FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

SHAWN VINCENT,)

Defendant-Appellant.)

Filed December 29, 1982
2-341
67666

Appeal from Sac District Court, Russell J. Hill, Judge.

Defendant appeals from his conviction of assault with intent to inflict serious injury in violation of Iowa Code sections 708.1 and 708.2(1)(1981). AFFIRMED.

Thomas H. Trienen, BattleCreek, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

Defendant appeals from his conviction of assault with intent to inflict serious injury in violation of Iowa Code sections 708.1 and 708.2(1)(1981). The defendant claims that the trial court erred (1) when it denied defendant's motion for mistrial after the prosecutor introduced evidence of defendant's refusal to give a written statement in violation of defendant's right against self-incrimination under the fifth amendment to the United States Constitution, (2) in allowing into evidence a co-defendant's written statement incriminating the defendant allegedly in violation of his right of confrontation, and (3) in refusing to mask the co-defendant's written statement to excise references to the defendant. We affirm.

The defendant, Steve Wirtjes, and another party were charged with the crime of assault with intent to inflict serious injury. Vincent and Wirtjes were jointly tried.

I. The Right to Remain Silent.

At the jury trial, a sheriff's deputy who had interrogated Vincent testified that Vincent had given an oral statement regarding the assault and that all three suspects had been asked to give written statements. In response to the prosecutor's question as to whether the defendant had given a written statement, the deputy said, "No." When asked to explain why not, the witness replied, "He just preferred not to." At this point, defense counsel objected. The trial court sustained the objection and struck the answer. However, defendant's motion for a mistrial on the ground that the State had violated Vincent's rights under the fifth amendment and prejudiced the defendant was overruled. Following arguments out of the presence of the jury, the court admonished the jury as follows:

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> It is a constitutional right of the defendant that he may not be compelled to make a written statement even after having made a verbal statement. You must not draw any inference of guilt from the fact that the defendant Shawn Vincent refused to give a written statement nor should this fact be discussed by you or enter into your deliberations in any way.

There can be no question about a defendant's right to remain silent, grounded in the fifth and sixth amendments to the United States Constitution and applicable to the States through the fourteenth amendment. The violation of such a fundamental right in a criminal trial is harmless "only if it is shown to be harmless beyond a reasonable doubt." State v. Porter, 283 N.W.2d 351, 353 (Iowa 1979), citing State v. Nelson, 234 N.W.2d 368, 372 (Iowa 1975). The question must be whether it appears beyond a reasonable doubt that the error did not affect the accused's right to a fair trial. Id. We find here that the trial court sustained the objection to the improper questioning, and struck the testimony on the spot. The jury was admonished in strong and unequivocal terms as to the rights of the defendant. This admonition was given to the jury immediately upon the resumption of the trial following the improper questions. Under the circumstances, we find that there was prosecutorial error, but that the error was harmless. See Porter at 353. See also State v. Burrell, 255 N.W.2d 119, 122 (Iowa 1977): "The general rule is that improper testimony, or in this case, prosecutorial inquiry, is not unduly prejudicial if the court admonishes the jury." As for a new trial, the defendant was entitled to one "only where it is manifest that the prejudicial effect remained with the jury." Id., citing State v. Peterson, 189 N.W.2d 891, 896 (Iowa 1971). The decision as to whether to grant a new trial is within the trial court's discretion. Id., citing State v. Mattingly, 220 N.W.2d 865, 870 (Iowa 1974); State v. Johnson, 183 N.W.2d 194, 198 (Iowa 1971). The error was harmless, it was remedied by the court's admonition to the jury, and there was no abuse of discretion by the court's denial of the motion for a mistrial.

II. The Right of Confrontation.

Over objections by the defendant, the court admitted a written statement by Wirtjes which included a number of first-person plural pronouns that appear to refer to Vincent as well as Wirtjes. Vincent objected to the introduction of this statement on the ground that it violated the rule in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Bruton stands for the proposition that the right of confrontation and cross-examination is violated when the confession of a co-defendant at a joint trial inculpates the defendant and the co-defendant does not testify and cannot be tested by cross-examination.

In the instant case, however, Wirtjes testified and was cross-examined by Vincent's counsel. Vincent therefore had, and exercised, the right of confrontation. State v. Waterbury, 307 N.W.2d 45, 49 (Iowa 1981).

III. The Co-Defendant's Written Statement.

Vincent also argues that the trial court erred in refusing to change the personal pronouns in Wirtjes' statement form plural to singular. The trial court instructed the jury to consider the written statement as evidence as to Wirtjes alone, but Vincent contends that admission of the statement was sufficient to prejudice the jury against him.

We find that Vincent suffered no prejudice from the court's failure to grant his request that his co-defendant's statement be masked. His own statements about his behavior are in every way consistent with the written statement of Wirtjes. Any error, therefore, is harmless.

AFFIRMED.