IN THE COURT OF APPEALS OF IOWA

No. 6-521 / 05-0426
Filed October 25, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FERNANDO SANDOVAL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

A defendant appeals following conviction and sentence for two counts of murder in the first degree and two counts of attempted murder, alleging district court error and ineffective assistance of trial counsel. **AFFIRMED.**

Donald L. Williams, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeffrey K. Noble, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Following a jury trial, Fernando Sandoval was convicted of two counts of murder in the first degree in violation of Iowa Code sections 707.1 and 707.2 (2003) and two counts of attempted murder in violation of section 707.11. He appeals, contending that the district court erred when it denied his motion for a mistrial and his motion for a new trial, and that his trial counsel were ineffective. We affirm Sandoval's convictions and sentences.

I. Background Facts and Proceedings.

During the early morning hours of January 24, 2004, Fernando Sandoval and his brother, Jorge Perez-Castillo, were at the Casa Vallarta bar drinking with a group of friends. The group included Christian Gonzales, who is Perez-Castillo and Sandoval's cousin. Santos Bueso Jr., his father Santos Bueso Sr., and his uncle Manuel Ulloa were also at the bar with a group of friends celebrating Bueso Jr.'s upcoming wedding. A fight erupted between the two groups, which was defused by security guards. After managers decided to close the bar and bar patrons exited to the parking lot, another fight erupted between the two groups. During the altercation, Bueso Jr., Bueso Sr., and Ulloa were shot. Bueso Sr. and Ulloa died as a result of their injuries.

Perez-Castillo and Sandoval left the scene in Perez-Castillo's pickup truck. Perez-Castillo was driving, and Sandoval occupied the passenger seat. The gun used in the shootings was inside the pickup truck.

A subsequent stop of the pickup truck, initiated by Officer David Viggers, evolved into a high-speed chase. During the pursuit shots were fired from Perez-Castillo's vehicle. One bullet struck the windshield of Officer Viggers's vehicle.

The pickup truck was eventually disabled. A foot chase ensued, during which Perez-Castillo fired at officers and was shot in the leg. After Perez-Castillo ran out of ammunition, he and Sandoval surrendered.

Both men were arrested and charged with two counts of murder in the first degree based on the deaths of Bueso Sr. and Ulloa, one count of attempted murder based on the shooting of Bueso Jr., and one count of attempted murder based on the shots fired at Officer Viggers. The matter proceeded to a joint trial in November 2004.

During voir dire, prospective Juror No. 35 was struck by the court. Because voir dire had not been reported, the court and counsel made the following record: Juror No. 35 had stated that he was "not comfortable with" and "opposes" mandatory sentencing, but that he would "make every effort to follow the court's instruction" and that "mandatory sentencing would not be his only deciding factor." Following questioning by counsel and the court, Juror No. 35 was struck. Defense counsel asserted that there was no pending motion to strike Juror No. 35 and thus the court acted in contravention of Iowa Rule of Criminal Procedure 2.18(5) and deprived Sandoval of an opportunity to resist removal or rehabilitate the juror. Defense counsel asserted Sandoval had been deprived of his right to a fair trial and accordingly moved for a mistrial.

The court denied the motion. It acknowledged the prosecutor had not made a motion to strike Juror No. 35 for cause until after the court had already struck the juror and apologized for its "clumsy handling of this whole thing." The court concluded, however, that the record indicated the State had intended to

challenge Juror No. 35 for cause, and that "there is no particular prejudice to either of the defendants at this particular stage . . . ."

During trial the State presented evidence, including eyewitness testimony and Perez-Castillo's confession to the police, that indicated Perez-Castillo had retrieved a gun from his pickup truck and, in rapid succession, shot Bueso Jr. while he was being restrained by Sandoval, shot Bueso Sr., then shot Ulloa while Sandoval stopped a member of the Bueso party who was attempting to go to Ulloa's aid. Although Perez-Castillo admitted in court that he had fired at pursuing police vehicles, the State presented evidence indicating the bullet that struck Officer Viggers's windshield was fired from the passenger area of Perez-Castillo's pickup truck.

Perez-Castillo and Sandoval each defended on the theory that, while they were at Casa Vallarta at the time Bueso Jr., Bueso Sr., and Ulloa were shot, they were not involved in the shootings. Perez-Castillo testified he was in his pickup truck when the first shots were fired, had a cell phone and not a gun in his hand when he exited the vehicle, observed that Gonzales and another man each had a gun, was able to take the gun away from Gonzales after a struggle, threw Gonzales's gun in his pickup truck before he and Sandoval left the scene, and had been the one firing during the police pursuit. He also presented witness testimony that partially corroborated his version of events. Sandoval did not testify, but relied on witness testimony that indicated he was still inside the bar when the shooting began and Perez-Castillo's own testimony that Sandoval was not involved. Each defendant suggested that, to the extent witnesses identified him as being involved in the shootings of Bueso Jr., Bueso Sr., and Ulloa, they

were confusing him with Gonzales. Individuals acquainted with Perez-Castillo, Sandoval, and Gonzales testified Gonzales somewhat resembled both men.

The jury received instructions that allowed them to convict either defendant as the principal in or an aider and abettor to the two murders and two attempted murders. The jury returned verdicts finding both Perez-Castillo and Sandoval guilty on all four counts. Sandoval filed a motion for new trial asserting, in relevant part, that he should be granted a new trial because the jury's verdicts were contrary to the weight of the evidence. The court denied the motion. Sandoval was subsequently sentenced to two life and two twenty-five-year terms of incarceration, to run concurrently.

Sandoval appeals. He asserts the district court abused its discretion when it denied his motion for a mistrial trial after the court struck potential Juror No. 35, and further abused its discretion when it denied his motion for a new trial. He also asserts his trial counsel were ineffective for failing to request a jury instruction on accessory after the fact.

II. Scope and Standard of Review.

We review the district court's denial of Sandoval's motion for a mistrial and his motion for a new trial for the correction of errors at law. Iowa R. App. P. 6.4. We will reverse the court's denial of the motions only upon a demonstrated abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006) (mistrial); *Nguyen v. State*, 707 N.W.2d 317, 327 (Iowa 2005) (new trial). In contrast, we conduct a de novo review of Sandoval's ineffective assistance of counsel claim. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999).

III. Motion for Mistrial.

Sandoval asserts the district court abused its discretion when it denied his motion for a mistrial because rule 2.18(5) does not expressly grant the court authority to strike a juror for cause absent a motion by the State or the defendant, and because the absence of a pending motion deprived him of the opportunity to resist the motion or rehabilitate the prospective juror. He contends that as a result he "was substantially prejudiced because the Court infringed on his constitutional right to a speedy and public trial, by an impartial jury . . . ."

Although it poses an interesting question, we need not address whether the district court had the authority to dismiss a prospective juror absent a pending motion from one of the parties. Significantly, "[a] mistrial is appropriate when 'an impartial verdict cannot be reached' or the verdict 'would have to be reversed on appeal due to an obvious procedural error in the trial.'" *State v. Piper*, 663 N.W.2d 894, 902 (Iowa 2003). Based on the record before us, neither of these circumstances is shown.

When a prospective juror is struck for cause, the key question is whether that juror can impartially judge the guilt or innocence of the defendant. *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993). Although this question is one entrusted to the district court's discretion, *id*., and although the record indicates the district court had an adequate basis for striking Juror No. 35, we will assume, for the sake of argument, that a timely motion by the State would have allowed Sandoval to successfully rehabilitate the juror. This assumption, however, does not assist Sandoval with his claim.

Even if the court had abused its discretion in striking prospective Juror No. 35, prejudice from the erroneous exclusion will not be presumed. *See Summy v. City of Des Moines*, 708 N.W.2d 333, 339 (Iowa 2006). Rather, there must be a showing the court's actions resulted in the seating of a juror who was not impartial. *See id*.; *Neuendorf*, 509 N.W.2d at 746. Here, there is no such showing. Thus, any potential prejudice that might have resulted from the court's actions is too speculative to justify overturning the jury's verdicts. *See Neuendorf*, 509 N.W.2d at 746. Because nothing in the record demonstrates the removal of prospective Juror No. 35 in any way deprived Sandoval of a fair and impartial trial, we find no prejudicial error in the district court's decision to strike the juror for cause.

IV. New Trial Motion.

Sandoval next asserts the district court abused its discretion when it denied his motion for a new trial, because the jury's verdicts were contrary to the weight of the evidence. *See State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998) (requiring court to set aside a jury's verdict if it is contrary to the weight of the evidence). A verdict is contrary to the weight of the evidence where "'a greater amount of credible evidence supports one side of an issue or cause than the other.'" *Id*. at 658 (citation omitted).

Although trial courts have wide discretion in ruling on such new trial motions, that discretion must be used sparingly. *Id*. at 659. The court must be mindful of the jury's role as the primary trier of facts and should not invoke its power to grant a new trial "except in the extraordinary case where the evidence preponderates heavily against the verdict . . . ." *State v. Shanahan*, 712 N.W.2d

121, 135 (Iowa 2006). The jury's findings should not be disturbed if the evidence is nearly balanced or would allow different minds to fairly arrive at different conclusions. *Id*. With these principles in mind, we turn to the jury verdicts in this matter.

The jury was allowed to convict Sandoval as either the principal in or an aider and abettor to the murders and attempted murders. The jury was instructed on aiding and abetting as follows:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.
>
> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.
>
> If you find the State has proved the defendant directly committed the crime, or knowingly "aided and abetted" other person(s) in the commission of the crime, then the defendant is guilty of the crime charged.

Sandoval asserts the court erred in not granting him a new trial on the verdicts finding him guilty of the murders of Bueso Sr. and Ulloa because there was no evidence he ever fired a gun in the Casa Vallarta parking lot or had any direct involvement in the men's deaths. He also asserts there was "substantial evidence to contradict" the conclusion that he was involved in the attempted murder of Bueso Jr. He points to eyewitness testimony that placed him inside

Casa Vallarta when the shootings occurred, the fact that Perez-Castillo denied Sandoval had any involvement in the shootings, and evidence that Sandoval had been mistaken for Gonzales.

While the jury could have found the foregoing evidence credible and sufficient to exculpate Sandoval, neither we nor the district court may ignore the fact that there is other evidence in the record indicative of Sandoval's guilt. Significantly, the jury was presented with eyewitness testimony that it was Sandoval who restrained Bueso Jr. while he was being shot by Perez-Castillo and then interfered with an individual attempting to come to the aid of Ulloa when Perez-Castillo was in the process of shooting Ulloa. If accepted as true, these facts are sufficient to constitute the encouragement of and active participation in the two shootings.

We recognize there is no direct evidence of Sandoval's involvement in the death of Bueso Sr. However, "[k]nowledge and proximity to the scene combined with circumstantial evidence such as companionship and conduct before and after the offense is committed may be sufficient to infer a defendant's participation in the crime*." State v. Johnson,* 534 N.W.2d 118, 123 (Iowa Ct. App. 1995). As the State points out, all three shootings occurred in rapid succession and appeared to be part of a common scheme or plan to kill members of the group celebrating Bueso Jr.'s upcoming wedding. In addition, Sandoval's and Perez-Castillo's conduct after leaving Casa Vallarta tends to prove their earlier involvement in the shootings. This evidence is sufficient in infer Sandoval's participation in the death of Bueso Sr.

Finally, we turn to the attempted murder of Officer Viggers. The only challenge Sandoval makes to this guilty verdict is an assertion that "there is inconclusive evidence [he] was the person who fired the shot that penetrated the windshield of Officer Viggers's vehicle during the pursuit." In support of this contention Sandoval points to testimony from Officer Viggers that he did not see anything during the pursuit which would indicate the origin of the shot. However, as previously noted, the State presented evidence that indicated the bullet had been fired from the passenger seat of Perez-Castillo's pickup truck, where Sandoval was sitting. A reasonable person could have found this testimony credible and relied on it to conclude that Sandoval fired the gun at Officer Viggers's vehicle, striking the vehicle's windshield.

In light of all the foregoing, we find no abuse of discretion in the district court's conclusion that the jury's guilty verdicts were not contrary to the weight of the evidence.

V. Ineffective Assistance of Counsel.

Sandoval further asserts his trial counsel were ineffective for failing to request a jury instruction on accessory after the fact.[1] To establish ineffective assistance of his trial counsel, Sandoval must prove both that his attorneys' performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466

[1] Section 700.3 provides, in relevant part:

> Any person having knowledge that a public offense has been committed and that a certain person committed it, . . . who harbors, aids or conceals the person who committed the offense, with the intent to prevent the apprehension of the person who committed the offense, commits an aggravated misdemeanor if the public offense committed was a felony, or commits a simple misdemeanor if the public offense was a misdemeanor.

U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). If Sandoval fails to prove either prong, his ineffective assistance claim cannot succeed. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

We agree with the State that Sandoval cannot succeed on this claim, as he has not shown he would have been entitled to such an instruction. "A defendant is ordinarily entitled to a theory of defense instruction if he or she makes a timely request, the request is supported by evidence, and the request sets out a correct declaration of the law." *State v. Johnson*, 534 N.W.2d 118, 124 (Iowa Ct. App. 1995). However when, as here, the State does not charge the defendant with accessory after the fact, an instruction on the theory does not set forth an applicable rule of law. *Id*.

In addition, the requested instruction "must set forth facts which would be incompatible with one or more essential elements of the crime charged." *Id*. Here, Sandoval does not suggest any particular language for the instruction or point to any facts that precluded a finding of guilt on the crimes charged. Even if an accessory after the fact instruction had been given, the jury still could have found Sandoval guilty of aiding and abetting in the murders of Ulloa and Bueso Sr. and the attempted murders of Bueso Jr. and Officer Viggers. *See State v. Perry*, 440 N.W.2d 389, 391-92 (Iowa 1989) (noting that when a defendant's actions can conceivably violate more than one criminal statute, the prosecutor has the sole discretion in determining which charge to file). Under the circumstances, Sandoval cannot establish that his trial counsel were ineffective for failing to request an accessory after the fact instruction.

VI. Conclusion.

The district court did not abuse its discretion in denying Sandoval's motion for a mistrial or his motion for a new trial. Nor has Sandoval established the ineffective assistance of his trial counsel. His convictions and sentences are accordingly affirmed.

AFFIRMED.