basis for reversal.

AFFIRMED.