

IN THE COURT OF APPEALS OF IOWA

No. 8-752 / 06-0778
Filed November 26, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH WAYNE LONGDON, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady (plea proceedings, mistrial), James Heckerman (motions), and Gordon C. Abel (trial, sentencing), Judges.

Defendant appeals his conviction for willful injury causing serious injury.

AFFIRMED.

Frank E. Robak, Sr. of Robak Law Offices, Council Bluffs, for appellant.

Kenneth W. Longdon, Jr., Clarinda, appellant pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Matthew D. Wilber, County Attorney, and John Jacobmaier, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle, J., and Schechtman, S.J.*

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

SCHECHTMAN, S.J.**I. Background Facts & Proceedings**

On August 22, 2004, Frankie Smith received a telephone call from his cousin, Kenneth Longdon. Longdon was upset that Smith was associating with “white people.” Smith invited Longdon over to his apartment if he wanted to discuss this problem further. Shortly, Smith’s live-in girlfriend, Jennifer Walker, heard Longdon yell “hello” through an open window. Smith went outside the apartment building.

Jessica Pitt and Tylinn Wright were walking by. They observed and heard an argument between two adult men. Pitt recognized Smith (known to her as Cane) as one of the men. Smith said, “Let’s take it over there,” and the men walked towards another spot. As they were walking, the other man stabbed Smith in the chest with a “shiny object” (later determined to be a steak knife). Smith ran from Pitt and Wright’s sight with Longdon in pursuit. Smith was struck with the same object in the back of his neck. Pitt and Wright proceeded to Smith’s apartment and told Walker that Smith had been assaulted.

Smith was transported to the hospital. The stab wound to the chest, caused a collapsed lung. The neck wound required several stitches. Smith identified Longdon as the assailant to the investigating officers. He added that as he was running, Longdon pulled a handgun, but had fallen. Smith was able to escape across the street. Police officers later found a .25 caliber handgun by the apartment complex’s dumpster.

Longdon was charged with attempt to commit murder and willful injury causing serious injury. Longdon was offered dismissals of the greater offense of willful injury causing serious injury and the attempted murder charge in exchange for a plea of guilty to the lesser offense of willful injury causing bodily injury. During formal plea proceedings, while the jury panel was assembled awaiting selection, in response to the court's inquiry, Longdon asserted his plea was "Not guilty." The plea proceedings were terminated and trial ensued on December 20, 2005.

In response to a motion in limine, the court had previously ruled the defense could interrogate Smith concerning an alleged pending probation for a burglary conviction. Defense counsel instead asked Smith about a trial information charging him with second-degree robbery and carrying weapons. The State's motion for mistrial was granted.

Longdon followed with several motions. The district court granted his request to be moved to a different jail. The court denied his motion to dismiss due to prosecutorial misconduct as well as his request for appointment of a special prosecutor and to assemble a grand jury. The State again offered a similar plea bargain to Longdon, who stated he would "never" take advantage of the plea offered.

The second trial began on January 31, 2006. The trial jury found Longdon guilty of assault with intent to commit serious injury, in violation of Iowa Code section 708.2(1) (2003), and willful injury causing serious injury, in violation of section 708.4(1). The district court denied Longdon's motion for new trial. The

court merged the two charges under Iowa Code section 701.9, as assault with intent to cause serious injury is a lesser included offense of willful injury causing serious injury. Longdon was sentenced to a term of imprisonment not to exceed ten years on the willful injury charge. Longdon appeals his conviction.

II. Plea proceedings

Longdon contends the district court erred by refusing to accept his plea. He claims he wanted to enter an *Alford* plea, and the court improperly required him to plea guilty or not guilty.¹ A district court may accept or reject a plea agreement. See Iowa R. Crim P. 2.10. A defendant does not have a constitutional right to enter a guilty plea. *State v. Hager*, 630 N.W.2d 828, 833 (Iowa 2001). A court has broad, but not unlimited, discretion in rejecting a guilty plea. *Id.*

The record in this case shows Longdon was extremely reluctant to enter a guilty plea. At the beginning of the plea proceedings Longdon stated, “I want to address the Court, and I would talk about the issues in the case, which I feel would bring up issues as far as showing that I am not guilty.” The court responded it would not accept Longdon’s plea if he was not guilty. Longdon then consulted with his attorney. Upon return to the record, the court thoroughly reviewed the rights Longdon would be waiving by pleading guilty. After some discussion with Longdon, the court stated, “Mr. Longdon, the question is: How

¹ In an *Alford* plea a defendant pleads guilty, but does not admit to a factual basis for the charged crime, however, agrees that it is probable that he would be found guilty nevertheless. See *North Carolina v. Alford*, 400 U.S. 25, 32-38, 91 S. Ct. 160, 164-168, 27 L. Ed. 2d 162, 168-172 (1970).

do you plead?” Longdon replied, “Not guilty.” Only then were the plea proceedings terminated.

The conclusion that Longdon decided not to plead guilty is buttressed by the fact that the plea bargain was offered at the pre-trial conference, held two weeks prior to the first trial, and remained open. The State again formally offered the identical plea bargain the day prior to that trial, with similar rejection. It was discussed again on the record thirteen days before the second trial, with counsel responding, “Longdon is not interested in any type of plea agreement.” Defense counsel and Longdon reviewed it on the record again. Defense counsel asked, “And are you certain that you don’t want to take advantage of that?” and Longdon replied, “Never”. The record abundantly shows Longdon never entered a guilty plea, whether an *Alford* plea or straight-up. We find no abuse of discretion or error by the district court.

III. Mistrial

Longdon claims the district court erred by granting a mistrial in the first trial. He asserts his counsel was properly attempting to impeach Smith and the court should have given an alternative, less drastic remedy, such as a curative instruction. Longdon also contends the second trial was barred by double jeopardy.

Any error in the first trial is not reviewable in an appeal of the second trial. See *State v. Ash*, 244 N.W.2d 812, 817 (Iowa 1976) (“We have disregarded that claim because, if there was error in the first trial, it is not reviewable on this appeal.”).

Longdon did not file a motion to dismiss the second trial due to double jeopardy concerns arising from the first trial. A claim of double jeopardy arising from the declaration of a mistrial in an earlier trial must be raised before the second trial. *State v. Harrison*, 578 N.W.2d 234, 238 (Iowa 1998); see also Iowa R. Crim. P. 2.11(2)(a) (noting defenses and objections based on defects in the institution of the prosecution must be raised prior to trial).

Longdon has not preserved error regarding those claims arising from the mistrial.²

IV. Cumulative Errors

Longdon contends the criminal prosecution against him should be dismissed because he was denied due process based on the district court's denial of his litany of motions. A defendant claiming a due process violation based on cumulative errors must show he was denied a fair trial and that he was prejudiced. *State v. Bass*, 349 N.W.2d 498, 504-05 (Iowa 1984). On constitutional issues, our review is de novo. *State v. Fox*, 491 N.W.2d 527, 530 (Iowa 1992). We independently evaluate the totality of the circumstances as evidenced by the record as a whole. *Id.*

A. Longdon asserts his conviction is marred by prosecutorial misconduct due to the State's failure to produce exculpatory evidence, as

² Longdon continually cites *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997), as authority for his preservation of error. In *Abbas*, the State contended the defendant had not preserved error, as he had not moved for judgment of acquittal. *Abbas*, 561 N.W.2d at 73. *Abbas* was a bench trial. *Id.* Our court held that "when a criminal case is tried to the court, a defendant may challenge the sufficiency of evidence on appeal irrespective of whether a motion for judgment of acquittal was previously made." *Id.* at 74. This was a jury trial, nor was sufficiency of the evidence an issue (except for the alleged two holes in the victim's shirt).

required by *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). Throughout, Longdon alleged that a fingerprint test of the handgun would show it had been in the possession of Smith.

A police detective testified that he decided to have a DNA test of the gun because he believed it was more likely to get better results. The handgun was found in six-inch high grass on a very humid evening. The detective had never experienced a case where fingerprints had been identified from a handgun. No DNA was found on it, and the DNA test would have destroyed any fingerprints.

To establish a *Brady* violation, a defendant is required to show (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to the issue of guilt. *State v. Piper*, 663 N.W.2d 894, 904 (Iowa 2003). “Evidence is suppressed ‘when information is discovered after trial which had been known to the prosecution but unknown to the defense.’” *Harrington v. State*, 659 N.W.2d 509, 522 (Iowa 2003) (citation omitted). The prosecution has a duty to learn of any favorable evidence, under *Brady*, known to others acting on the government’s behalf. *Id.*

On the other hand, the State is not required to create evidence by performing certain tests for the benefit of the defendant. *State v. Johnson*, 495 A.2d 1367, 1369 (N.J. Super. Ct. App. Div. 1985) (finding no *Brady* violation where prosecution “failed to lift fingerprints from the gun that was found and later determined to be defendant’s weapon”); *see also United States v. Weisz*, 718 F.2d 413, 436 (D.C. Cir. 1983) (noting the government has no duty to create evidence); *United States v. Butler*, 499 F.2d 1006, 1007-08 (D.C. Cir. 1974)

(finding that if a test had been performed, the government was required to share the results; but if no test was made, the matter was concluded).

Longdon has failed to show prosecutorial misconduct due to the prosecutor's failure to provide him with exculpatory evidence. He made no motion for independent testing. Furthermore, the whole weapon argument is a proverbial red herring -- the defense of self-defense was not offered and the gun was not involved in the injury, nor the subject of any threatened involvement. Whether any fingerprints were the victim's, the defendant's, or unidentified, would not have altered anything, much less the trial's outcome, nor were the alleged fingerprints material to the issue of guilt.

B. Longdon claims the prosecutor made disparaging comments during the prosecution of the case and during closing arguments, but does not set them forth, nor was there any objection urged during trial. To preserve a claim of prosecutorial misconduct, there must be timely and proper objections. See *State v. Romeo*, 542 N.W.2d 543, 552 (Iowa 1996). This ground for appeal has not been preserved.

C. Between the first and second trials Longdon filed a motion to have the county attorney recuse himself, and that a grand jury be called. These requests were based on Longdon's claims of emotional/physical mistreatment and racial harassment at the county jail. The district court remarked that Longdon's claims relating to his treatment at the county jail had no relevance to the issues. The court also stated it had no authority to convene a grand jury to

investigate Longdon's allegations about the county jail. We find no error in the district court's orders.

Longdon raises claims regarding an assistant county attorney who had been terminated. He does not state that this assistant county attorney had any participation in his case. Further, it is not clear these claims were raised before the district court, and preserved for our review. See *State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997).

D. Longdon claims he waived his right to speedy trial in October 2005 based on the State's representation that it would complete fingerprint testing of the gun prior to the first trial date in December 2005. He asserts that because no fingerprint testing was done, his waiver was insufficient and the case should be dismissed on speedy trial grounds.³

Longdon's sole mention of his speedy trial rights was in a motion to dismiss filed between the first and second trials, which stated:

That in this case, the State of Iowa through Pottawattamie County has violated Defendant's civil rights, right to fair, public and speedy trial, and right to due process, racial discrimination, prosecutor bias and abuses, interference with his attorney/client relationship, and malicious and cruel treatment while held in the Pottawattamie County Jail.

No further argument was presented to support his claim of a speedy trial violation, or the grounds for such an assertion. During oral argument, Longdon's arguments centered around his claims of prosecutorial misconduct and convening a grand jury. The court considered the motion as alleging prosecutorial misconduct and denied it.

³ The record shows Longdon later withdrew his waiver of speedy trial.

Longdon never succinctly raised a violation of the speedy trial rule. In order to preserve a speedy trial issue, a defendant must make a pretrial motion to dismiss. *State v. Schiernbeck*, 215 N.W.2d 261, 262 (Iowa 1974).

E. Longdon asserts his conviction is not supported by the evidence. He points to Smith's shirt, which he claims had three holes in it, instead of two and makes an unsubstantiated allegation of tampering with the evidence. He admits, however, that he did not object to this evidence. Again, this issue has not been preserved. See *Jefferson*, 574 N.W.2d at 278.

We find no merit to any of the cumulative errors claimed by Longdon. He has failed to show any denial of due process based upon these allegations.

V. Pro Se Issues

Longdon raises several issues in a pro se brief: (1) the district court was not impartial due to conflicts of interest; (2) his due process rights were violated by gross prosecutorial and judicial misconduct; (3) the prosecutor was biased in bringing these charges; (4) dismissal of a block of jurors, which included the sole African-American prospective juror, (5) there are not effective safeguards for accountability in judicial proceedings; and (6) his constitutional right to access to the court has been violated while in prison.

We have already addressed Longdon's due process arguments. As to the issues relating to his criminal trial, Longdon has not preserved error as to these issues. See *id.* The incidents occurring while he was in prison are outside the record on appeal, and are not considered. See *Rasmussen v. Yentes*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994).

After consideration of all of the issues presented, we affirm Longdon's conviction.

AFFIRMED.