IN THE COURT OF APPEALS OF IOWA

No. 8-414 / 07-0832
Filed November 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY MARCELLUS COLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge, and Kellyann M. Lekar, Judge.

Anthony Cole appeals from judgment and sentence entered upon his convictions for attempted murder, assault, willful injury causing serious injury while armed with a firearm, two counts of reckless use of a firearm causing serious injury, and felon in possession of a firearm. **AFFIRMED.**

Eric K. Parrish of Parrish, Kruidenier, Dunn, Boles, Gribble, Cook, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

HUITINK, P.J.

Anthony Cole appeals from judgment entered upon his convictions for attempted murder, assault, willful injury causing serious injury, two counts of reckless use of a firearm causing serious injury, and felon in possession of a firearm. He contends the trial court erred: (1) in denying the defendant's motion for a mental health expert of his choosing; (2) in granting the Waterloo Courier's motion to quash the testimony of a reporter and otherwise presenting evidence of a prosecutor's characterization in a different trial of the defendant as a "hunted man"; (3) in denying his motion for mistrial when a witness made statements contrary to an in limine ruling; and (4) in failing to recuse itself. He also argues the evidence was insufficient to sustain his convictions. We affirm.

I. Denial of Expert Witness. Anthony Cole was initially charged in 2003. He asserted defenses of diminished capacity and self-defense, and in support of those defenses he retained the services of Dr. Rosalyn Schultz through an expert witness referral service, TASA. Cole entered into a contract of service whereby TASA imposed a twenty percent premium on the expert's services. After entering into the contract, Cole asked the court to cover the costs of Dr. Schultz's services as Cole was indigent. The court entered a ruling that Dr. Schultz was entitled to the reasonable cost of her services.

In February 2004, at Cole's first trial, Dr. Schultz testified about the trauma Cole experienced when he was kidnapped and the repercussions for him psychologically after the kidnapping. Dr. Schultz opined that due to the kidnapping Cole suffered from posttraumatic stress disorder on March 6, 2003.

Dr. Schultz further opined that Cole was unable to form the specific intent on March 6, 2003, to harm either Landfair or Walker.

In the present proceedings concerning the 2003 shootings, Cole again asserted the defenses of diminished capacity and self-defense. Cole sought to have a different mental health expert authorized by the court, arguing that a previous fee dispute with Dr. Schultz would effectively deny him his defense witness. The trial court denied the request. At trial, Cole sought to have Dr. Schultz appear and present testimony. Dr. Schultz informed the court she would not appear unless she was provided $2500 in advance. In a telephone conference, the court assured Dr. Schultz that her reasonable fees and travel expenses would be paid.

Dr. Schultz did not respond to efforts by Cole to obtain her presence and live testimony. Dr. Schultz's previous trial testimony was presented to the jury. Cole argues that his constitutional right to a defense was violated by the trial court's failure to appoint a different mental health expert witness.

A. Scope and standard of review. 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. Dixon,* 534 N.W.2d 435, 439-40 (1995). We review the denial of a motion for mistrial for abuse of discretion. *Id.* at 439. To the extent the right of attaining an expert witness falls within the sixth amendment, our review is de novo. *State v. Barker*, 564 N.W.2d 447, 450 (Iowa Ct. App. 1997).

B. Merits. We acknowledge that an indigent defendant's right to effective assistance includes the right to public payment for reasonable expert

services. *Id.* at 451. Cole was provided—at public expense—an expert witness with respect to his mental health.[1] At trial, Cole presented the testimony of that expert in support of his claim of diminished capacity. Cole now states he was denied a "competent" expert "in light of [the trial court's] refusal to ensure defendant's expert was adequately reassured she would be compensated for her time." The State argues that Cole did not use available subpoena procedures in a timely manner to ensure Dr. Schultz's appearance.

Dr. Schultz's testimony was provided by reading former testimony into the record. Cole provides no authority for finding that this method of introducing his evidence of diminished capacity results in a finding that the expert was thereby rendered incompetent. We find the trial court did not abuse its discretion with respect to the request for a different expert witness or with respect to refusing to provide Dr. Schultz with advance payment of the demanded amount. *See id.* (noting defendant's entitlement to reasonable expert services, but not "anything which a wealthy one could purchase"). Moreover, we note the trial court offered Cole the following accommodations: a continuance to allow Cole extra time to seek Dr. Schultz's personal appearance at trial; assistance in obtaining an interstate subpoena; and introduction of Dr. Schultz's prior trial testimony over the State's objection. Expert testimony in support of Cole's defenses was presented. We find no violation of Cole's sixth amendment rights.

II. Denial of Motion to Quash Testimony. Cole subpoenaed a reporter for the Waterloo Courier to testify about statements made by an assistant county attorney to a jury in the criminal trial of David Willock, a person implicated in the

[1] Cole was also provided a ballistics expert and an investigator.

kidnapping of Cole. It is Cole's contention that the assistant county attorney's purported statement that Cole was a "hunted man" was relevant to his defense of self-defense. The trial court quashed the subpoena, ruling that any statements made in court at Willock's trial by the assistant county attorney were inadmissible in Cole's trial. The trial court ruled that the statements were hearsay and would be misleading because the county attorney would not be speaking from personal knowledge. Cole argues the statements went to the heart of his defense and that the statements are admissible as admissions of a party opponent or statements against interest or opinions by a lay witness.

A. Scope and standard of review. A court has wide discretion in determining whether to quash a subpoena. *Morris v. Morris*, 383 N.W.2d 527, 529 (Iowa 1986). We review for an abuse of that discretion. *See id.* Constitutional claims are reviewed de novo. *See Rhiner v. State,* 703 N.W.2d 174, 176 (Iowa 2005).

B. Merits. Cole asserts that a large part of his case relied upon his claim that he shot Walker and Landfair in self-defense. His self-defense claim rested upon his belief that several people threatened to harm him if he testified against David Willock. His claim of diminished capacity relied upon his suffering from posttraumatic stress as a result of his kidnapping and his constant fear that he was being hunted. He argues that the proffered testimony of the newspaper reporter or the assistant county attorney corroborated his defenses.

We are not at all sure the attorney's statement to a jury that Cole was a hunted man could be considered an admission of a party opponent. But, even if considered an admission, Cole has not shown such a statement was "made for

the express purpose of dispensing with formal proof of a fact at the trial." *See State v. Howell*, 290 N.W.2d 355, 359 (Iowa 1980) (noting that for an admission of an attorney to bind a client, it must be "distinct and formal and made for the express purpose of dispensing with formal proof of a fact at the trial").

Finally, even were we to assume the statement was admissible, and that the statement could be offered via a court reporter, we find Cole suffered no prejudice. *State v. Greene,* 592 N.W.2d 24, 27 (Iowa 1999) ("Even if an abuse of discretion is found, reversal is required only when the abuse is prejudicial."). The trial court did not keep Cole from offering evidence that he was a "hunted man." Cole presented numerous witnesses who testified that Cole and his girlfriend had been the victims of a kidnapping; that David Willock was convicted of kidnapping Cole prior to the shooting at issue here; that there were several other crimes in the area involving more than one perpetrator that were possibly connected to Cole's kidnapping; that Cole's kidnapping had a traumatic effect on him; and that it was Dr. Schultz's opinion that as a result of the situation, Cole suffered from posttraumatic stress disorder, feared for his safety, and was not able to form the specific intent to harm those he shot. Under this record, we find there was no error in disallowing testimony of the attorney's statement to a different jury.

III. Violation of In Limine Ruling. Prior to trial, the court granted defendant's motion in limine and prohibited any mention of defendant's first trial in front of the jury. At trial, the State's first witness, Jimmie Walker, took the stand and, during the course of his testimony, Walker was asked: "After you were taken to the hospital, did you ever see that coat again, other than when I had displayed it to you previously?" Walker responded, "In the first trial."

Outside the presence of the jury, Cole moved for a mistrial. During voir dire Walker asserted that he had not been told not to mention the first trial. Cole asserted a mistrial was proper on grounds of prosecutorial misconduct and the admission of evidence contrary to the court's ruling.

The State offered the testimony of Robert Duncan, an investigator, who stated that the prosecutor had cautioned Walker not to mention the first trial.

The trial court concluded that Walker's statement, though inadmissible, was not so prejudicial as to warrant a mistrial. The court also found there was no prosecutorial misconduct, distinguishing between what Walker was told and what he heard. When proceedings before the jury resumed, the court instructed the jury that the last statement was stricken and they were to disregard it.

A. Scope and standard of review. 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." *Dixon,* 534 N.W.2d at 439-40. "A trial judge has considerable discretion to declare a mistrial after a procedural error has occurred during a trial and we will not reverse the court's decision absent a finding of abuse of discretion." *Id.* at 439.

B. Merits. The trial court found that Walker's statement was not so prejudicial as to warrant a mistrial. The court stated it intended to instruct the jury to disregard it. The jury was admonished to disregard the statement. We presume the jury followed the court's instruction absent evidence to the contrary. *State v. McMullin*, 421 N.W.2d 517, 520 (Iowa 1988).

We conclude the court did not abuse its discretion in denying Cole's motion for mistrial based on Walker's statement.

IV. Failure to Recuse. Following the trial court's ruling excluding evidence of statements by the assistant county attorney, Cole asked the court to recuse itself because he "was stunned by the court's rulings" and expressed a belief that there were "inherent biases" that had "manifested themselves in the various ruling of this court to date." Cole now enumerates six specific rulings he asserts support the motion to recuse.

A. Scope and standard of review. There is a constitutional right to have a neutral and detached judge. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). A judicial officer is disqualified from acting in a proceeding if the officer has a personal bias. *See State v. Haskins*, 573 N.W.2d 39, 44 (Iowa Ct. App. 1997). The test is whether a reasonable person would question the judge's impartiality. *Id.* Actual prejudice must be shown before a recusal is necessary. *Id.* The trial court's decision will not be overturned unless there has been an abuse of discretion. *State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979).

B. Merits. We find Cole's claims of legal error, without supporting authority, insufficient to sustain his burden of establishing prejudice. That some of his motions were overruled is insufficient to assert bias. We hold the trial court did not abuse its discretion in overruling Cole's motion for recusal.

V. Substantial evidence to support the verdict. Cole contends there is insufficient evidence to convict him on any count because the State did not disprove his claim of self-defense and diminished capacity.

A. Scope and standard of review. When reviewing the sufficiency of the evidence for a guilty verdict, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may be

fairly and reasonably deduced from the evidence in the record. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). A jury verdict is binding upon this court, and we must uphold the verdict unless the record lacks substantial evidence to support the charge. *Id.*

B. Merits. Cole argues that considering all the evidence, the jury could not conclude that he did not act in self-defense and that he did not suffer from diminished responsibility. Cole did present evidence in support of his defenses. Evidence was presented from which the jury could reject those defenses.

We note that the credibility of witnesses, in particular, is for the jury: "The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *Thornton,* 498 N.W.2d at 673. The jury was not required to accept Cole's expert's opinion as to his inability to form specific intent. *See State v. Jacobs,* 607 N.W.2d 679, 685 (Iowa 2000) (stating that trier of fact is not obligated to accept opinion evidence, even from experts, as conclusive).

There was evidence presented that Cole shot Walker, pushed him to the ground, and again shot him while Walker was face-down on the ground; that Walker's arm was amputated after the shooting; that Cole shot at Landfair and stated "you're not going to get away"; and that but for medical intervention Landfair could have died from his injuries. We have reviewed and conclude the record evidence supports each of Cole's convictions for attempted murder, assault, willful injury causing serious injury, two counts of reckless use of a firearm causing serious injury, and felon in possession of a firearm.

Conclusion. The trial court did not err in: denying the defendant's motion for a mental health expert of his choosing; granting the Waterloo Courier's motion to quash the testimony of a reporter and otherwise presenting evidence of a prosecutor's characterization in a different trial of the defendant as a "hunted man"; denying defendant's motion for mistrial when a witness made statements contrary to an in limine ruling; or refusing to recuse itself. There is substantial evidence in the record to sustain his convictions. We affirm.

AFFIRMED.