IN THE COURT OF APPEALS OF IOWA

No. 3-170 / 11-1210
Filed August 21, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDDIE ROGER ADAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

A defendant contends (1) the prosecutor committed misconduct in multiple ways, (2) the State withheld exculpatory evidence, (3) the district court judge should have recused herself, (4) the district court erred in answering a jury question, and (5) his right to confront witnesses was violated. **AFFIRMED.**

Eddie R. Adams, Fort Dodge, appellant pro se.

Christopher M. Soppe of Law Office of Christopher M. Soppe, Dubuque, and Christopher J. Welch of Blair & Fitzsimmons, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Ralph Potter, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

Knicker's Saloon in Dubuque was robbed by two men wearing ski masks and carrying sawed-off shotguns. The State charged Eddie Adams and his father, Eddie Chest, with crimes arising from the incident. Adams's case proceeded to trial, and a jury found him guilty of first-degree robbery, possession of an illegal firearm, and possession of a firearm.

On appeal, Adams contends (1) the prosecutor committed misconduct, (2) the State withheld exculpatory evidence, (3) the district court judge should have recused herself, (4) the district court erred in answering a jury question, and (5) his right to confront witnesses was violated. We will address the pertinent facts and procedures in the context of each of these arguments.

I. Prosecutorial Misconduct

A claim of prosecutorial misconduct requires proof of misconduct and proof of "prejudice to such an extent that the defendant was denied a fair trial." *State v*. *Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Review of this issue where there is a proper objection is for an abuse of discretion. *State v*. *Thornton*, 498 N.W.2d 670, 676 (Iowa 1993).

A. Prosecutor's Statement That Adams Lied. In her closing arguments, the prosecutor stated, "[W]e have Eddie Adams himself on the stand, who turned himself in as one of the State's best witnesses by lying and getting caught at it, and by Eddie Adams pointing the finger as hard and as fast as he can away from Eddie Adams." Adams's attorney immediately objected to the prosecutor's assertion that Adams was lying, arguing that the statement violated case precedent. The prosecutor responded by asking the court whether she had

indeed made such a statement; the court responded she had. The prosecutor then stated:

> I did? Okay. All right. And I apologize. When the Defendant took the stand, and told us what he told, you get to decide whether it's good or not. And I apologize, it is wrong, that I said the Defendant was lying. He—absolutely bad words. That's your job. You figure that out. You figure that out. But when the Defendant takes the stand, and tell us us what he tells us, it's your job to figure out who's telling the truth.

We will assume without deciding that the prosecutor committed misconduct by stating that Adams lied. *See Graves*, 668 N.W.2d at 876 ("[I]t is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments."). Adams cannot establish prejudice based on this statement because the prosecutor immediately retracted it, apologized, and followed up with a statement that credibility was for the jury. Additionally, the district court fashioned a special instruction that reiterated the point. *See State v. Carey*, 709 N.W.2d 547, 558 (Iowa 2006) ("While this court has held that referring to a defendant as a liar is misconduct, such comments do not always result in prejudice.").

B. Prosecutor's Cross-Examination of Adams. On direct examination, Adams testified that his nephew came to the apartment in which he was staying and told him he committed a robbery with his grandfather. While Adams was trying to process this information, he said he "happened to look up in the ceiling, and the tile was out of place." He knew his nephew "usually puts stuff up there in the ceiling" so he "reached in and grabbed the envelope, and it's full of money."

On cross-examination, the prosecutor asked Adams, "And magically, you saw the tile away from its original place, and you went up there, and you found

the envelope, full of money. Yes?" Adams's attorney objected, and the prosecutor withdrew the question. Later, the prosecutor referred to Adams's discovery of the money and stated, "You are a lucky man." Again, Adams's attorney interposed an objection and, again, the prosecutor withdrew the assertion.

We are not persuaded that these comments amounted to prosecutorial misconduct. *See Carey*, 709 N.W.2d at 557 (stating that jurors "are sophisticated enough not to be inflamed or prejudiced by what would reasonably be characterized as simply being snide or sarcastic comments"). First, the comments were withdrawn. Second, the comments flowed directly from Adams's testimony. *See id.* (concluding prosecutor's statement that defendant came up with a "ridiculous story" was not presented merely as the prosecutor's personal opinion).

C. Burden-Shifting. Adams next asserts that the State attempted to shift its burden of proof to him on multiple occasions. Only one of the claimed instances was arguably preserved for review.[1] We will address that instance.

Adams testified that he told his sisters about his nephew's confession to committing the robbery. On cross-examination, the prosecutor asked, "So they can both verify that they talked to you, and you told them that [your nephew] and your dad committed this crime?"

Generally, a prosecutor may not comment on a defendant's failure to call a witness. *State v. Hanes*, 790 N.W.2d 545, 556 (Iowa 2010). This can be viewed

[1] With respect to the instance we address, Adams's attorney objected on relevancy grounds, not on burden-shifting grounds. Nonetheless, we will afford Adams the benefit of the doubt and assume he preserved error on this ground.

as shifting the burden of proof to the defense. *Id.* However, a prosecutor may "generally reference[ ] an absence of evidence supporting the defense's theory of the case." *Id.*

We are not persuaded that the prosecutor improperly shifted the burden of proof to Adams in asking whether his sisters would verify his testimony. Adams's theory was that his nephew committed the crime. The prosecutor was free to explore this theory with Adams and point out deficiencies, if any. *See State v. Craig*, 490 N.W.2d 795, 797 (Iowa 1992) (finding no misconduct where a prosecutor asked the jury why a defendant's friends did not testify).

D. Unpreserved Instances of Claimed Misconduct. As noted, Adams asserts that the prosecutor committed misconduct in other respects. Because his attorney did not object to these claimed instances of misconduct, we review these claims de novo under an ineffective-assistance-of-counsel rubric. *See Graves*, 668 N.W.2d at 869. Adams must show (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

1. Adams's Background. At trial, the defense presented evidence that Adams had a strained relationship with his father dating back to his childhood that diminished the probability he would participate in a crime with Chest. Adams contends the prosecutor improperly shifted the burden of proof to him in questioning him about his background. He cites the prosecutor's cross-examination of him as to why his siblings did not testify about the relationship. He also cites a reference in her closing argument to the absence of his siblings, a statement that was inaccurate because Adams called his brother to testify about

the abusive relationship. Adams additionally points to the prosecutor's request for medical or legal records to support his claim that he was awarded a personal injury settlement as a teenager, which his father used to purchase items for his siblings.

Again, we view the prosecutor's questions as inquiries into the defense theory of the case rather than an improper shifting of the burden of proof. *See Craig*, 490 N.W.2d at 797. For that reason, we conclude Adams's trial attorney did not breach an essential duty in failing to object to these inquiries.

2. DNA Evidence. Adams next takes issue with the prosecutor's comment on the fact that his DNA expert did not independently test the materials that the State's expert tested. There was nothing improper in this line of questioning designed to elicit weaknesses in the expert analysis.

3. Closing Arguments. Adams challenges several additional comments made by the prosecutor during closing arguments, arguing she impermissibly injected her personal beliefs. *See State v. Poppe*, 499 N.W.2d 315, 317 (Iowa Ct. App. 1993) ("It is misconduct for counsel to create evidence by argument or express a personal belief regarding the defendant's guilt."). First, he takes issue with the prosecutor's references to his nephew. The prosecutor acknowledged that the nephew was in the vicinity of the robbed bar and asserted the State was not "hiding the ball." Second, Adams challenges the prosecutor's statements "we are going to be darned sure we're not taking the wrong man" and "we do not have the wrong man."

We are not persuaded that the "hide the ball" references amounted to misconduct. Those references were simply an acknowledgement of the defense theory that another person of interest was at the scene of the robbery.

The references to not having "the wrong man" are more problematic. *See id.* at 318 (holding the prosecutor's comments that "clearly the defendant has committed these crimes" and "the State has no reason to prosecute anyone other than those that are guilty" were improper). While the State argues the comments were an attempt to rebut the defense attorney's assertion that "they've got the wrong guy," the defense is allowed to question the State's evidence in that fashion, whereas the State does not have similar latitude. *See Hanes*, 790 N.W.2d at 557 ("It was appropriate for defense counsel to call attention to the State's failure to call [certain witnesses]."). The prosecutor was allowed to highlight the State's burden of proof, as she did, stating, "[I]t is the State's job to bring the kind of evidence to you to allow you to find the Defendant guilty." The prosecutor was not allowed to say "we do not have the wrong man."

Even if Adams's attorney breached an essential duty in failing to object to these comments, Adams cannot establish *Strickland* prejudice because, on our de novo review of the record, we are persuaded that there is no reasonable probability a successful objection would have resulted in a different outcome. A Department of Criminal Investigation employee testified that a DNA profile of Adams's nephew was not consistent with DNA profiles developed from items obtained at the scene, including a bullet, ski mask, and gloves. She also testified that a "major contributor to a mixture of DNA taken from a ski mask was consistent with the DNA profile of Eddie Adams." There was additional evidence

corroborating Eddie Chest's identification of Adams as his partner in the robbery. Based on this and other evidence, we conclude the prosecutor's references to not having the wrong man do not require a new trial.

Finally, Adams challenges the prosecutor's reference to him as "Mr. Big Man." This fleeting characterization which followed a discussion of Adams's "big pockets of money," was inartful but could not be said to inflame the passions of the jury.

II. Claimed Withholding of Evidence

Adams asserts that the State withheld two pieces of exculpatory evidence: (1) evidence that an eyewitness to the crime was awaiting trial on theft charges and (2) a traffic video that was shown on rebuttal.

To establish a violation, the defendant must prove that: "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue of guilt." *Harrington v*. *State*, 659 N.W.2d 509, 516 (Iowa 2003) (quotation marks and citation omitted).

The theft charges became the subject of a motion for mistrial. While the jury was deliberating, Adams's attorney advised the district court, "We did a check online, Iowa Courts Online, and . . . [the witness] had been charged with Theft Second . . . and that is certainly information that would have been relevant, useable, for impeachment purposes, to attack and impeach the issue of credibility."

We are not persuaded that the State suppressed this evidence. As the defense conceded, the evidence was publicly available. Additionally, Adams's attorney became aware of the charge because his law partner represented the

witness's co-defendant. *See id.* at 522 (stating evidence is considered suppressed "when information is discovered after trial 'which had been known to the prosecution but unknown to the defense'" (quoting *Cornell v. State*, 430 N.W.2d 384, 385 (Iowa 1988))). Finally, as the State pointed out, the evidence would have been of little value absent a conviction. *See* Iowa R. Evid. 5.609 (providing that a witness's credibility may be attacked with evidence that he or she has been convicted of a crime).

As for the traffic video, that video was used to rebut Adams's testimony concerning when he arrived in Dubuque. The video was not favorable to the defense and was used in rebuttal, obviating the need for disclosure. *See Harrington*, 659 N.W.2d at 516; *State v. Belken*, 633 N.W.2d 786, 795 (Iowa 2001) ("Rebuttal witnesses, however, are not required to be disclosed by the State.").

III. Recusal

Adams next contends that the district court judge should have recused herself. He cites (1) certain statements made by the judge during the sentencing phase of Chest's trial, (2) the denial of his motion for change of venue, and (3) the judge's denial of his request to use demonstrative exhibits during opening statements. Our review of the judge's recusal decision is for an abuse of discretion. *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005).

We discern no abuse. All the claimed improprieties arose in the context of judicial proceedings over which the judge presided. *See id.* ("Only personal bias or prejudice stemming from an extrajudicial source constitutes a disqualifying factor."). *But see In re C.L.C. Jr.*, 798 N.W.2d 329, 337 (Iowa Ct. App. 2011)

(stating facts introduced or occurring during the course of current proceedings may constitute a basis for bias or partiality sufficient to justify recusal, but only when they "display a deep-seated favoritism or antagonism that would make fair judgment impossible" (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994))). None made a fair judgment impossible.

The judge's claimed comments at Chest's sentencing hearing addressed the fact he served as a poor role model for his children. There was no specific comment about Adams or his involvement in the robbery.

The judge's denial of Adams's motion for change of venue was based on responses to questionnaires submitted to a mock jury pool. The court stated,

> The responses to the questionnaires do not convince this Court that the potential jurors in the Dubuque community and the outer-lying county areas could not be fair and impartial in the analysis and review of evidence concerning these matters. The media coverage was not inflammatory and pervasive so as to give rise to a presumption of prejudice. It was not "run of the mill" but it was much less than coverage that has been relayed to the community in other cases that have been pending within the last three years. There is not an extensive bias in the reactions by the mock jury panel so as to make a determination that the Defendants' rights as afforded to them under the United States Constitution and that of the State of Iowa for a fair and impartial jury trial have been infringed.

We discern no antagonism in this ruling, let alone antagonism that would deprive Adams of a fair trial.

The court's ruling on Adams's request to use demonstrative exhibits during opening statements was equally unbiased. In response to a request from Adams's attorney to show the jurors "pictures of the witnesses, or of the Defendant or the co-defendants, pictures or maps of the area," the district court

stated the opening statement was akin to a "table of contents." The court continued.

> You're giving them an anticipation of what it is that will be forthcoming. I don't want anything to presuppose one issue and not have something to counterbalance that.
>
> If I can say that better, I don't want somebody to give me something out of the deposition that hasn't been properly presented yet, and anticipate that that witnesses is going to say that, because I think that puts a whole different spin on what it is that we're supposed to be doing in this trial, and having live witnesses testify from their best recollection of what happens.
>
> So I want to stick with the parameters as I set forth in my instructions to the jurors, that when we start this case out, the attorneys are going to present an outline for them, and inform them of the table of contents, and I don't want to stray from what the benchbook requires for me to give them guidance as to how it is that things are going to happen.

The court did agree however that it "would be permissible . . . [to use] a map of the location." Nothing in this ruling met the recusal standard.

We conclude the district court did not abuse its discretion in denying Adams's motion for recusal.

IV. Answer to Jury Question

Adams contends the district court did not properly instruct the jury in response to jury questions about a plea entered by co-defendant Eddie Chest and the meaning of an *Alford* plea.[2] With respect to the second question, the State requested an answer that "[a]n Alford plea is a form of guilty plea." The defense suggested the following answer: "An Alford plea is a form of guilty plea

[2] In *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), the Court held, "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *See also State v. Burgess*, 639 N.W.2d 564, 567 n.1 (Iowa 2001) ("An *Alford* plea is different from a guilty plea in that when a defendant enters an *Alford* plea, he or she does not admit participation in the acts constituting the crime.").

where the Defendant pleads guilty because they believe it is in his/her best interest but does not admit fault." Alternatively, the defense suggested the court tell the jury to rely on its collective memory. The court gave the State's requested answer.

On appeal, Adams asserts "[w]ithout giving the full definition of an *Alford* plea, the jury wouldn't know that Eddie Chest did not admit participation in the criminal activity. . . . This would have prejudiced the jury against [him]."

"The decision to answer a jury question or whether to give additional information requested by a jury during deliberations generally rests within the discretion of the trial court, and in the absence of abuse of that discretion, the court's action will not be disturbed on appeal." 89 C.J.S. *Trial* § 973, at 431 (2012). We discern no abuse of discretion because, whether or not Chest admitted guilt when he entered his plea, he admitted his involvement in the robbery when his deposition was taken, and those deposition answers were read into the trial record.

V. Admission of Deposition Testimony

The prosecution subpoenaed Eddie Chest as a witness at trial. On his arrival, Chest stated that he would assert his right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution. At that point, the district court ruled that Chest's deposition testimony would be read into the record. The court reasoned as follows:

> Based on his presence here in the courtroom, and his decision to assert his privilege, I stand firm with the decision I made . . . the other day with regard to his deposition testimony. Asserting his Fifth Amendment privilege creates a circumstance where he is unavailable to this court for purposes of complying with the

> subpoena for testimony, and the deposition will then come in for purposes of statements that were provided previously while Mr. Chest was under oath represented by counsel and Mr. Adams had counsel present for purposes of examination. Again, the Court finds that the motives for cross examination exist today, as they did at that time.

On appeal, Adams asserts he "did not have the right to confront . . . Eddie Chest." *See* U.S. Const. amend. VI; Iowa Const. art. I § 10; *Crawford v. Washington*, 541 U.S. 36, 59 (2004) ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."); *State v. Kellogg*, 385 N.W.2d 558, 560 (Iowa 1986) ("A witness who has exercised a fifth amendment privilege is 'unavailable' for purposes of the confrontation clause."); *see also* Iowa R. Evid. 5.804(b)(1) (setting forth an exception to the hearsay rule for former testimony by a witness at a deposition "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination").

The deposition was taken by an attorney who represented Adams in this matter. The attorney questioned Chest in detail about his family, his criminal background, and the incident that precipitated these charges. Under either the constitutional or evidentiary standard cited above, there was no violation.[3]

We affirm Adams's judgment and sentence.

AFFIRMED.

Tabor, J., concurs; Mullins, J., concurs specially.

[3] Under either the constitutional or evidentiary standard cited above, there was no violation.

MULLINS, J. (concurring specially)

I concur with the result of the majority opinion but write separately to call attention to what should be obvious: multiple trips to the edge of the cliff increase the likelihood of going over.