IN THE COURT OF APPEALS OF IOWA

No. 9-330 / 88-1285

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

NOAH WILLIAM SHEFFEY,

Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Defendant appeals his conviction of the crime of willful injury. **AFFIRMED.**

John Malvik, Rock Island, Illinois, and Marsha J. Stevenson for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and J. Michael Tobey, III, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

OXBERGER, C.J. 476

Defendant Noah William Sheffey (Sheffey) appeals his conviction of the crime of willful injury following a jury trial. Our scope of review is for correction of errors at law. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa App. 1982); Iowa R. App. P. 4. We affirm.

Defendant was charged with the crime of willful injury in violation of Iowa Code section 708.4. Sheffey was accused of shooting Dennis Lee Wickman (Wickman) on the night of March 11, 1988. Wickman spent most of that day drinking alcoholic beverages, although he also used a small amount of cocaine. Later in the day Wickman met Sheffey and the two drank together. Wickman and Sheffey had an argument about money and Wickman went home. During the night Wickman was shot six times. The next day Wickman told police officers he did not know who shot him. It was not until a week later that Wickman told officers that Sheffey was the assailant. During this time Wickman told two friends he was shot by a buddy. Defendant was convicted for shooting Wickman at a jury trial. Sheffey appeals his conviction and sentence and contends the following prejudicial errors were made during his trial.

I. Amended Information.

After the State rested during the trial and one defense witness had testified, the trial court allowed the State to

amend the trial information to allege that defendant was armed with a firearm at the time of the offense. Sheffey argues that the court should not have allowed the amendment of the trial information. He states that he was prejudiced by the additional allegation concerning a firearm because he did not have time to prepare to defend it. Also, essentially he was charged with a wholly new and different offense in violation of Iowa Rule of Criminal Procedure 4(8)(a).

Iowa Rule of Criminal Procedure 4(8)(a) allows a trial information to be amended before or during a trial if (1) substantial rights of the defendant are not prejudiced and (2) a wholly new or different offense is not charged. State v. Berney, 378 N.W.2d 915, 919 (Iowa 1985); State v. Williams, 328 N.W.2d 504, 505 (Iowa 1983) (citing State v. Williams, 305 N.W.2d 428, 430-32 (Iowa 1981), and State v. Sharpe, 304 N.W.2d 220, 223 (Iowa 1981)). Both prongs of the test must be satisfied.

We concluded this test has been met and the amendment was proper. The amendment did not result in a wholly new or different charge being brought against Sheffey. The trial information charged Sheffey with the crime of willful injury in violation of Iowa Code Section 708.4 (1987). The State alleged that Sheffey committed an act which was intended to and did seriously injure Wickman. As the trial court noted:

> It appears to the Court from the Minutes of Testimony filed by the State that there was never any doubt that the State was alleging Mr. Wickman was assaulted with a firearm. There are no other allegations that he was hit, struck or otherwise assaulted other than with a firearm. That issue has been in this case from the very beginning and, therefore, there is no surprise in allowing this amendment.

Sheffey was not denied a fair trial nor were any of his substantial rights prejudiced by the amendment. The amendment did not change the content of the State's evidence nor the nature of the case. Substantial rights of the defendant are prejudiced if the amendment creates such surprise that the defendant would have to change his trial strategy to meet the charge in the amended information. State v. Gray, 429 N.W.2d 571, 572 (Iowa App. 1988) (citing State v. Fuhrmann, 257 N.W.2d 619, 624 (Iowa 1977)). Sheffey does not point to any change in how or what evidence he would have presented or different strategy he would have used if initially presented with the use of the firearm allegation. The addition of the formal allegation of use of a firearm did not call for a new defense strategy. We find defendant's substantive rights were not prejudiced by the amendment. Therefore, we find the trial court properly allowed amendment of the trial information.

II. Hearsay.

Sheffey contends the trial court erred in overruling his objections to hearsay evidence. He contends that the

testimony of Wickman's friends, Jerry Tracy, Sr., and Jerry Tracy, Jr., that Wickman told them he had been shot by a buddy is hearsay. He believes that the statements were offered to prove the truth of what was said and that the statements do not come within any of the hearsay exceptions.

It is within the trial court's discretion to determine the admissibility of the evidence. We will reverse a decision only if the trial court abused that discretion. State v. Russell, 261 N.W.2d 490, 495-96 (Iowa 1978).

Iowa Rule of Evidence 801(d)(1)(B) and (C) provide that a prior statement by a witness is not hearsay if:

> The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . . .

The defense counsel's trial theory was to show that Wickman did not know who shot him and that the police improperly influenced him to identify Sheffey as the assailant. In the opening statement defense counsel stated:

> . . . [T]his is my opportunity to advise you of what I believe the evidence is going to show.
> . . . .
> We would submit to you that then Mr. Wickman somehow was shot in his home, but we believe the evidence will show that he doesn't know who shot him. In fact, we believe the evidence will show that on numerous occasions between March 12th, when he was shot, and March -- sometime after March 20th, he made numerous statements to the

> authorities and other people that he did not know who shot him.
>
> . . . .
>
> I believe the evidence will lead you to the conclusion that Mr. Wickman doesn't know who shot him, that he has conveniently picked out Noah William Sheffey, Noah or Billy, as his assailant because suggestions by the police that that's who shot him were made to him and inducements were made to him by the authorities to get him to say that this is, in fact, the person who shot him. We believe that at the close of the case you will be among those who also do not know who shot Dennis Wickman and you will be compelled, based on the evidence that you hear in this courtroom, to find the defendant not guilty.

At trial Jerry Tracy, Sr., and Jerry Tracy, Jr., testified over defendant's hearsay objection that Wickman made a statement to them identifing his assailant. On direct examination, Wickman testified concerning the identification of Sheffey as his assailant. He stated that on the morning after the shooting he told Jerry Tracy, Sr., and Jerry Tracy, Jr., that "Our buddy" shot him. On cross-examination he admitted that when the police arrived at his apartment he told them that he did not know who shot him. Further, that during his eight days at the hospital he informed the police that Sheffey shot him but did not make a formal statement until he was released. We believe the testimony of the Tracy's comes within the ambit of Rule 801(d)(1)(B) in that it rebuts defendant's fabrication and inducement claims and is therefore not hearsay. See State v. Brotherton, 384 N.W.2d 375, 380-81 (Iowa 1986); State v. Brown, 400 N.W.2d 74, 76 (Iowa App. 1986).

We further find testimony by the Tracys not to be hearsay since it concerns Wickman's identification of Sheffey. Iowa Rule of Evidence 801(d)(1)(C) "removes a statement of prior identification from the realm of hearsay altogether if '[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement.'" State v. Brown, 341 N.W.2d 10, 15 (Iowa 1983). Wickman testified at trial and was subject to cross-examination concerning his identification of the defendant as his assailant. We find no abuse of discretion by the trial court. The trial court did not error by allowing the Tracys to testify concerning Wickman's identification of his assailant.

III. Trial Court Discretion in Limiting Cross-Examination.

Sheffey contends that he was not allowed to cross-examine Wickman concerning his possible drug addiction. He claims the evidence would be relevant to show Wickman's ability to observe and his reliability as a witness.

Our review of the record reveals that the trial court did not limit or prevent cross-examination of Wickman. The State made record, out of the presence of the jury, that the defense counsel's questions regarding Wickman's general course of dealings in drugs would open the door for the State to explore the nature of their relationship. The trial court than ruled accordingly: "[I]f the question is

persisted in, then the door will be opened and the State may go completely into the relationship." Defense counsel after conferring with the defendant stated:

> Mr. Malvik [DEFENSE COUNSEL]: I will withdraw the question and won't pursue it, and if the Court would like to make an admonition to the Jury to disregard it --

We find the defense counsel voluntarily abandoned his questioning of Wickman concerning his prior involvement with drugs and drug use. On appeal defendant cannot claim error by the trial court in allowing defense counsel to forego a line of questioning to prevent potentially prejudicial inquiries of the defendant by the State. We find no error by the trial court.

IV. Admission of Evidence.

Sheffey contends the trial court erred in admitting State's Exhibit 19, a police report, into evidence over his objection. He contends that there is no legal basis for admission of the report into evidence.

Sheffey did not testify at the trial. His girlfriend, Karol Castel testified that he was with her at the time of the shooting. In rebuttal the State presented testimony of Detective Murphy. On cross-examination, defendant attempted to impeach Murphy with a portion of State's Exhibit 19. At the close of Murphy's cross-examination the State offered the remainder of the report into evidence in response to defense counsel having used a portion thereof. The trial court allowed the entire report to be admitted

into evidence over defendant's relevancy and prejudical hearsay objections.

The State contends the remainder of Exhibit 19 was properly offered and admitted into evidence to place into context the portions Detective Murphy discussed on cross-examination. See Iowa R. Evid. 106(a). We agree.

Iowa Rule of Evidence 106(a) provides:

> **Remainder of related acts, declarations, conversations, writings, or recorded statement.**
> a. When an act, declaration, conversation, writing, or recorded statement, or part thereof, is introduced by a party, any other part or any other act, declaration conversation, writing, or recorded statement is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation.

The rule is an expression of the rule of completeness fashioned after Rule 106 of the Federal Rules of Evidence. Federal Rule of Evidence 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

"[T]he rule permits introduction only of additional material that is relevant and is necessary to qualify, explain, or place into context the portion already introduced." United States v. Pendas-Martinez, 845 F.2d 938, 944 (11th Cir. 1988); see also United States v. Smith, 749 F.2d 1333, 1335 (8th Cir. 1986).

In State v. Kendrick, 173 N.W.2d 560 (Iowa 1970), the Iowa Supreme Court addressed the rule of completeness. The

Kendrick court held the trial court did not abuse its discretion in permitting the State to present the entire conversation the defendant had with police after the defendant used only part of the conversation on cross-examination of the police officer.

On cross-examination, Detective Murphy testified about the length of his interview and his conversation with Karol Castel concerning the time of Sheffey's arrival at her apartment. Defense counsel impeached Murphy with statements from his police report relating to the question of the time Karol Castel told him Sheffey got into bed with her. The defense counsel's questions are as follow:

> Q. Detective Murphy, I would like to ask you if you put in your report the following statement: "She did state that according to what she could recollect that the time Noah Sheffey got in bed was two o'clock."
>
> A. Two, right.
>
> . . . .
>
> Q. Did you also make in that same report, "It should be noted that Karol Castel could not remember any other details to this event except for the exact time that Noah Sheffey arrived at her apartment"? Did you make that statement in there?
>
> A. Yes, I did.

Thereafter, the State offered the remainder of the report into evidence to show the context of the comments about time and the circumstances under which Karol Castel was interviewed. After the defense counsel made a more extensive record regarding his objection to the admission of the entire report, the trial court stated:

> THE COURT: The Court will reconsider admission of Exhibit 19 in full. The Court finds that the third full paragraph on page three of the report is such that it should be excised from the exhibit placed in evidence with the Jury. With that, the remainder of the exhibit is relevant to the circumstances and the interview and was covered in the testimony of Kevin Murphy and, therefore, is relevant and admissible. The Court cannot find that there are mental impressions extraneous or conclusions of witness Murphy in anything other than possibly the third full paragraph on page three.

Upon our review of the portion of the report admitted into evidence we agree with the trial court that it is relevant to the circumstances and the interview, and was covered in the testimony of Detective Murphy.

Further, Sheffey asserts that Exhibit 19 constitutes hearsay and therefore is inadmissible.

The State contends Exhibit 19 is admissible even if it constitutes hearsay. The State urges this court to adopt the view that "independent inadmissibility [sic] is not a prerequisite for admission under Iowa Rule of Evidence 106."

The Iowa Supreme Court in State v. Kendrick, 173 N.W.2d at 562-63, upheld the trial court's admission of remaining portions of a conversation containing an otherwise inadmissible reference to a defendant's prior criminal record. Here the evidence was offered in response to the defendant's use of only part of the conversation on cross-examination of a police officer.

We believe that Iowa Rule of Evidence 106(a) "can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." United States v. Sutton, 801 F.2d 1346, 1368-70 (D.C Cir. 1986)(examining similar Federal Rule of Evidence 106); see also United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986). Consequently, we find the trial court did not abuse its discretion by allowing the State to admit Exhibit 19 over Sheffey's objection.

V. Exhibit 19.

Sheffey also asserts that the court should not have admitted State's Exhibit 19 into evidence for substantive purposes. He argues that if the report was properly admitted, it should only be used for impeachment. We previously found no abuse of discretion on the part of the trial court by allowing the State to admit Exhibit 19 over Sheffey's objections. Therefore, we find this contention without merit.

VI. Rebuttal Evidence.

Sheffey also contends the trial court erred in allowing Jerry Tracy, Jr. to testify as a rebuttal witness for the State. The court allowed Jerry Tracy, Jr. to testify in the State's rebuttal case that Sheffey had confessed to him

that he shot Wickman. Sheffey contends that this rebuttal was improper because he never testified at the trial and the testimony did not rebut anything he presented at trial.

The trial court has a good deal of discretion in determining what is proper rebuttal testimony and its ruling will not be disturbed on appeal absent a clear showing of abuse of that discretion. State v. Nicholson, 402 N.W.2d 463, 466 (Iowa App. 1987). "Rebuttal evidence includes any competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence introduced by the accused or which is brought out on his or her cross-examination." Id. (citing 23 C.J.S. Criminal Law § 1050(a) (1961)).

Gladys Vogt was called as the State's first witness. She testified that on March 12th she was awaken between 2:30 and 3:00 a.m. by what "sounded like someone had taken a high heel and hit the door three times." Mrs. Vogt and Wickman live in the same apartment complex. Mrs. Vogt lives on the second floor of the complex. Wickman was shot in his first floor apartment. On cross-examination, Mrs. Vogt stated that she could not tell where the sound came from or whether it came from Wickman's apartment.

Karol Castel was called as a witness for the State and later recalled by the defendant. On direct examination, Ms. Castel testified that the defendant was in bed with her at 2:00 a.m. on the morning of March 12th. On

cross-examination and subsequent direct examination by defense counsel, Ms. Castel stated that her clock was set fifteen minutes fast, that the defendant had really gotten home at 1:45 a.m., and that he did not arrive home later than 2:00 a.m.

In light of this testimony, we think the State was properly allowed to reply by presenting testimony of Jerry Tracy Jr. concerning Sheffey's confession. We find no abuse of discretion on the part of the trial court by allowing this rebuttal testimony.

VII. Prosecutorial Misconduct.

Finally, Sheffey claims that the prosecutor engaged in prejudicial misconduct during his closing statements by making inflammatory remarks about defense counsel, talking about personal experiences, pulling the trigger of a gun in court, and arguing about a videotape which was never admitted into evidence.

"A showing of prosecutorial misconduct alone will not warrant a new trial. Defendant must show he was so prejudiced by the misconduct he was denied a fair trial." State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986). Trial courts have considerable discretion to determine whether defendant has suffered such prejudice and we reverse only upon a showing that that discretion was abused. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). The trial court is in the "better position to determine if prejudice

resulted from the prosecutor's conduct because that court observed the alleged misconduct and the jury's reaction." Bishop, 387 N.W.2d at 561.

A. Comments about defense counsel.

In this case, the prosecutor, during his closing remarks stated:

> By the way, I would like to point out that this man had the gaul [sic] to tell you that Jerry Tracy must be a bad person because he's unemployed. How many people from International Harvester, from Caterpillar, from John Deere would belt him in the mouth if he said that in an open place --

Trial court promptly admonished the jury to disregard the statement.

An improper comment will, in most instances, not be held to constitute prejudice where the court admonishes the jury to disregard it. State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982). Only in rare cases where the prejudicial effect of the comment cannot be wiped away will an admonition be found insufficient. Id. Consequently, we do not find the misconduct denied Sheffey a fair trial.

B. Comments about personal experiences.

Sheffey next claims prosecutorial misconduct in the use of an anecdote about personal experiences. This instance of alleged misconduct occurred when the prosecutor commented about his experiences as a child when someone tattled on a friend. Defense counsel's objection was overruled by the trial court. Sheffey contends that the

prosecutor created evidence by arguing his own credibility. We disagree.

We find no misconduct. "Because trial court actually was present to hear closing arguments and observe the jury's reaction to the statements in question, we give considerable weight to trial court's ruling." Bishop, 387 N.W.2d at 563. We do not find these comments to have prejudiced Sheffey so that he was denied a fair trial.

C. Comments about a videotape.

Sheffey also asserts misconduct by the prosecutor in his references to a videotape which was never admitted into evidence. During closing argument the prosecutor stated:

> Once again, a snatch, a bit, a piece of something was taken out of a document or testimony and read to a witness, and as a result, the whole document is now before you, and this is a typed report of the substance of the taped interview with Karol Castel. Now, you heard Detective Murphy on the stand. He looked Mr. Malvik right in the eye, "There is a videotape of it. If you like to see what happened, let's play it." Now, I guarantee you because the man is competent, he is comfortable in the courtroom, I asked --

The trial court overruled defense counsel's objection to these statements.

We fail to find any misconduct by the prosecutor by referring to facts and statements that are already in the record. On direct examination and cross-examination Detective Murphy testified extensively concerning Karol Castel's videotaped interview. We do not find these comments to have prejudiced Sheffey so that he was denied a fair trial.

D. Handgun demonstration.

Sheffey's final claim of misconduct involves the prosecutor's demonstration with Ms. Castel's handgun. He asserts that pulling the trigger of a gun in court was extremely inflammatory.

Defense counsel did not object to this demonstration at trial. "The purpose of objecting is to give the trial court an opportunity to correct error and avoid possible prejudice." State v. Mulder, 313 N.W.2d 885, 892 (Iowa), cert. denied 459 U.S. 841, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1981). Since defense counsel did not object to this demonstration at trial he cannot raise the issue on appeal. State v. Atwood, 342 N.W.2d 474, 475 (Iowa 1984). Therefore any objections regarding improprieties are waived.

We find no prosecutorial misconduct so prejudicial to have denied Sheffey a fair trial.

In summary, we find the trial court properly allowed amendment of the trial information. The trial court did not error by allowing witnesses to testify concerning Wickman's identification of his assailant. We find the trial court did not limit or prevent cross-examination of Wickman. Additionally, we find the trial court did not abuse its discretion by allowing the State to admit Exhibit 19 over Sheffey's objection, or by allowing the rebuttal testimony. The defendant's conviction is affirmed.

AFFIRMED.