IN THE COURT OF APPEALS OF IOWA

No. 8-598 / 07-0693
Filed December 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BOBBY JOE STOUFFER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Bobby Joe Stouffer appeals his conviction, following jury trial, for murder in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat and Jaki Livingston, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., and Miller, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

MILLER, J.

Bobby Joe Stouffer appeals his conviction, following jury trial, for murder in the second degree. He contends there was insufficient evidence to support his conviction and the trial court erred in denying his motion for mistrial. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

From the testimony presented at trial the jury could find the following facts. Joshua McBride arrived at Shannon (a.k.a. Shane) Batty's (Batty) residence at 11:00 a.m. on April 21, 2006, to hang out and cheer up Batty. He and Batty eventually walked to a convenience store to purchase beer. They encountered Stouffer on their way to the store. Stouffer went to the store with them and then all three went to Batty's apartment. Batty and Stouffer consumed the beer. At approximately 6:00 p.m. McBride and Batty walked to the store again and purchased more beer while Stouffer stayed at Batty's. On their way back to Batty's they ran into Derek Bayliff and John Bothwell, both of whom accompanied them to Batty's apartment. When they returned from getting the beer, Stouffer had a gun and jokingly pointed it at McBride and yelled, "Freeze." Batty told Stouffer to put the gun away and McBride did not see it again.

It was not unusual for Batty and Bayliff to sit around and share a few beers as they were doing on April 21, 2006. In addition to drinking beer that evening Bayliff, Batty, and Stouffer smoked "a little" marijuana. During the evening in question the three were also "playing around" with a black powder pistol that Batty had. Bayliff joked about killing himself with the gun and placed his head next to Batty's and joked about getting "two with one." Stouffer held the gun to

his head and pulled the trigger several times. Bayliff knew the gun was not loaded because Batty did not keep loaded guns in the house. At some point Batty told Stouffer to put the gun away.

Fifteen-year-old John Bothwell was in and out of the apartment that evening. He had met Batty and Stouffer for the first time that night. Bothwell stated that he, Stouffer, Batty, and Bayliff were all drinking beer and smoking marijuana that night. He saw a gun sitting beside the couch but did not know what kind of gun it was.

Batty lived in an upstairs apartment of his father, Robert Batty's, home. Robert knew that Batty had drug and alcohol problems but believed he had overcome them at the time of his death. He also knew his son possessed several guns, including a black powder pistol they had fired when they were out shooting together earlier that same week. The pistol needed to be cocked each time before shooting.

Robert stopped in at Batty's apartment around 6:45 p.m. on April 21, 2006, before leaving home for the night. He saw Batty was drinking beer. They had a discussion about Batty not drinking any more than one can of beer a day. Batty stated the can was the last of a six pack, but Robert did not know how much Batty actually had to drink that day. Robert saw that Stouffer was there with Batty. He checked in with Batty again around 11:30 p.m. by telephone and did not sense that Batty was intoxicated. However, Robert acknowledged that Batty was usually able to hide his intoxication from him.

Robert did not return home that night, but called to check on Batty the next morning. Batty's daughter answered and said Batty was not there so Robert decided to drive home to check on Batty and his children. Robert did not find Batty at home so he began to search for him in the immediate area and then in downtown Mitchellville. Robert saw McBride and Bayliff in Mitchellville. Both said they had seen Batty the night before at his apartment but they had left the party early and had not seen him since. Robert then went to Stouffer's residence to ask him about Batty. Stouffer too said he had last seen Batty at Batty's apartment and claimed he left shortly after Bayliff and McBride. He told Robert everything was fine when he left. Robert returned home and went into the downstairs level of the residence where he lived. He saw Batty lying on the floor in the living room and discovered he was dead. The call for emergency services came in at 2:25 p.m. Responding officers found Batty's body lying on its side on the floor of Robert's apartment.

Dr. Gregory Schmunk, the Polk County medical examiner, testified he examined Batty's body at the scene. It was obvious to him Batty died of a gunshot wound to the right side of his chest. Schmunk could tell the body had been moved at some point, because based upon lividity the body had been lying at least partially face down but had been turned over and was lying face up when he arrived. Schmunk testified Batty had been shot at close range, as evidenced by the gunpowder tattooing to his skin. A loose .44 caliber ball used with a black powder handgun found at the scene was consistent with the size of the wound found on Batty's body, but was not the actual ball that killed him. A .44 caliber

black powder revolver was found in Batty's apartment. Schmunk testified that if someone had sought help for Batty immediately after he was shot there was some chance he would have survived. Batty had a .248 alcohol concentration at the time of his death.

A few days after Batty's death, Robert called Stouffer to discuss what had happened at the party on the night of Batty's death. Stouffer changed what he had told Robert earlier, now saying he and Batty had wrestled over the gun and it had gone off. During this same conversation, Stouffer again changed his story and said he had been trying to pull a bullet from one of the cylinders in which it had lodged. He stated that when he could not remove the bullet Batty told him to give the gun back to Batty and he would remove the bullet. Stouffer stated the gun went off while he was handing it back to Batty. Robert suspected that Stouffer's story was untrue because he knew the gun had a particular quirk that when a bullet would lodge in the cylinder the only way to remove it was to fire the gun and Batty was aware of this quirk.

Detective Pat Tapscott had interviewed Stouffer the day after the shooting. Stouffer told the detective he had been at the party but knew nothing about Batty's death. Stouffer stated that when he left the party Batty was on the verge of passing out, and that Batty had been playing with the gun but that he, Stouffer, had not touched the gun.

Robert Stouffer, the defendant's father, testified he was awakened by his son between 11:00 a.m. and 11:30 p.m. on April 21, 2006. He had to open the door for him and noticed he had been drinking because he "smelled like a

brewery." The next morning Robert Stouffer confronted his son about his drinking. Stouffer told his father he had been in a "little argument" with Batty, that Batty had "pulled the gun on him," and when Stouffer tried to take the gun from Batty it went off, shooting Batty in the stomach. Stouffer stated that Batty then ran downstairs and he tried to follow him but lost him so he just ran home. Stouffer also told his father that earlier in the evening several people at the party had been playing "Russian Roulette" with the gun. Right before Stouffer's conversation with his father, Robert Batty had stopped at Stouffer's house to ask Stouffer if he had seen Batty. Stouffer simply told Batty's father he had not seen Batty that day.

The State charged Stouffer, by trial information, with involuntary manslaughter. The State later amended the trial information to charge Stouffer with murder in the second degree, in violation of Iowa Code sections 707.1 and 707.3 (2005).

Jury trial commenced February 12, 2007. Three Polk County jail inmates testified for the State at trial. Ernesto Adams testified as follows. He had a bunk next to Stouffer in jail and he heard Stouffer tell others Stouffer had killed a guy in Mitchellville with a black powder pistol. He also heard him say that he got away with murder because of his bipolar defense, and that he had washed his arm and shirt sleeve to remove any remnants of the gunpowder so nothing could be revealed if tested. Stouffer said that after he shot Batty he walked over, looked at him and left. Stouffer said he told the cops the shooting was an accident, and admitted to lying to Robert Batty that the last time he had seen Batty he was

okay. Stouffer stated that the shooting had grown out of an argument and after he had shot Batty he, Stouffer, had said, "Who is laughing now?"

Adams testified that another inmate, Ronald Morgan, was the inmate actually talking with Stouffer when Adams overheard the conversation. Morgan testified Stouffer told him he had been charged with manslaughter for an incident that happened at Batty's apartment. He said several people were there and had been drinking and smoking marijuana and the "horseplay" included pointing a gun at one another. An argument developed between Stouffer and Batty, and at one point Batty leveled the gun at Stouffer. Stouffer told Morgan he then jumped over some furniture, grabbed the gun from Batty, cocked it, and shot Batty. Stouffer said Batty had been laughing until he shot him, and Stouffer then said to him, "Who is laughing now, mother fu----?" Morgan testified that Stouffer told him Batty then ran out through the door of the apartment. Stouffer followed the trail of blood to the lower level where Batty's father lived. He found Batty lying on the floor, rolled him onto his side and saw the entry and exit wounds, and left. Stouffer then went home and washed his clothes in Cheer detergent with bleach to wash off any gunpowder residue. Stouffer sang a song to Morgan about the killing to the tune of "On Top of Old Smokey."

Terrance Edington was also in jail with Stouffer. He testified he overheard Stouffer say, "Well it wasn't really an accident," and that he "better not say anymore. I think I said too much already." Stouffer repeatedly admitted to Edington that it was not an accident. Stouffer stated he had been arguing with Batty and had waited until everyone else left before shooting Batty so there

would be no witnesses. Edington's testimony about Stouffer's description of the shooting and his conduct afterward was consistent with Morgan's testimony.

Detective Randy Johnson also testified at trial. Johnson stated he interviewed Stouffer about the shooting. Stouffer acknowledged that earlier in the evening in question Batty had pulled a gun from a black zippered case. Stouffer also told Johnson that Batty and Bayliff jokingly talked about entering into a suicide pact and mockingly demonstrated this by pointing the weapon at their heads. Contrary to his earlier statement to Detective Tapscott, he admitted he touched the gun "once." He denied participating in the games with the gun, and told Johnson he left around 11:15 p.m., leaving Batty drunk on the couch.

Detective Johnson later learned from another detective that Stouffer's stepmother said Stouffer had admitted being present when Batty was shot. The next day Stouffer was brought to the sheriff's office and interviewed again. With each successive interview, Stouffer revealed more information to the police about his involvement in the shooting. He ultimately admitted he had shot Batty, but always insisted the shooting had been accidental.

All of Stouffer's interviews with the officers at the station were videotaped and listed as evidence to be offered at trial by the State. Stouffer filed a motion in limine on February 8, 2007, requesting to redact from these videos any mentions of a polygraph test. Prior to trial the parties agreed that any portions of the interviews referring to a polygraph test should be taken out, and the State endeavored to do so. However, one reference to Stouffer's confidence as to whether he could pass a polygraph test was a left in one of the interviews that

was played for the jury. After the jury heard it, Stouffer moved for a mistrial. He argued he was prejudiced by the introduction and publication of such statements to the jury. The court denied the motion, finding the State had unintentionally left that portion of the interview in the video and the statements in question were not prejudicial to Stouffer.

The jury found Stouffer guilty as charged. The court sentenced Stouffer to a term of imprisonment of no more than fifty years. Stouffer appeals his conviction, contending there was not sufficient evidence to convict him of second-degree murder and the trial court erred in denying his motion for mistrial.

II. MERITS.

A. Sufficiency of the Evidence.

Stouffer made a motion for judgment of acquittal at the close of the State's case in chief, arguing there was not sufficient evidence to corroborate the statements he made to law enforcement and to jail inmates, regardless of whether those statements were considered admissions or confessions. The trial court concluded there was sufficient corroboration of the admissions/confessions to generate a fact question for the jury and denied the motion. Stouffer claims the court erred in denying his motion for judgment of acquittal because the only evidence of murder was his statements and they cannot corroborate themselves.

Our scope of review and many of the standards of review that apply in sufficiency-of-the-evidence challenges are set forth in *State v. Webb*, 648 N.W.2d 72, 75-76 (Iowa 2002), and need not be repeated here. The following additional standards are applicable as well. Inherent in our standard of review of

jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). The existence of corroborating evidence is a legal question for the court to resolve. *State v. Bugley*, 562 N.W.2d 173, 176 (Iowa 1997). Once its legal adequacy is established, its sufficiency is for the jury. *Id*. It is well established that direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(*p*); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995).

Initially, we note that "[a]dmissions made subsequent to the commission of a crime are treated as though they were confessions replete with the same inherent weakness of confessions. As such, admissions made after the crime must also be supported with sufficient corroborating evidence." *State v. Polly*, 657 N.W.2d 462, 466 n.1 (Iowa 2003) (citations omitted). Thus, we need not determine whether the statements in question here were admissions or confessions because under the facts and circumstances of the case the nature of the corroborating evidence required is the same for both. *See id.*

Iowa Rule of Criminal Procedure 2.21(4) provides, "The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense." The corroboration "need not be strong nor need it go to the whole case so long as it confirms some material fact connecting the defendant with the crime." *Polly*, 657

N.W.2d at 467. The "other proof" required by rule 2.21(4) "does not have to prove the offense beyond a reasonable doubt or even by a preponderance" of the evidence. *Id*. Instead, it "merely fortifies the truth of the confession, without independently establishing the crime charged." *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 489, 83 S. Ct. 407, 418, 9 L. Ed. 2d 441, 456 (1963)). The corroborative evidence may be direct or circumstantial. *See State v. Brown*, 397 N.W.2d 689, 695 (Iowa 1986). However, corroborative evidence must show more than a defendant's mere "opportunity to commit a crime" and must raise "more than a suspicion of the defendant's guilt." *State v. Vesey*, 241 N.W.2d 888, 891 (Iowa 1976).

We conclude there was ample evidence corroborating Stouffer's confessions/admissions, made to both law enforcement officials, and other jail inmates, and thus supporting his conviction.

The physical evidence corroborates Stouffer's admissions that he shot Batty in the right side of his midsection with a black powder pistol while Batty was shirtless and crouching. Dr. Schmunk, the Polk County medical examiner, testified that Batty was shot and died of a gunshot wound, likely from a .44 caliber black powder pistol, to the right side of his chest, at close range, at an angle and distance consistent with Stouffer's admissions. Stouffer admitted to wiping the pistol off after using it, consistent with the lack of fingerprints found on the gun. He further stated that Batty told him there were two bullets in the gun. This corroborates the evidence that the gun was found with one ball lodged in the cylinder while the second one shot Batty. Furthermore, Stouffer admitted to

following a blood trail to the downstairs apartment. Batty's body was found on the floor of the downstairs apartment. Finally, Stouffer told the three inmates that he washed his arm and clothing in Cheer detergent with bleach to get rid of any evidence of residue from the shooting. The day after the shooting at about noon, Stouffer's stepmother testified she saw Stouffer, who had just got out of bed, doing a small load of laundry. She testified it looked like little more than two or three items of clothing and she told him they did not have the money to be doing such small loads of laundry.

As set forth above, "[c]orroboration need not be strong nor need it go to the whole case so long as it confirms some material fat connecting the defendant with the crime." *State v. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994). Further, it is the jury's duty to weigh the evidence and assess witness credibility, *see Liggins*, 557 N.W.2d at 269, including the credibility of the jailhouse informants and the truth of Stouffer's statements to them. Apparently the jury, as was its prerogative, believed that the inmates' testimony regarding Stouffer's admissions/confessions to them was truthful, believed that Stouffer was truthful with the inmates when he said he had shot Batty on purpose, and did not believe that Stouffer was being truthful when he told the police and others that the shooting was an accident.

Based on the nature and location of Batty's injury, the location of Batty's body, and Stouffer's concealment activity, we conclude Stouffer's multiple admissions/confessions to the police and jailhouse inmates were sufficiently corroborated. Based on these corroborated statements and the additional

evidence in the record, we conclude a reasonable jury could find Stouffer guilty beyond a reasonable doubt of murder in the second degree. The trial court did not err in denying Stouffer's motion for judgment of acquittal.

B. Motion for Mistrial.

Stouffer next claims the trial court erred in denying his motion for mistrial. As noted above, Stouffer's interviews with the police were recorded. The parties agreed prior to trial that any mentions of polygraph tests would be redacted from these interviews. However, either through a misunderstanding or oversight by the State, a certain portion of one interview inadvertently was left in one of the recordings and played to the jury. In that portion the officer asked Stouffer, "Okay. So . . . before we brought you back in, after we talked to your dad, do you think you would have passed the polygraph?" Stouffer answered, "Until I got them last two little things out, no." The officer then began a question with, "Okay. Do you think", but Stouffer interrupted, "Now I would." The officer asked, "You think you will?" Stouffer replied, "Now I would." The officer asked, "Okay. And you are sure about that?", and Stouffer responded, "I'm positive."

After this recording was played for the jury, Stouffer moved for mistrial. He argued that he was prejudiced by the introduction and publication of such statements to the jury. The court denied the motion, finding that although it was clear both parties agreed that portion of the recording should have been redacted, leaving it in "was unintentional on the part of the State." The court concluded the objectionable material resulted in no prejudice to Stouffer that would require a mistrial. The court had the objectionable portion of the recording

redacted prior to the recording being given to the jury. Defense counsel affirmatively stated that the defense did not want a curative instruction to be given to the jury.

In arguing that he was prejudiced by the reference to a polygraph, Stouffer cites *State v. Green*, 254 Iowa 1379, 121 N.W.2d 89 (1963). In that case the court held, in part, that the defendant was prejudiced by misconduct on the part of the prosecutor in stating that the defendant had agreed to take a lie detector test. *Id.* at 1383, 121 N.W.2d at 92.

A trial court has broad discretion in ruling on a motion for mistrial. *Brown*, 397 N.W.2d at 699; *State v. Waters*, 515 N.W.2d 562, 567 (Iowa Ct. App. 1994). We review a trial court's ruling on a motion for mistrial for abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006). The pertinent question here is whether the trial court was clearly unreasonable in concluding a fair and impartial verdict could be reached notwithstanding the brief discussion quoted above. *Id.* For the following reasons we find no abuse of discretion.

First, there was a single, short reference, at the end of a very long interview, to Stouffer's confidence he could pass a polygraph test. The word "polygraph" was used just one. The discussion was brief and isolated and the subject was never raised in front of the jury again. We note that the arguable insignificance of the brief discussion is somewhat evidenced by the fact the trial court apparently missed any reference to a polygraph when it first heard the interview, stating during arguments on the motion for mistrial, "Maybe I missed something. Was there something in there about polygraph?" Whether the

incident was isolated or repeated is relevant to the question of whether prejudice is likely to have occurred because prejudice results more readily from persistent efforts to place prejudicial matter before the jury. *State v. Anderson*, 448 N.W.2d 32, 34 (Iowa 1989).

Second, there is ample evidence in the record that Stouffer changed his story several times about what happened on the night of the shooting. Initially, he told Robert Batty that he left the party with Batty near passing out. He later told Robert the gun went off while he and Batty were wresting over the gun, then during the same conversation told him the gun fired accidently when he was trying to dislodge a ball from one of the chambers. Stouffer insisted to both his father and police the shooting was accidental, and that he ran home without finding Batty, who fled the apartment after the shooting. However, while in jail Stouffer told cellmates the shooting was prompted by an argument with Batty, it was not accidental, and he followed Batty into the downstairs apartment after the shooting, rolled him onto his side and observed his wounds, and then left. Thus, in asking Stouffer if he could pass a polygraph test the questioning officer was merely testing Stouffer's commitment to the final version of events he had given to law enforcement. Further, the brief discussion simply involved Stouffer telling the officer that at one point in time he had not been telling the whole truth but now, after filling in a couple of pieces, he was telling the truth. The jury heard no suggestion that Stouffer had been offered a polygraph test, had taken or refused a polygraph, or had passed or failed such a test. The questions by the officer merely gave Stouffer a chance to retract or affirm his final version of events, and

he affirmed it by stating he was positive he would now pass a polygraph test. The discussion and concluding statement were in fact exculpatory in nature and favorable to Stouffer.

Stouffer contends that *any* mention of a polygraph test to the jury results in prejudice and requires a new trial. He relies almost exclusively on *State v. Green*, 254 Iowa 1379, 121 N.W.2d 89 (1963), in support of this argument. In *Green*, the prosecutor stated in opening statements that the defendant had agreed to take a polygraph test. *Green*, 254 Iowa at 1383, 121 N.W.2d at 91. The prosecutor knew at the time that the defendant had not taken such a test, and the court found the prosecutor was also aware of the decisions of our supreme court as well as the majority of other states holding that reference to the taking or not taking of a lie detector test was misconduct. *Id.* The prosecutor also attempted to inject the matter into evidence later in the trial. *Id.* Our supreme court concluded that because of the prosecutor's remarks and his attempt to inject the matter into the trial the "defendant was prejudiced and did not receive a fair trial." *Id.* at 1385-86, 121 N.W.2d at 92.

Here, the prosecutor attempted in good faith to remove any references to a polygraph test from the interviews. One brief mention was inadvertently left in and was admitted into the record at the end of a long videotaped interview that was played for the jury. Importantly, reference by the prosecution to the defendant taking or not taking a polygraph test is what was found to be prejudicial and warranted a new trial in *Green*. *Id.* In the case at hand, there was not even a suggestion that Stouffer had been offered the opportunity to take

a polygraph test, that he had refused or agreed to do so, or that any results of such a test existed. The officer was in essence simply asking Stouffer if he was now telling the truth. Stouffer's answer that he was positive he would pass a test was exculpatory in nature and favorable to him. We find this case readily distinguishable from *Green.* This case does not involve evidence of the nature found prejudicial in *Green*.

Accordingly, we conclude the trial court could reasonably conclude that a fair and impartial verdict could be reached notwithstanding the inadvertent admission of the evidence in question, and the court thus did not abuse its broad discretion in denying Stouffer's motion for mistrial.

III. CONCLUSION.

For the reasons set forth above, we conclude the trial court did not err in denying Stouffer's motion for judgment of acquittal and did not abuse its discretion in denying Stouffer's motion for mistrial.

AFFIRMED.