IN THE COURT OF APPEALS OF IOWA

No. 0-485 / 09-0150
Filed November 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACOVAN DERONTE BUSH,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Fae Hoover-Grinde, Judge.

A defendant appeals his first-degree murder conviction, contending in part that the State called three witnesses as part of its case in chief in order to introduce inadmissible evidence in the guise of impeachment. **REVERSED AND REMANDED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Harold Denton, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

Thomas Horvath died of gunshot wounds following a fight in Cedar Rapids, Iowa. Jacovan (Jake) Bush was charged with and found guilty of first-degree murder in connection with the shooting. On appeal, Bush raises several grounds for reversal, including an argument that the State called three witnesses as part of its case in chief in order to introduce inadmissible evidence in the guise of impeachment. We find this issue dispositive.

I. Background Facts and Proceedings

Two groups of young men gathered outside an apartment complex for a fight. One of the groups included Barri Salehoglu, Richard Beets, twin brothers Reggie and Ricky Beard, and Bush. Shots were fired, and Horvath was struck and eventually died.

The day after the shooting, Salehoglu told police he saw Bush fire the bullets that hit and eventually killed Horvath. The State called Salehoglu as a witness at Bush's trial. Salehoglu again identified Bush as the shooter and recounted Bush's post-shooting statement that he buried the gun and Salehoglu was "not to narc him off." On cross-examination, Salehoglu admitted that Horvath's brother essentially threatened him with death unless he told police who shot Horvath.

Beets and the Beard brothers also gave the police statements that incriminated Bush. All three recanted those statements prior to trial.

With their recantations in hand, Bush's attorney filed a motion in limine seeking to exclude the three men as State witnesses. He argued:

> It is believed the State will call these witnesses in an effort to put inadmissible hearsay (their prior statements) in front of the jury under the guise of impeachment.

The district court denied the motion, reasoning that the State would not call these witnesses "for the sole purpose of impeaching the witness with hearsay that is favorable to the State." The court stated these witnesses would also presumably "set the stage for the shooting" and describe "incidents following the shooting." The case proceeded to trial.

The first reference to the three witnesses' recanted police statements came in the prosecutor's opening statement. Without mentioning the recantations, the prosecutor told the jury that Beets and the Beard brothers "acknowledge [to the police] they know who the shooter is." Bush's attorney immediately lodged an objection. He stated,

> [A]t this point I think it's clear the State's opening statement is based on inadmissible evidence and speculation, and I would like it noted that they are doing their best to poison the jury with inadmissible material.

The court overruled the objection.

The prosecutor made additional references to the recanted statements during his direct examination of Beets and the Beard brothers. Following trial, a jury found Bush guilty as charged.

II. State Witnesses—Impeachment-Hearsay

The Iowa Rules of Evidence allow any party to attack the credibility of a witness, no matter who called the witness to testify. Iowa R. Evid. 5.607. However, this rule "is to be used as a shield and not as a sword." *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990). Specifically,

> The State is not entitled under rule [5.607] to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible. To permit such bootstrapping frustrates the intended application of the exclusionary rules which rendered such evidence inadmissible on the State's case in chief.

Id.

In *State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992), the Iowa Supreme Court reiterated the rule announced in *Turecek*, stating:

> Given that the record clearly reveals that the State knew K.A. intended to retract the allegations of sexual abuse she had formerly made, we must assume the State orchestrated this series of events merely to place before the trier of fact various items of evidence that would otherwise be inadmissible. As we concluded in *Turecek,* this sort of maneuvering constitutes reversible error.

Bush contends the prosecutor violated the *Turecek* and *Tracy* holdings when he called Beets and the Beard brothers as witnesses. In his view, those witnesses were called simply to introduce their otherwise inadmissible recanted police statements. As the holdings of *Turecek* and *Tracy* are premised on violations of the rule against admission of hearsay evidence, our review is for errors of law. *State v. Long*, 628 N.W.2d 440, 447 (Iowa 2001).[1]

A. Witness Testimony—Summary and Analysis

1. Richard Beets. The prosecutor initially asked Richard Beets how and why he came to be at the apartment complex where the fight took place, whether he had a weapon, what type of car he was driving, and how many people were with him. The prosecutor next asked Beets who was in the car with him. Beets

[1] The State raises error preservation concerns. After reviewing the record on the *Turecek/Tracy* issue, we conclude error was thoroughly preserved. In addition to filing the motion in limine, defense counsel objected throughout trial on the ground the prosecutor was engaging in "improper impeachment." His objections were timely and left no doubt as to their purport.

responded, "I don't remember." At this point, the prosecutor asked Beets to look at his written police statement to "refresh [his] recollection." Over defense counsel's objections, which were overruled, the prosecutor proceeded to insert into the record in the form of questions details from Beets's earlier police statement concerning his level of intoxication. The prosecutor continued with questions about the car and the nature of the fight, ending with the following exchange:

> Q. What ended the fight? A. Gunshots.
> Q. How many shots did you hear? A. I don't know. Three or four.
> . . . .
> Q. What did you do when the shots were fired? A. I got in my car and reversed out.
> Q. When you heard that series of shots, didn't you look at the direction of where the shots came from? A. No.
> Q. Didn't you want to know where it was the person was firing from? A. No, because I didn't know who had it.

The prosecutor did not ask Beets who fired the shots. Instead, he asked who Beets picked up in his car, whether Beets was startled by the shooting, and whether the car's occupants talked about the shooting. Then, the prosecutor again asked, "And you're saying that the entire time that the four of you drove back to Reggie's nobody talked about the gun being shot?" Beets responded, "No." The prosecutor proceeded to question Beets about substantive details in his recanted written statement to police. He asked, "Didn't you tell the officer that Jake said that he fired shots in the air?" After the court overruled the defense attorney's objection to the question, Beets responded, "Yes." The prosecutor continued, "And did you also tell that same officer that Jake told you he hid the gun?" After equivocating, Beets admitted this assertion appeared in his police

statement. Over defense counsel's objections, he also eventually admitted he told the officer that Bush asked him to keep the shooting to himself.

2. Reggie Beard. The prosecutor began his questioning of Reggie Beard by eliciting testimony about Beard's relationship with some of the other participants in the fight. He proceeded to events leading up to the fight and details about the fight. Like Beets, Beard stated gunshots rang out. The prosecutor then asked, "What did Jacovan Bush say about the gun?" Beard responded, "Nothing." The prosecutor next inquired about Beard's interview with police. Beard denied telling the police that Bush said he was the shooter. He also denied telling the police that Bush said he hid the gun. Beard essentially admitted, however, that he picked Bush out of a photo lineup. Beard qualified this admission by saying he believed he was simply to place Bush at the scene of the crime rather than to mark him as the shooter.

3. Ricky Beard. The prosecutor elicited testimony from Ricky Beard about the nature of his relationship with Bush, the circumstances preceding the fight, and the fight itself. Like the other two witnesses, Ricky Beard testified he heard gunshots. The prosecutor asked Beard, "Did you see someone fire the gun?" Beard responded, "No, sir." The prosecutor turned to Ricky Beard's police statement, asking several questions about Beard's prior assertions concerning Bush's involvement. The prosecutor obtained no admission that Bush was the shooter. The prosecutor next questioned Beard about a photo array. He asked, "Did [the police] ask you if the shooter was in that?" Beard responded, "They did and then I specifically said he is not the shooter, but he was there that night."

There is no question the three witnesses' assertions in their recanted police statements, whether written or oral, would have been inadmissible hearsay had they been offered directly rather than under the guise of impeachment. *See* Iowa R. Evid. 5.801(*c*) (defining hearsay). The statements were not made by the witnesses while testifying at trial and were offered to prove the truth of the matter asserted (i.e. that Bush was the shooter). *See id.*; *Tracy*, 482 N.W.2d at 679. There is also no question that the Beard brothers' prior identification of Bush from photo arrays was elicited to establish Bush as the shooter and was also inadmissible hearsay. *See State v. Galvan*, 297 N.W.2d 344, 346 (Iowa 1980) (stating assertive conduct, as well as oral or written statements, can be hearsay).

We recognize the prosecutor was not able to extract from the Beard brothers, as he did with Beets, unequivocal reaffirmations of their earlier recanted statements. The prosecutor's lack of success, however, does not change the fact that he "orchestrated this series of events merely to place before the trier of fact various items of evidence that would otherwise be inadmissible." *Tracy*, 482 N.W.2d at 679. In reaching this conclusion, we need look no further than the prosecutor's opening statement during which he told the jury these witnesses would identify Bush as the shooter. The prosecutor made this statement despite his knowledge, gained prior to trial, that all three witnesses recanted those portions of their police statements inculpating Bush. In light of the prosecutor's assertion, his real purpose in calling these witnesses requires no speculation. *See State v. Sowder*, 394 N.W.2d 368, 371 (Iowa 1986) (the focus is on "the real purpose for which the testimony was offered").

The prosecutor's assertion in his opening statement also disposes of the State's contention that "the bulk of each challenged witness's trial testimony was not inconsistent with police interview statements and necessary to give the jury a complete picture of the scene." With the focus on the "real purpose" for the witness testimony, it matters little that the prosecutor first elicited details of the crime from the three witnesses. The prosecutor did not tell the jury these witnesses would be called as fact witnesses to complete the story of the crime. He told the jury they would be called to identify Bush as the shooter. Notably, the prosecutor elicited most of the important details, including the identity of the shooter, from Salehoglu and Horvath's brother, both of whom testified before the three challenged witnesses. On the face of the record, therefore, the elicitation of details surrounding the crime was nothing more than a subterfuge for the real purpose of introducing the recanted statements.[2]

We conclude the district court erred in denying defense counsel's motion in limine and in allowing Beets and the Beard brothers to testify as part of the State's case in chief.

B. Harmless Error

The State contends "any error in admitting limited prior inconsistent statements does not require reversal when viewed against the record as a whole." Underlying this assertion is an assumption that reversal is not automatic on a finding of a *Turecek* violation. We question this assumption in light of *Tracy*,

[2] The district court could have limited the testimony of the three witnesses to their observations at the scene and thereafter, as defense counsel urged, so long as there was no attempt by the State to induce the witnesses to testify concerning the recanted statements or the recantation itself.

where the Iowa Supreme Court stated, "[T]he mere admission of such evidence is reversible error." *Tracy,* 482 N.W.2d at 680; *see also Turecek*, 456 N.W.2d at 225–26 (reversing and remanding for new trial without engaging in harmless error analysis). Nonetheless, because the quoted language from *Tracy* was made in the context of an ineffective-assistance-of-counsel discussion, we find it prudent to address the State's argument on its merits.

"Prejudice is presumed if hearsay is admitted, unless the contrary is affirmatively established." *Sowder*, 394 N.W.2d at 372; *see also State v. Sullivan*, 679 N.W.2d 19, 30 (Iowa 2004). The record does not affirmatively establish otherwise.

Salehoglu was the only witness other than the three challenged witnesses who identified Bush as the shooter. His testimony was of questionable value given the death threat that preceded his identification of Bush as the shooter.

The State also called the police officers who interviewed the three challenged witnesses and presented the Beard brothers with the photo arrays. They testified about the contents of the written statements, interviews, and arrays, but not before Bush's attorney interposed hearsay and "improper impeachment" objections. Based on our discussion above, these objections should have been sustained. Accordingly, this evidence cannot be considered in determining whether non-prejudice is "affirmatively established" in the record. *See Sullivan*, 679 N.W.2d at 30 (focusing on "properly admitted evidence").

The State additionally points to an expert's identification of gun residue in the form of lead and antimony particles on Bush's left coat sleeve. This evidence would have bolstered Salehoglu's identification of Bush as the shooter had the

expert been able to tie the gun residue to the shooting. In fact, the expert admitted she could not tell whether the person wearing the coat may or may not have discharged a firearm.

Finally, the State offered a fourteen-minute excerpt of a videotape of one of the police interviews to rebut the defense assertion that the police statements were coerced.[3] Bush's attorney lodged vociferous objections, stating:

> So this is extremely misleading; and if this final hearsay is going to come into a record that is filled with hearsay, then I would ask that it not be taken out of context. We will put the entire seven-hour video of Mr. Ricardo Beard, the two hours that we have on video of Reggie Beard before they move him to a room without video. . . . And we'll just throw away the rule book, not worry about hearsay anymore, and let the jury see what happened. But at this point I have to object. It's just more hearsay in a record already tainted with a lot of hearsay.

Later, Bush's attorney said,

> The offer by the State is hearsay. I'm objecting because it's hearsay. If the Court overrules the hearsay objection, I think it will be erroneous and at that point I would ask that the—so they can see the context what these people went through, that the entire thing comes in and we can put in Reggie's too. That doesn't mean it's not hearsay. It would be totally inappropriate to put it into the record.

The district court admitted the tapes in their entirety. The State now asserts these tapes were admissible for "impeachment by contradiction." In its view, "the circumstances of the challenged witnesses' recanted or inconsistent statements was highly relevant for a full and fair evaluation of their credibility as witnesses." If accepted, this argument would effectively amount to an end-run around the holdings of *Turecek* and *Tracy*. Notably, the Iowa Supreme Court rejected the

[3] Bush raises the admission of these tapes as a separate issue. We find it necessary to examine the issue only as it pertains to whether non-prejudice from the erroneous admission of the three witness' testimony was affirmatively established.

State's virtually identical argument in *Turecek*. 456 N.W.2d at 224–25. We conclude the videotapes were not admissible for "impeachment by contradiction." Accordingly, the contents of the tapes could not be used to affirmatively establish non-prejudice from the erroneous admission of the three witnesses' testimony.

We find it unnecessary to address the remaining issues raised by Bush. We reverse and remand for a new trial. *See Tracy*, 482 N.W.2d at 682.

REVERSED AND REMANDED.