IN THE COURT OF APPEALS OF IOWA

No. 0-062 / 09-0756
Filed May 12, 2010

STATE OF IOWA,
Plaintiff-Appellant,

vs.

LEONARDO RUFIN-FONES,
Defendant-Appellee.

Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

The State appeals from a district court order granting the defendant a new trial. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, and Allen Cook, County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellee.

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

VAITHESWARAN, P.J.

The State appeals an order granting Leonardo Rufin-Fones a new trial based on a post-trial statement by his co-defendant that Rufin-Fones was not involved in the crimes for which he was found guilty.

I. Background Facts and Proceedings

A grocery store employee was accosted by a knife-wielding man wearing a ski mask, gloves, and dark clothing. The man told the employee, "[D]on't look back, just keep walking, keep going forward or otherwise I will kill you." He directed her to a back room and bound her hands with tape. Meanwhile, a second person stole jewelry and approximately $3000 in cash from the front of the store.

Police officers discovered two sets of footprints in the newly fallen snow. An officer described one set as having "a tennis shoe-type sole." The officers followed the footprints to an apartment. A woman who was standing at the back door told them that her two roommates, Leonardo Rufin-Fones and Paulino Perez-Mondragon, had just returned home about ten minutes earlier. The woman gave the officers permission to enter the apartment.

In the bathroom, the officers found two dark-colored stocking caps with eye holes cut out. In Rufin-Fones's bedroom, they discovered jewelry, a purse holding $2892 and another holding $51 in cash, two knives, a pair of white gloves, a dark-colored coat, and a pair of wet tennis shoes with a tread pattern matching the pattern of one set of footprints leading away from the store. Rufin-Fones admitted the tennis shoes were his.

The store employee identified the jewelry and purses of cash as the same jewelry and purses taken from the store. Although she was unable to confirm that Rufin-Fones was one of the men who robbed the store, she stated Rufin-Fones was at the store approximately an hour before the robbery, did not watch television as he usually did, and stayed in a corner of the store "for awhile."[1]

When interviewed by police, Rufin-Fones admitted he went to the store, but said he was there simply to get a phone card and watch television. He said that after he left the grocery store, he went back to his apartment, waited for Perez-Mondragon in his car, and entered the apartment with him. In response to a request to tell the truth, he stated, "If I say it was me what do I gain?"

Perez-Mondragon was also interviewed by the police. He implicated Rufin-Fones in the crime.

The State jointly charged Rufin-Fones and Perez-Mondragon with first-degree robbery in violation of Iowa Code sections 711.1 and .2 (2007) and assault while participating in a felony in violation of section 708.3. Rufin-Fones moved to sever the trials based on Perez-Mondragon's statements against him. The district court granted the motion and ruled that Perez-Mondragon's statements inculpating Rufin-Fones would not be admissible at Rufin-Fones's trial.

Following trial, the jury found Rufin-Fones guilty on both counts. Prior to sentencing, Perez-Mondragon pled guilty to first-degree robbery. At the plea

[1] As the employee died of a heart condition prior to trial, her deposition transcript was admitted in lieu of live testimony.

proceeding, he stated that Rufin-Fones was not the second person involved in the crimes.

Rufin-Fones filed a motion for new trial, claiming that Perez-Mondragon's change of story constituted newly discovered evidence. The district court agreed, and granted the motion. The State appealed.

Notwithstanding the broad discretion with which trial courts are vested in ruling on motions for new trial on the basis of newly discovered evidence, these motions are not favored, should be closely scrutinized, and should be granted sparingly. *State v. Gilroy*, 313 N.W.2d 513, 522 (Iowa 1981).

II. Analysis

To prevail on a new trial motion based on a claim of newly discovered evidence, a defendant must show:

> (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial.

Jones v. State, 479 N.W.2d 265, 274 (Iowa 1991).

The State argues the first factor was not satisfied because Perez-Mondragon's statements were not "newly discovered" but were merely "newly available." The State also contends the second and fourth factors were not satisfied. We begin and end our discussion with the first factor.

As to this factor, the district court stated:

> [T]he Court does notice that the ability to compel Mr. Perez-Mondragon's testimony at the time of the Rufin-Fones trial was not available to this defendant. In fact, one of the chief reasons that the trials were severed was because of the difficulties with the statements that one of the defendants had made and difficulties in

> testing those statements at trial, and this defendant simply wouldn't have been able to compel this testimony because of the 5th Amendment rights. So this is the very kind of new evidence that the Court reads Iowa Rule of Criminal Procedure 2.24(2)(*b*)(8) to go to, and the Court finds good cause to grant a new trial.

While this reasoning is appealing at first blush, our supreme court has

> specifically held that the potentially exculpatory testimony of a codefendant, who . . . had earlier exercised his fifth amendment privilege against self-incrimination at a defendant's criminal trial, where that testimony was known to the defendant, may not be considered newly discovered evidence so as to warrant the grant of a new trial.

Id.; *see also Jones v. Scurr*, 316 N.W.2d 905, 910 (Iowa 1982) ("[E]xculpatory evidence that was unavailable, but known, at the time of trial is not newly discovered evidence . . . .").

Rufin-Fones acknowledges this authority but argues the statements made by Perez-Mondragon at his plea proceeding were not known to him at the time of trial because Perez-Mondragon had earlier implicated him as his accomplice. However, a "witness's shifting desire to testify truthfully does not make that witness's testimony 'newly discovered' evidence." *United States v. Turns*, 198 F.3d 584, 587 (6th Cir. 2000); *see also United States v. Lofton*, 333 F.3d 874, 876 (8th Cir. 2003) (distinguishing between a witness's willingness to testify (or testify truthfully), which is not itself evidence, and the particular relevant fact about which the witness may testify, which is evidence); *accord United States v. Lenz*, 577 F.3d 377, 381 (1st Cir. 2009). As our supreme court observed in *Scurr:*

> It is not unusual for one of two convicted accomplices to assume the entire fault and thus exculpate his co-defendant by the filing of a recanting affidavit. In a case such as the present one, the already convicted codefendants have nothing to lose by making

> statements that exculpate defendant. We find that such statements should not automatically be allowed to interfere with the finality of the underlying trial. Otherwise, the underlying trial would always be tentative unless all codefendants and alleged accomplices testified fully at that trial.

316 N.W.2d at 910 (internal citations omitted). This is what happened here. Perez-Mondragon had nothing to lose by exculpating Rufin-Fones after he reached a favorable deal in his own case. Therefore, his newfound willingness to exonerate his former roommate could not amount to newly discovered evidence.

We conclude Perez-Mondragon's statements about Rufin-Fones at the plea proceeding did not amount to newly discovered evidence justifying a new trial for Rufin-Fones. Accordingly, we find an abuse of discretion. *See State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008) (stating an abuse of discretion can occur when the court's decision is based on an erroneous application of the law). We find it unnecessary to address the remaining factors pertaining to a newly discovered evidence claim.

We reverse the district court's grant of Rufin-Fones's new trial motion and remand for reinstatement of his convictions, entry of judgment, and sentencing.

REVERSED AND REMANDED.