IN THE COURT OF APPEALS OF IOWA

No. 0-611 / 09-0522
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARTAVES DESHONE KEYS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

A defendant appeals his judgment and sentence, contending the district court (1) should have suppressed statements he made to police and others, (2) should have granted him a new trial based on what he asserts was juror misconduct, and (3) erred in giving certain jury instructions. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple and Brook Jacobsen, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, J.

Martaves Keys appeals his judgment and sentence for two counts of first-degree murder. He contends the district court (1) should have suppressed statements he made to police and others, (2) should have granted him a new trial based on what he asserts was juror misconduct, and (3) erred in giving certain jury instructions.

I. Background Facts and Proceedings

Two individuals were found dead of gunshot wounds inside a vehicle in Waterloo. Police officers picked up Martaves Keys and conducted a recorded interview for approximately four hours. During the interview, Keys admitted he was in the vehicle at the time of the shootings but denied firing the shots. He pointed the finger at another individual and expressed fear that this individual would assault him.

Following the interview, police officers transported Keys to a hotel and posted officers at the door of his room. The next morning, they returned him to the police station and interviewed him on and off for approximately nine hours. This interview was also recorded.

Within the first hour of the second interview, officers administered a polygraph test. The interrogating officer later told Keys the test came back "truthful." The officer continued his questioning.

After several hours, the interrogating officer allowed Keys to visit with his girlfriend in the interrogation room. The video recording device continued to run during their conversation. When the officer returned, he elicited a confession

from Keys to both shootings. The officer then left and Keys continued his conversation with his girlfriend, who was still in the interrogation room. He also had a telephone conversation with his mother. The video recording device continued to run.

The State subsequently charged Keys with two counts of first-degree murder. Keys moved to suppress the statements he made, citing the United States and Iowa constitutions. The district court denied the motion.

At trial, the State played for the jury Keys's videotaped confession and the videotape of his conversations with his girlfriend and mother.

The jury found Keys guilty of both counts of first-degree murder. Keys filed a motion for new trial based on an allegation of juror misconduct. The district court denied the motion and imposed judgment and sentence. This appeal followed.

II. Suppression Ruling

A. Miranda Waiver

"Statements made by a suspect during a custodial interrogation are inadmissible unless a suspect is specifically warned of his or her *Miranda* rights and freely decides to forgo those rights." *State v. Ortiz*, 766 N.W.2d 244, 251 (Iowa 2009).[1]

Keys asserts he did not freely decide to forgo his *Miranda* rights. Once this type of issue is raised, "the State must prove by a preponderance of the evidence that the waiver [of the suspect's *Miranda* rights] was knowingly,

[1] *Miranda v. Arizona,* 384 U.S. 436, 473–76, 86 S. Ct. 1602, 1627–29, 16 L. Ed. 2d 694, 723–25 (1966).

intelligently, and voluntarily given." *State v. Countryman*, 572 N.W.2d 553, 559 (Iowa 1997). "This is determined by examining the totality of the circumstances surrounding the interrogation." *Id.* Review of this issue is de novo. *State v. Miranda*, 672 N.W.2d 753, 758 (Iowa 2003).

As a preliminary matter, the State concedes it is not challenging the district court's finding that Keys was in custody. There is also no dispute that he was interrogated by the police.[2] The real question is whether Keys had the mental capacity to validly waive the rights articulated in *Miranda*.[3]

Keys contends he did not. He relies on the testimony of forensic psychologist Bruce Frumkin, who opined it was "unlikely [Keys] would have been able to fully make a knowing and intelligent waiver of his *Miranda* rights." Frumkin based his opinion on five factors: (1) Keys's educational level, (2) the results of an IQ test, (3) Keys's overall psychological functioning, (4) the results of comprehension tests, and (5) Keys's history of drug use.

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[2] In *Miranda*, the court stated: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d. at 706.

[3] Those rights are as follows:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Miranda, 384 U.S. at 444–45, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706–07.

With respect to the first two factors, it is undisputed that Keys was not an academic stand-out in high school, dropped out in the eleventh grade, and had IQ scores at the low end of the testing range. These facts, however, did not automatically render Keys incapable of waiving his *Miranda* rights. *See State v. Fetters*, 202 N.W.2d 84, 89 (Iowa 1972). Indeed, while Frumkin opined "that people of lower intelligence don't understand *Miranda* rights as well as people of higher intelligence," he conceded there is no cutoff IQ score that renders someone incapable of waiving his or her *Miranda* rights.

This brings us to the third factor, Keys's overall psychological functioning. This factor also does not support a finding that Keys was incapable of waiving his *Miranda* rights. It is true that Keys had a history of anxiety, preoccupation with intrusive thoughts, and a propensity for "cognitive slippage," which Dr. Frumkin defined as "some temporary inefficiency in processing information." However, these deficits were not apparent in the video recordings. To be sure, Keys had trouble coming up with certain descriptive words, but he responded quickly to the officer's questions and comments and his reactions were appropriate for the circumstances.

The fourth factor cited by Dr. Frumkin, the results of tests to measure Keys's current comprehension and appreciation of *Miranda* rights adds little to the analysis, as Dr. Frumkin admitted Keys did "relatively well" and "currently ha[d] a good understanding of the *Miranda* rights and currently is able to make an intelligent use of the *Miranda* rights." While Frumkin suggested the positive test results reflected Keys's efforts to educate himself after the interrogation, this

suggestion belies his earlier assertion that Keys lacked the education and IQ to process the *Miranda* warnings at the time of the custodial interrogations.

The final factor cited by Dr. Frumkin, Keys's drug use, was not evident on the video recordings. Dr. Frumkin acknowledged this and the State's expert confirmed it. Additionally, all the officers who encountered Keys testified they did not believe the defendant was under the influence of drugs.

On our de novo review, we agree with the district court that Keys possessed "sufficient intellectual capacity to understand *Miranda* warnings and to validly waive those *Miranda* warnings."

B. Voluntariness

Keys also contends his statements to police officers were not voluntary.

> The test for voluntariness is whether the "totality of the circumstances" demonstrates that the statement was the "product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired."

State v. Vincik, 398 N.W.2d 788, 790 (Iowa 1987) (quoting *State v. Hodges*, 326 N.W.2d 345, 347 (Iowa 1982)).[4] "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" *Id.* (citation omitted).

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[4] In *State v. McCoy*, 692 N.W.2d 6, 28 (Iowa 2005) an opinion deciding whether an officer's promise of leniency rendered a confession involuntary, the Iowa Supreme Court stated:

> The district court did not decide the voluntariness issue under a totality-of-the-circumstances test. It is clear from the court's ruling that it decided the issue on an evidentiary basis, a procedure with which we concur. This is evident from the court's failure to employ the usual factors federal courts resort to under that test. Moreover, we note the State filed no post-hearing motion asking the court to employ the federal totality-of-the-circumstances test.

As this case involves no claims that officers promised Keys leniency, we decline to apply the evidentiary standard.

As discussed, we are not convinced Keys's mental capacity rendered his statements involuntary. *See id.* at 789–92 (examining most of same factors for voluntariness of *Miranda* waiver and voluntariness of statement). The question remains whether the police used "coercive" techniques to elicit the confession. *Id.* at 790. Keys maintains they did, pointing to the officer's explanation of the polygraph test result. The State concedes the officer's statement that the polygraph came back "truthful" was deceptive, but asserts the overall circumstances reveal the questioning was not coercive.

While deceit is not condoned, it is only one of several factors to consider in determining the voluntariness of confessions. *State v. Davis*, 446 N.W.2d 785, 789 (Iowa 1989); *State v. Boren*, 224 N.W.2d 14, 15 (Iowa 1974). Here, the officer's deception was apparently an effort to throw Keys off his guard. It had precisely the opposite effect. Surmising that the officers believed his earlier story, Keys persisted in it. Thus, the deception failed. *See Boren*, 224 N.W.2d at 16 ("We do not believe Manchester's alleged 'trick question' constituted coercion. It was a means of challenging defendant's veracity rather than a device calculated to overbear his will or impair his capacity for self-determination.").

Notably, the officer changed course after making the deceptive statement and proceeded with a contradictory strategy based on accusations that Keys was lying about key facts. This strategy failed as well. It was only after the officer allowed Keys to speak to his girlfriend several hours later that Keys changed his story and admitted he shot the two occupants of the vehicle.

We conclude the officer's statement about the polygraph test was not coercive and, accordingly, did not render his confession involuntary.

III. Police Recording of Third-Party Conversations

Keys next claims his trial attorney was ineffective in failing to seek the suppression of the recordings of his conversations with his girlfriend and mother. To prevail, he must show the breach of an essential duty and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). A reviewing court need not engage in both prongs of the analysis if one is lacking. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992) ("[A] reviewing court can affirm a conviction on direct appeal if the defendant has failed to prove prejudice, without deciding whether counsel's representation was incompetent.").

"Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim." *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Sometimes, the appellate record is adequate to resolve the issue on direct appeal. *Id.* We believe the record is adequate to resolve the issue.

In order to prove the second prong of the ineffective assistance test, the defendant must show a reasonable probability that without counsel's errors, the result would have been different. *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998). Where the evidence of guilt is overwhelming, we will find no prejudice. *See Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

As the State points out, the evidence of Keys's guilt was overwhelming. In addition to the properly admitted confession, an underwater search and recovery team located the gun used in the shooting at a point in the Wapsipinicon River where Keys said he threw it. A shell casing recovered from the vehicle in which the shootings took place was positively identified as coming from the recovered gun. DNA profiles of blood taken from a home Keys went to after the shootings essentially matched the profiles of the two individuals who were shot and killed. Based on this evidence, we conclude Keys cannot establish *Strickland* prejudice and his ineffective-assistance-of-counsel claim necessarily fails.

IV. Juror Misconduct

Keys contends the district court erred in refusing to grant his motion for new trial based upon claimed juror misconduct. He specifically maintains one juror was untruthful in her responses to a jury questionnaire and was not forthcoming during voir dire about her ability to be impartial. Review of this issue is for an abuse of discretion. *State v. Wells*, 629 N.W.2d 346, 352 (Iowa 2001).

> For the purpose of determining juror prejudice, the relevant question is not what a juror has been exposed to, but whether the juror holds such a fixed opinion of the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant.

State v. Gavin, 360 N.W.2d 817, 819 (Iowa 1985).

At the hearing on the motion for new trial, Keys elicited testimony from Edward Smart, who stated he saw the juror and she discussed Keys's trial, saying, "Yeah, I was in his trial. I found the MF guilty as soon as I recognized who he was," and, "[H]e was guilty from the get-go." The juror whose impartiality

was questioned also testified. She stated she had never seen Edward Smart before and never made the comments that Smart attributed to her.

In denying the motion for new trial, the trial court stated:

> I pay special attention to Mr. Smart's criminal record. He has a litany of criminal convictions, and a long-time involvement with run-ins with the law. He has served possibly as many as four—or, has had possibly as many as four federal convictions, and he has had a number of state court convictions, as well.
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> At the important time that we're talking about, February 2009, Mr. Smart was in the custody of the Black Hawk County Sheriff, in the same jail as Mr. Keys, and the degree of contact that Mr. Keys would have had with Mr. Smart, I guess, is open to question. Mr. Smart says that he had minimal, if no, contact with Mr. Keys. But again, given Mr. Smart's proclivity for violating the law, and his criminal convictions, one has to take anything that he has to say with not just the proverbial grain of salt, but with probably a box of salt, because Mr. Smart does not strike one as being a very credible person.
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> His life has been one of criminal activity and criminal convictions. And his assertion that he was so swept up in the heat of justice, that he regarded it as being something that shocked his conscience and something that he could not easily live with, when his life has been such that violations of the law, violation of other people's rights and responsibilities don't seem to be things that much concern him, I do not find credible.
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> And given a conflict in the evidence between [the juror] and Mr. Smart, I have absolutely no hesitancy in concluding that, once more, the credibility should be placed with [the juror].
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> But one does not have to necessarily just depend upon [the juror] to reach that conclusion. [Another witness] . . . did not say that Mr. Smart was there. And so, we have two individuals who say that Mr. Smart was not there . . . .
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> And again, given Mr. Smart's penchant for violating the law, and lack of regard for anybody's rights or anybody's entitlement to be safe from his criminal activities, I'm not at all convinced that Mr. Smart has much of a regard for any oath to tell the truth, and that I have no doubt he would, without hesitation, take the stand, swear to tell the truth, and then give testimony that he knew not to be the truth.
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> And so, for those reasons, I conclude that Mr. Smart's testimony is not credible, and that no such conversation ever occurred between Mr. Smart and [the juror], and that Mr. Smart disregarded his obligation to testify truthfully when he testified that such a communication—such a conversation did, in fact, occur.

In light of this detailed assessment of the testimony and the credibility of the witnesses, we conclude the district court did not abuse its discretion in finding no juror misconduct and denying the motion for new trial on this ground. *See State v. Christianson*, 337 N.W.2d 502, 506 (Iowa 1983) ("[W]e think trial court in the exercise of its broad discretion properly could examine the claimed influence critically in light of all the trial evidence, the demeanor of witnesses and the issues presented before making a commonsense evaluation of the alleged impact of the jury misconduct."); *State v. Tharp*, 372 N.W.2d 280, 282 (Iowa Ct. App. 1985) (affirming a district court's denial of a new trial motion based on a witness's recantation, noting that the district court had not found the recantation credible).

V. Jury Instructions

A. Ineffective Assistance of Counsel

Keys contends his trial attorney was ineffective in failing to object to certain jury instructions. As discussed above, Keys cannot show *Strickland* prejudice, because the evidence supporting the jury's findings of guilt was overwhelming. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Therefore, this ineffective-assistance-of-counsel claim fails.

B. Error in Failing to Instruct on Alternate Theories

Keys next contends the district court erred in altering a uniform jury instruction by deleting a reference to the presentation of "two or more alternative theories." While this issue was raised before the trial court, it was raised by the prosecutor rather than the defense. Defense counsel initially appeared to concur

with the State's assertion that there should be no alteration of the uniform instruction but, when asked to comment on the altered instruction, she stated, "That's probably the cleanest way to do it." Based on this comment, we conclude defense counsel waived error with respect to a challenge to this particular jury instruction. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988).

VI. Disposition

We affirm Keys's judgment and sentence.

AFFIRMED.