IN THE COURT OF APPEALS OF IOWA

No. 9-577 / 88-611

FILED
JAN 2 5 1990
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

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HAROLD LEROY PAGE,

Appellant.

Appeal from the Iowa District Court for Page County, Luther T. Glanton, Judge.

The defendant appeals from a conviction and sentence, entered by the trial court, following a jury trial, finding him guilty of one count of first-degree murder and one count of first-degree robbery. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender; James F. Whalen and Shari Barron, Assistant State Appellate Defenders; for appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; James Smith, Polk County Attorney; and James Ramey, Assistant County Attorney; for appellee.

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

PER CURIAM

Raymel Rogers wanted to purchase some marijuana from Daniel Zenor, a known Des Moines drug dealer. On his way to Zenor's house, Rogers saw his cousin, Harold Page, at the car wash located at 21st and University. At the time Page was in a car with a friend, Michael Brown. Page asked Rogers to buy some marijuana for him, and gave him $10. Rogers went to Zenor's home and knocked on the back door. Zenor opened the door and Rogers entered.

Almost immediately someone started pushing on the door. Zenor struggled to close the door against the intruder, later identified as Page. He called out to a friend, Joe Payne, to get a gun. A shot was fired and Rogers saw Zenor fall down the basement stairs, fatally wounded. Page then pointed a gun at Rogers and told him to leave. Page grabbed Tina Symmonds, who was living with Zenor, and held a gun to her neck and told her no one would get hurt. After grabbing some money from the table, Page left through the back door.

Page was later arrested. The trial court granted Page's request to represent himself and appointed Tom Isaac as standby counsel. Various pretrial motions were submitted on behalf of Page, acting pro se. The trial court granted Page's motion to sever his trial from that of Rogers, who was charged along with Page. Rogers was later acquitted.

At trial various witnesses to the shooting testified Page was the man who forced open the door and shot Zenor. Tammy Green, Zenor's fiancee, Cheryl Beliel, and Symmonds all testified Page was the intruder that evening, and they saw him leave in a dark colored car.

Detective Charles Soderquist testified a .22 caliber long rifle shell casing was found at the scene, but no murder weapon was ever found. Soderquist did testify Green, Symmonds, and Beliel were all shown a photographic array. Green had selected Page's photograph after viewing the array for approximately one minute. During her perusal she studied two photographs before identifying Page's. Although Symmonds selected the photograph of Page, she did so hesitantly and said she wasn't 100% positive. Beliel displayed no hesitation at all in pointing out Page's picture. Soderquist also testified Page, in an interview after his arrest, told him he had sold the gun to a drug dealer for $50 worth of crack.

During cross-examination of these witnesses, Page sought to impeach them by eliciting testimony regarding their inconsistency in identifying Page. Green had initially described the intruder as a light-skinned Mullato-type. On cross-examination, Page also elicited the fact that Green, Beliel and Symmonds had not been able to identify any one of a set of four photographs of the intruder which were all photographs of Page. Beliel and

Symmonds stated they were certain a photograph, exhibit E, was the intruder although the exhibit is actually a photograph of someone else.

The jury found Page guilty as charged. The trial court sentenced Page to twenty-five years on the robbery count, and life imprisonment on the first-degree murder count. The sentences are to be served consecutively. Page now appeals.

Page first asserts the trial court did not make sure he knowingly and intelligently waived his right to counsel when he decided to represent himself pro se. Page claims the trial court was openly antagonistic and actually encouraged him to appear pro se. Page claims his performance at trial evidenced his lack of ability to represent himself.

Page additionally alleges the trial court erred in excluding the testimony of Gloria Page because it would have impeached Rogers' testimony. Page states his mother would have testified Rogers mailed her a picture of the man who had actually committed the killing and told her to give it to her son. These statements are admissible, Page contends, as being inconsistent with earlier statements provided by Rogers.

Page next submits the trial court should have granted a mistrial when the jurors became aware of the trial judge was wearing a bullet-proof vest. This knowledge coupled

with the uniformed officers placed in the court room to guard Page may have caused the jurors to draw improper conclusions about the defendant and thus, deprived him of a fair trial. Page argues he should have been present at a pretrial hearing regarding security precautions because he had a right to be present at every stage of trial.

Page maintains State's exhibit eight should not have been admitted into evidence because Soderquist was unable to testify from direct knowledge when the photograph was taken or it accurately depicts the defendant.

Page contends the trial court erred in failing to give an instruction on voluntary manslaughter as a lesser-included offense. He asserts there was sufficient evidence of provocation at the crime scene to instruct the jury on the lesser-included offense.

Page argues the State was slow in fulfilling its promise to make its file available until three days before trial, and therefore the trial court should have granted a continuance. Page lastly argues the prosecutor's statements about aiding and abetting to the jury were prejudicial, and should have been excluded since the trial court had already ruled the evidence was insufficient to instruct on either of those issues.

We affirm the trial court

1. Waiver of Right to Counsel. Prior to the State's filing of trial information, attorney Rick Olson was

appointed to represent Page. When the defendant appeared for arraignment on October 26 or October 27, he indicated he would privately retain attorney William Garretson. Page was returned to the court on October 28, at which time attorney Garretson was also present. Garretson told the court he had been contacted by Page's wife, but had not been retained. After a heated discussion between the trial court and Page, the defendant stated he could represent himself if he wanted to. The court appointed attorney Tom Isaac to serve as standby counsel.

According to Page, no valid waiver of his right to the assistance of counsel occurred and his pro se representation resulted in a deprivation of his constitutional right to counsel.

The sixth and fourteenth amendments to the Constitution of the United State guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975). Faretta established that a defendant can waive his right to counsel and defend himself as long as he makes a knowing, intelligent and voluntary waiver of that right. 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581. When a defendant decides to represent himself, standby counsel may be appointed "to aid" defendant and to ensure availability of counsel to fully represent the defendant in

the event the self-representation ends prior to the end of trial. Faretta v. California, 422 U.S. at 834, 95 S. Ct. 2541, 45 L. Ed. 2d 581, n.46 (1975).

A defendant can waive his Faretta right after asserting it by subsequent conduct. Brown v. Wainwright, 665 F.2d 607, 611 (5th Cir. 1982).

> Even if a defendant requests to represent himself, the right may be waived through his subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether. . . . A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself.

Reese v. State, 391 N.W.2d 719, 723 (Iowa App. 1986), quoting Brown v. Wainwright, 665 F.2d at 611.

Although Page filed numerous pro se pretrial motions, attorney Isaac also filed a large number of pretrial motions: motion to sever Page's trial from Roger's; application for bond review; motion for disclosure of exculpatory evidence; application for court-ordered discovery; motion for bill of particulars; application for court appointment of an investigator; notice of alibi defense; motion in limine and application for payment of transcript from public funds. When the severance and in limine motions were considered, trial counsel first argued to the court and then was followed by Page.

Prior to jury selection, the court asked Page what help he wanted from Isaac. Page replied, "[a]t this time, Your Honor, Mr. Isaac is doing what he can at this moment. I

don't feel--I might not conduct it properly . . . from lack of knowledge in that specific area. Otherwise in that I'm still going to keep my pro se and I expect to act in that capacity only at some time or another." The court replied it would allow that and confirmed from Page that trial counsel would select the jury. Page said he expected trial counsel to cross-examine prosecution witnesses and he didn't know if he would do any questioning.

When trial convened the next day, trial counsel, outside the jury's presence and prior to any witnesses being called, stated Page wrote Isaac a note saying he wished Isaac would take over the entire trial. When asked to confirm this, Page replied he was "still going to retain my pro se." Page explained this meant he might possibly ask questions of the witnesses after counsel finished if he thought Isaac had missed something.

This court concludes Page abandoned his assertion of his right to self-representation and merely functioned as cocounsel. He was not deprived of his sixth amendment right to counsel as he was fully represented by attorney Isaac throughout the course of the proceedings.

2. Exclusion of Testimony. Defendant contends the trial court's exclusion of the testimony of his mother, Gloria Page, was prejudicial error. The testimony centered on defense exhibit E, a photograph which several witnesses said depicted the man they saw enter the Zenor home on the

night of the shooting. Rogers, on cross-examination by the defense, testified he could not remember telling defendant's mother the photograph was the man he was with on the night Zenor was killed and was the man who shot Zenor.

Gloria was called to the stand and asked to relate her conversation with Rogers about the photograph. The court permitted the answer, over the State's objection. After she responded Rogers told her he was mailing a picture to her of the man who shot Zenor, the court struck the answer and admonished the jury to disregard it.

An error in the admission of evidence does not require reversal if no prejudice results. State v. Windsor, 316 N.W.2d 684, 688 (Iowa 1982). The presence of other overwhelming evidence of guilt is persuasive of the harmlessness of an alleged error. State v. Freeman, 297 N.W.2d 363, 367 (Iowa 1980). Evidence which is merely cumulative to other evidence presented is harmless if erroneously admitted. State v. Hollins, 397 N.W.2d 701, 705 (Iowa 1986).

The evidence excluded was introduced to impeach the credibility of Rogers. It was not offered as substantive evidence the fellow in the picture actually killed Zenor. The defendant was not prejudiced by the exclusion of this testimony. No reversible error occurred here.

3. Motion for Mistrial. Page argues the trial court should have granted his motion for mistrial after it was established the jurors knew the trial judge was wearing a bullet-proof vest. This information, coupled with the extra security precautions in force during the trial, denied defendant a fair trial because of the implication he was dangerous. We do not agree.

A trial court has broad discretion in ruling on mistrial motions because it is in the best position to decide whether prejudice can only be avoided by granting a new trial. State v. Brown, 397 N.W.2d 698, 699 (Iowa 1986). A defendant who asserts the trial court's actions were insufficient to remedy the situation has the heavy burden of proving a clear abuse of discretion on the part of the trial court. State v. Brown, 397 N.W.2d at 699, citing to State v Staker, 220 N.W.2d 613, 617 (Iowa 1974). Page does not meet this burden.

Several days after the trial began the defense asked the court to question the jurors regarding a newspaper article which reported on the prior day's proceeding. The court questioned each juror closely and admonished each of them individually to decide the case only on the evidence. He told them they must ignore whatever they heard and avoid having it affect the verdict.

Additionally, the jury was issued several instructions which dealt with this issue. They were admonished to

ignore all suspicion from the present situation of the defendant and instructed on the presumption of innocence. They were also instructed on what constituted evidence and reminded that the verdict could only be based on evidence received in court. They were warned to ignore any other information, suggestions, or extraneous matters.

Defendant does not meet the burden of showing the trial court abused its discretion in denying the motion for mistrial. Defendant also fails to show he was prejudiced because of the security precautions in force during his trial.

4. Hearing Without Presence of Defendant. Defendant does not contend he was denied a fair trial because of the security measures. He only claims a pretrial hearing, held in his absence, which considered whether to impose security measures at trial, was a "stage of trial" and thus, he had a personal right to be present. However, he fails to explain on appeal how his presence at this pretrial hearing would have made any difference. Thus, any absence from this hearing is harmless. State v. Hempton, 310 N.W.2d 206, 209 (Iowa 1981).

5. Admission of State's Exhibit Eight. Defendant argues the court erred in admitting State's exhibit eight, a photograph of defendant, because the foundation was inadequate. We do not agree.

Foundation for admission of a photograph is generally met by testimony of a witness who is familiar with what the photograph depicts and who can state that the photograph accurately and fairly depicts that particular subject. State v. Holderness, 293 N.W.2d 226, 230 (Iowa 1980). However, in the absence of testimony, a foundation can be established circumstantially when the foundational witness has not actually seen what the photograph depicts. Id. at 230-231. Whether a sufficient foundation has been laid is left to the trial court's sound discretion. State v. Farnum, 397 N.W.2d 744, 746 (Iowa 1986). The trial court did not abuse its discretion in admitting this photograph.

6. Manslaughter as Lesser-Included Offense. The trial court refused to give defendant's requested instruction on voluntary manslaughter as a lesser-included offense. The court stated there was an absence of testimony to support voluntary manslaughter.

The defendant argues State v Jeffries, 430 N.W.2d 729 (Iowa 1988), and State v. Royer, 436 N.W.2d 637 (Iowa 1989), hold this failure to give the requested lesser-included offense instruction is erroneous.

Our reading of Royer leads us to the conclusion the trial court correctly refused the instruction.

In Jeffries the supreme court stated the trial court will automatically be required to instruct on a lesser-included offense without applying the factual basis

test, except in two instances. Jeffries, 430 N.W.2d at 737. One of the exceptions is a lesser-included offense that does not meet the legal test but is a statutory lesser-included offense. Id.

Voluntary manslaughter is an included offense under an indictment for murder in the first or second degree. Iowa Code § 707.4. It also contains elements not found in first-degree murder. Because voluntary manslaughter contains elements not included in murder, it fails the legal test. Jeffries, 430 N.W.2d at 736.

We again turn to Royer for guidance. In the case of statutorily mandated lesser-included offenses, the trial court must determine whether the elements of the lesser offense not present in the greater offense [foreign elements] are supported by substantial evidence. Royer, 436 N.W.2d at 643. "If there is substantial evidence of each element contained in the lesser-included offense, the trial court must follow the statutory dictate to submit the offense for jury consideration." Id.

For a voluntary manslaughter conviction, the defendant must act solely as a result of a sudden, violent and irresistible passion, and that passion must result from "serious provocation sufficient to excite such passion in a reasonable person. State v. Inger, 229 N.W.2d 119, 122 (Iowa 1980). The court in Royer ruled the trial court properly refused to give a lesser-included offense

instruction because there was no substantial evidence for one of the elements of the lesser offense. Royer, 436 N.W.2d at 643.

Page did not introduce substantial evidence he acted as a result of extreme passion or the provocation was so serious it would cause a violent and irresistible passion in a reasonable person. The trial court was correct in refusing the instruction based on lack of testimony to support the charge.

7. Failure to Grant a Continuance. Defendant argues the trial court abused its discretion in refusing to grant a continuance to cure the State's failure to timely deliver discovery materials to the defense. Again, we reject this contention because defendant has failed to demonstrate the trial court abused its discretion and he was prejudiced. State v. Ware, 338 N.W.2d 707, 714 (Iowa 1983).

8. Improper Comments in State's Closing Argument. Defendant claims the prosecutor, in his closing argument, improperly referred to theories of aiding and abetting and joint criminal conduct. Defendant has not, however, established a new trial is warranted.

Closing arguments were not reported. The record reveals after the arguments were completed, but before the case was submitted to the jury, the parties made a record outside the jury's presence. After Page stated the prosecutor's comment included joint criminal conduct, the

court agreed to advise the jury to ignore this comment. Because defendant made no record of any further objection on this issue, we presume the admonition was given. We affirm on this issue.

AFFIRMED.