

IN THE COURT OF APPEALS OF IOWA

No. 6-835 / 06-0218
Filed December 28, 2006

STATE OF IOWA,
Plaintiff-Appellant,

vs.

ANTHONY JOSEPH CURCE,
Defendant-Appellee.

Appeal from the Iowa District Court for Clinton County, Charles Pelton,
Judge.

The State appeals from a district court order granting Anthony Curce's
motion for new trial following a jury verdict finding him guilty of sexual abuse in
the third degree. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, James G. Tomka and Greta
Truman, Assistant Appellate Defenders, for appellee.

Thomas J. Miller, Attorney General, Darrel Mullins, Ann Brenden, and
Mary Tabor, Assistant Attorneys General, Michael Wolf, County Attorney, and
Ross Barlow, Assistant County Attorney, for appellant.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

The State appeals from a district court order granting Anthony Curce's motion for new trial following a jury verdict finding him guilty of sexual abuse in the third degree in violation of Iowa Code section 709.4(c)(4) (2003), a class "C" felony. We reverse and remand.

I. Background Facts and Proceedings

On February 25, 2005, the State charged Anthony Curce by trial information with sexual abuse in the third degree. The State alleged Curce performed a sex act upon a fourteen- or fifteen-year-old female who was not his spouse when he was four or more years older than the female.

The jury could have found the following facts from the evidence presented at trial. The victim, A.M., began "dating" Curce on October 11, 2004. At that time, A.M. was fourteen and Curce was twenty-three.¹ A.M. had sexual intercourse with Curce more than twenty times during the period of time that they dated. The encounters occurred at Curce's house, A.M.'s grandmother's house, and a friend's house. A.M.'s friend, Brigitte, testified she saw A.M. having sexual intercourse with Curce on five or six occasions.

The last time Curce had sexual intercourse with A.M., it occurred in an abandoned house after A.M. had run away from home. Curce and A.M. were found by the police in a closet of the house. When the police apprehended Curce, he was only wearing a tank top and underwear. His jeans and shoes were somewhere else in the house.

¹ A.M. was born June 1990 and Curce was born August 21, 1981.

When he was interviewed by the police, Curce denied he had sexual intercourse with A.M. However, he told the police he had lied about some things. Curce told the interviewing officer that if the officer had heard things from A.M., they were probably true because she would not lie. At the time Curce was interviewed, he was wearing a friendship ring given to him by A.M.

Curce wrote a letter to A.M. the first time she was caught running away. The letter stated, "I'm miserable without you, Baby," and "I could not love you too much." The letter also stated, "I'm sorry all this happened. It's all my fault. I should have ended it as soon as I saw all this trouble coming."

At trial, Curce testified he did not have sex with A.M. He claimed he and A.M. were just friends. He stated the purpose of the letter he had written to A.M. was "to cheer her up." The evidence presented at trial included videotape clips of an interview a police officer conducted with the defendant.

The jury asked the court three questions during its deliberations. First, the jury asked how they should treat evidence of events that occurred outside the time period the crime was to have occurred. The court, the State, and the defendant agreed to an answer directing the jury to reread and abide by the court's original instructions. Second, the jurors asked if they could see a letter A.M. had written to Curce when she was in a shelter and if they could have a VCR to view the videotaped police interview with Curce. The court and both parties agreed to instruct the jury that the letter was not in evidence and a transcript was not available. The parties also agreed the jury should be provided with the requested audiovisual equipment so the jurors could watch the videotaped interview which had been admitted as State's Exhibit 1.

The jury's final question stated:

We reviewed the entire video. There was more information and more video on the tape not presented in court. That information has influenced our decision. May we consider the information on the tape not shown in court, but that was on the video entered as State's Ex. No. 1?

The record reveals the district court, prosecutor, defense counsel, and the defendant met to discuss the jury's question and to consider an appropriate response. After discussing the matter at some length, the court proposed that the following response be made to the jury:

Only consider the portions of the videotape shown in open court. If there is something else on the tape that you are fairly certain was not shown in court, please disregard it, as it was not intended to be evidence for your consideration.

After defense counsel spoke with Curce concerning the proposed instruction, he told the court, "That instruction is fine, Your Honor." The court's response was then provided to the jury.

The jury returned a guilty verdict on October 19, 2005. Curce filed a combined motion in arrest of judgment and motion for new trial on October 26, 2005. The motion for new trial accused the county attorney's office of "prosecutorial misconduct which denied the Defendant a fair and impartial trial" for failing to properly prepare and review the videotape. The motion also stated the defendant was willing to "[a]ssum[e] the submission of the unoffered, unadmitted video portion(s) was wholly accidental." Later, defense counsel orally amended the motion to add a claim of "jury misconduct" based on the jury's consideration of extraneous material. Before the defendant's motion for new trial was heard, the court directed the State to transcribe all the clips on the videotape

which the jury viewed during its deliberations. A segment of the videotape, which begins approximately 165 seconds after the last clip shown at trial, can be seen and was transcribed. Following a hearing, the district court concluded the jury saw a portion of the tape that was not in evidence and granted Curce's motion for new trial. The State now appeals.

II. Scope and Standards of Review

We review the district court's ruling on a motion for new trial for abuse of discretion. *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997). We will reverse only upon a showing that the court granted the new trial on grounds which were clearly unreasonable and untenable. *State v. Mercer*, 470 N.W.2d 67, 68 (Iowa Ct. App. 1991). We are slower to interfere with the grant of a new trial than with its denial. *Id.* The State bears the burden to establish the district court abused its discretion in granting the defendant a new trial. *State v. Weaver*, 554 N.W.2d 240, 244 (Iowa 1996) *overruled on other grounds by State v. Hallum*, 585 N.W.2d 249, 254 (Iowa 1998). Motions for new trial are not favored and should be closely scrutinized and sparingly granted. *Weaver*, 554 N.W.2d at 245.

III. Discussion

The State contends the district court erred in granting a new trial on the basis of a ground made known to all the parties during jury deliberations. The State claims the defendant and defense counsel specifically opted not to move for a mistrial and instead gambled on a not guilty verdict after the jury informed the court there was information on the videotape they viewed during their deliberations that was not presented in court during trial. For the reasons which follow, we believe the State's argument has merit.

If a defendant fails to object or move for mistrial regarding an error that is known before a verdict is rendered, he or she waives consideration of the issue on appeal. *State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991). In this case, the jury informed the court they had viewed a portion of a videotape during their deliberations that had not been presented during trial. As we have mentioned, the parties convened to discuss an appropriate response to the jury's communication before the jury reached a verdict. The defendant had an opportunity to object and move for a mistrial at that time. Defense counsel declined to move for a mistrial even after the prosecutor said, "[I]f there's something on there [the videotape] that wasn't seen in court, I—I think that there—there rightfully should be a mistrial." When the prosecutor offered to view the tape with defense counsel to ensure there was nothing on it that had not been presented in court, defense counsel only suggested the jury should disregard the portion of the tape they did not see in court. The district court proposed to instruct the jury to only consider the portions of the tape shown in court and to disregard portions that were not shown in court. The court asked the parties if the proposed instruction was fair, and defense counsel stated, "I agree."

The prosecutor then asked defense counsel if he was sure Curce wished to proceed with the court's proposed instruction as opposed to asking for a mistrial. At that point, defense counsel asked for an opportunity to confer with his client. After a private meeting with Curce, defense counsel again informed the court the proposed instruction to the jury was acceptable. Curce did not move for

a mistrial based on the jury's viewing of an unadmitted video clip until after the jury returned a guilty verdict.

The record reveals Curce was given several opportunities to move for a mistrial. Instead, he chose to gamble on a not guilty verdict. A defendant is not permitted to withhold an objection or motion for mistrial on an error known to the defendant before the jury reaches a verdict, gamble on a not guilty verdict, and later raise the same issue as a ground for a new trial. See *State v. Wells*, 629 N.W.2d 346, 356-57 (Iowa 2001) (holding that when a defendant made a belated claim of juror misconduct that was observed before the verdict, the court would not reward him for making a losing bet on his own conviction by granting him a new trial). We conclude Curce waived his claim of error and the trial court abused its discretion in granting his motion for new trial.

IV. Conclusion

Because we conclude the district court abused its discretion in granting a new trial to the defendant, we reverse the district court's order, reinstate Curce's conviction of sexual abuse in the third degree, and remand for the entry of judgment and sentencing.

REVERSED AND REMANDED.