IN THE COURT OF APPEALS OF IOWA

No. 2-838 / 11-2000
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY WAYNE STEEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Davis County, Daniel P. Wilson, Judge.

A defendant contends that the district court erred in ruling on a motion in limine, allowing the State to cross-examine him based on statements that he allegedly made to an unavailable witness. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott and Denise Timmons, Assistant Attorneys General, and Rick Lynch, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

The State charged Larry Steen with first-degree murder following the death of his ex-wife's boyfriend. Prior to trial, Steen filed a motion in limine seeking to exclude evidence of a confession he made to his daughter. He asserted that his daughter was unavailable to testify, a law enforcement officer's summary of her statement was hearsay, and admission of the evidence would violate his constitutional right to confront witnesses.

The district court held a hearing outside the presence of the jury. At the hearing, Steen's attorney expressed a desire to have Steen testify, but stated that his decision would depend on whether the court allowed the State to cross-examine him about the confession.

The district court broke down the inquiry into two questions: (1) whether the prosecutor could ask Steen if he confessed to his daughter and (2) whether the prosecutor could introduce evidence of the confession if Steen equivocated.

On the first question, the court stated:

> I'm inclined to believe that if Mr. Steen takes the stand, depending on the width and breadth of direct examination, in other words, depending what you ask him, [defense counsel], and whether anything is outside the reasonable scope of direct examination asked on cross, that it would be fair game for the State to ask Mr. Steen, "Did you make—did you have the telephone call with [your daughter], yes or no?" If he says, yes, "Did you state this to her?"

In response to the prosecutor's request for clarification, the court continued, "I think your scope of potential cross-examination is more limited by the nature and the specific question asked on direct." The court provided an example, then stated, "Preliminarily, if . . . Mr. Steen takes that stand, the State will be permitted

to ask him if the conversation with [his daughter] occurred based on his end of that conversation, 'Did you say to her the following?'"

On the second question, whether the prosecutor would be allowed to offer evidence of the confession on rebuttal, the court stated,

> If you put Mr. Steen on the stand, I think the State is going to have some leeway to ask him, "Did you have this conversation with Amanda Cuculich?" If he said no or if he says, "I don't remember," that may or may not be the end of it.
>
> I don't think if that happens the State is going to be permitted to bring in anybody, including your agent, to say, "[The daughter] told me the following," which supports your theory that Mr. Steen made these comments to her.
>
> I need to think about that one a little bit. I think it's a little bit convoluted.

Later, the court stated, "Preliminarily, that's my ruling in terms of the issues you raised so far as I understand them."[1]

Steen elected not to take the stand. A jury found him guilty of second-degree murder, and the district court imposed judgment and sentence.

On appeal, Steen asserts "the district court erred in permitting the State to question [him] based upon hearsay statements from an unavailable witness." Steen concedes he faces an error preservation hurdle because he elected not to testify and he did not have to confront the challenged evidence. He also acknowledges that Iowa Supreme Court precedent stands in his way. *See State v. Brown*, 569 N.W.2d 113, 118 (Iowa 1997); *see also State v. Derby*, 800 N.W.2d 52, 59–60 (Iowa 2011).

[1] In a written ruling, the court stated Steen's daughter would be prohibited from testifying unless she subsequently became available for testimony at trial. The court also excluded hearsay statements concerning the daughter's comments, "unless some exception to the hearsay rule applies."

In *Brown*, a defendant challenged a ruling on a motion in limine allowing the State to impeach the defendant with his prior convictions in the event he took the stand. 569 N.W.2d at 118. The court held the defendant "was required to testify at trial and face the challenged evidence before complaining of it." *Id.*

In *Derby*, the court reaffirmed *Brown's* holding, stating, "Derby has not presented us with any developments since our decision in *Brown* that call into question *Brown's* vitality, nor have we found any." 800 N.W.2d at 60.

While acknowledging this precedent, Steen contends an intervening opinion, *State v. Daly*, 623 N.W.2d 799 (2001), "cast[s] doubt" on *Brown*. The Iowa Supreme Court addressed and rejected the same argument in *Derby*. 800 N.W.2d at 56–58.

Steen also asserts that the district court's ruling on the motion in limine was a final ruling on the admissibility of the evidence that he could contest without objecting at trial. Again, the *Derby* court addressed this argument, noting that the rule concerning the finality of limine rulings was invoked where a defendant testified and confronted the challenged evidence. *Id.* at 58. That is not the case here; Steen did not testify and did not confront the challenged evidence. In any event, the district court used qualifying language that reflected its ruling was not final.

Finally, Steen argues that the question proposed by the prosecutor was "so overwhelmingly prejudicial that [his] answers, whether he denied making such statements or stated that he did not remember, would be of no consequence." This assertion goes to the merits of his claim that the court should not have preliminarily allowed the question. We do not reach the merits,

a decision that makes sense given the state of the record. As the *Derby* court pointed out in discussing impeachment evidence under rule 5.609(a), the court "is handicapped" in balancing the probative value versus prejudicial effect where a defendant does not testify. *Id.* at 55.

Based on *Brown* and *Derby*, we conclude Steen did not preserve error on his challenge to the district court's preliminary ruling that the State would be allowed to cross-examine Steen about the confession, if he took the stand.

We affirm Steen's judgment and sentence for second-degree murder.

AFFIRMED.