IN THE COURT OF APPEALS OF IOWA

FILED
JAN 26 1989
CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
MICHAEL J. CARAHER,)
Defendant-Appellant.)

8-342
87-840

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Appeal from the Iowa District Court for Greene County (No. 3158), Albert L. Habhab, Judge.

Defendant appeals his conviction and sentence for assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2), following a jury trial. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and James F. Whalen, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Pamela Greenman Dahl, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ. Habhab, J., takes no part.

SCHLEGEL, P.J.

Defendant appeals his conviction and sentence for assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2), following a jury trial. Defendant was accused of stabbing his girlfriend during an altercation. He claims the district court erred in: 1) admitting rebuttal evidence regarding the location and discovery of the victim's purse where the prosecutor failed to promptly disclose this evidence in accordance with the pretrial discovery agreement; 2) permitting the State to rebut the defendant's evidence of good character with proof of prior specific incidents of misconduct; and 3) entering judgment and sentence of defendant's conviction of assault causing injury, an offense not charged in the trial information, when it did not have jurisdiction.

Defendant Michael J. Caraher was charged with attempt to commit murder. These charges arose out of an altercation with Ruth Hull on June 20, 1986. Caraher and Hull had dated for several months until Hull became pregnant. On the day in question they had an argument about whether Hull would run away or have an abortion. Caraher stabbed Hull in the back, leg, and shoulder and struck her in the face. Hull kicked Caraher in the groin. Caraher then left and drove to the Greene County Law Enforcement Center where he reported the incident. Hull walked to a nearby farmhouse to try to get help. Caraher

testified that he acted in self-defense when Hull tried to attack him with the knife. The jury returned a verdict finding Caraher guilty of the submitted lesser-included offense of assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2(2). Defendant was sentenced to one year in the Greene County Jail.

Defendant first claims that the trial court abused its discretion in allowing the State to use newly-discovered physical evidence in rebuttal. Prior to trial, the State and Caraher entered into an informal discovery agreement whereby the State agreed to allow the defendant "to inspect and or copy, all items requested therein, within the State's possession, at all reasonable times and places." During the trial, a citizen found the victim's purse in a ditch along the road in front of the abandoned farmhouse where the crime occurred. The prosecutor acknowledged that he did not immediately inform the defense about the purse because he did not believe the pretrial discovery agreement extended to rebuttal evidence as it was his intent to use the newly-discovered evidence solely for impeachment purposes.

We agree that the State had a continuing duty to disclose any newly-discovered evidence subject to discovery under the terms of the parties' pretrial discovery agreement, see Iowa R. Crim. P. 13(5), however, in reviewing the record on this issue, we find that the trial

court did not abuse its discretion in failing to exclude such evidence.

Iowa Rule of Criminal Procedure 13(6)(c) allows the trial court to impose a variety of sanctions where a party has failed to comply with a discovery rule. The court may "order [the offending party] to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing any evidence not disclosed, or it may enter such other order as it deems just under the circumstances." This rule accords considerable discretion to the trial court in enforcing the discovery rules. State v. Leto, 305 N.W.2d 482, 489 (Iowa 1981) (citation omitted). In reviewing the trial court's exercise of discretion, relevant factors include: (1) the circumstances surrounding the violation; (2) the prejudice, if any, resulting from the violation; (3) the feasibility of curing any prejudice; and (4) any other relevant consideration. State v. Brown, 397 N.W.2d 689, 698 (Iowa 1986).

In the instant case, the prosecution intended to use the victim's purse for impeachment purposes; the defendant had testified at trial that he did not remember whether the victim was carrying a purse and specifically denied that he threw her purse from the car on his way back to the Law Enforcement Center. Upon defense counsel's motion in limine to prevent the State from making any reference to

the purse during the course of the trial, the trial court ordered the State to produce the purse for defense examination, allowed the defense to depose the witness who found the purse and allowed a continuance to permit defense counsel to prepare surrebuttal testimony. We believe that the trial court's actions here were proper, particularly since the evidence in question had no direct bearing on the crime charged. Upon consideration of all of the relevant factors, we affirm the trial court on this issue.

Caraher next contends that the trial court erred in allowing the rebuttal testimony of Caraher's classmates, Billy Phend and Craig Kinsey, and a teacher, Harry Hagedorn, who testified as to Caraher's aggressive nature. The rebuttal witnesses were presented in response to Caraher's witnesses who portrayed him as peaceful and nonviolent. Caraher argues that the prosecution should not have been allowed to introduce evidence of specific instances of misconduct to rebut the defense evidence of good character, in violation of Iowa Rule of Evidence 404(a)(1).

Rule 404(a)(1) provides that the prosecution may offer evidence of a pertinent trait of defendant's character to rebut defendant's favorable character evidence, however rule 404(b) of that same section provides that evidence of other crimes, wrongs, or acts is <u>not</u> admissible to prove the character of a person in order to show that he acted in

conformity therewith. We find that the admission of Phend and Kinsey's testimony was error, however, we fail to find this amounted to reversible error in light of the court's actions.

In the instant case, immediately after Phend and Kinsey's testimony, the trial court ordered it stricken from the record and directed the jury to "remove that testimony from your mind and give it no consideration whatsoever in your deliberation." Trial court's later instructions to the jury stated, "[Y]ou should put out of your mind entirely and not consider in any way the testimony of Craig Kinsey and William Phend on rebuttal." Generally, a trial court's quick action in striking the improper responses and cautioning the jury to disregard it, coupled, when necessary, with some type of cautionary instruction, will prevent any prejudice. A defendant who asserts these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of trial court. State v. Brown, 397 N.W.2d at 699. Caraher has made no showing trial court's actions failed to remove potential prejudice he might otherwise have suffered had the offending testimony not been stricken. See, id. We find no error in this regard.

We further find no error with the trial court's refusal to strike the testimony of Harry Hagedorn. The court allowed this testimony for impeachment purposes only and

provided the following cautionary jury instruction to the jury:

INSTRUCTION NO. 9

> Evidence has been introduced through the testimony of Harry Hagedorn which purports to show that the character of a witness for violence is bad.
>
> Evidence as to the character of a person for violence is a recognized method of impeaching a witness and discrediting his testimony. However, this evidence may be used only for that purpose and no other.
>
> It is for you to determine whether the witness has been impeached by this evidence. If you find him to be impeached, you may, but are not required to, disregard the testimony of that witness; but, you should not disregard it if the testimony is corroborated by other credible evidence or if, for any other reason, you believe the testimony to be true.

We find that the trial court's actions were proper pursuant to Iowa Rule of Evidence 608(a) and fail to find error here.

Finally, Caraher argues that the trial court erred in submitting the offense of assault with bodily injury as a lesser-included offense of attempted murder. He did not object to the instruction for assault causing bodily injury, but claims that the error was not waived by his failure to object. We disagree. In the recent Iowa Supreme Court case of State v. Taggart, 430 N.W.2d 423, 425 (Iowa 1988), the court held that a defendant's failure to object to the giving of the jury instruction that stated that willful injury was an included-offense in the charge of attempt to commit murder waives any right to assert that

error on appeal, and thus, right or wrong, the lesser-included offense instruction became the law of the case. We find Taggart to be controlling in the instant case and find defendant's claim to be without merit.

We affirm defendant's conviction of assault.

AFFIRMED.