

IN THE COURT OF APPEALS OF IOWA

No. 8-406 / 07-0309
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RON JAREL MILLBROOK,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary Howes, Judge.

Defendant appeals following his convictions for first-degree murder and intimidation with a dangerous weapon with intent. **AFFIRMED.**

Lauren M. Phelps, Bettendorf, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald L. Feuerbach, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

PER CURIAM

Ron Jarel Millbrook appeals following his convictions for first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (2005) and intimidation with a dangerous weapon with intent in violation of section 708.6. He contends the district court erred in: (1) denying his motion for mistrial following an altercation in the hallway of the courtroom; (2) overruling his objection to the felony murder jury instruction; (3) denying his motion in limine regarding admission of evidence of other, unrelated shootings; (4) allowing admission of a Colt Combat .45 handgun; and (5) denying his motion for new trial based upon each of these alleged errors as well as their cumulative effect. He also contends his trial counsel was ineffective in failing to move for a change of venue.

I. Background Facts and Proceedings.

At about 10:30 p.m. on August 19, 2006, Vincelina Howard and several other people were at a gathering at her grandmother's home. Vincelina was sitting on a bench in the backyard near other family members and acquaintances. Two vehicles drove by the gathering. The occupants of the vehicles were discharging weapons. Vincelina was fatally wounded.

During an interview by police on August 24, 2005, defendant Ron Millbrook initially told the officers he was not involved, but later gave a detailed account of the shooting and his involvement. Millbrook told the police that on August 19 he borrowed a van from a man named Mark. Mark delivered the van to Millbrook's house at about 5:30 p.m. Millbrook then participated in a memorial walk for a friend, Andrell Hearn, who had been killed in a drive-by shooting on April 19 earlier that year. After the walk, Millbrook went to a barbeque at the

home of Hearn's grandmother. Three of Millbrook's friends were also there: Rasheem Bogan, Terrell Lobley and Don White. Bogan began talking about "going across the bridge" (to Davenport) and asked Millbrook to use the van.

Millbrook told the officers that Bogan, Lobley, White, and he went to Davenport looking for "Stevie" and another man, whom Bogan believed had been involved in a shooting at Jimmy's Club in Rock Island. Millbrook described the position of each man in the van and made a drawing showing where each of the men had been sitting. Millbrook told police that Bogan was driving the van, Lobley was sitting in the front passenger seat, and White and Millbrook were sitting on the middle bench seat—White was on the driver's side and Millbrook was on the passenger's side.

Millbrook told police he was carrying a .45 caliber Springfield; Lobley was carrying a .45 caliber Commander; Bogan had a 9 mm handgun; and White had a .38 caliber chrome gun. Millbrook said the ammunition came from a bag of ammunition the police found under the back porch of his house. He confirmed the Springfield found in the trunk of a car near his house was the gun he used in the shooting.

Millbrook told police that while in the van someone spotted "Stevie" and his car as they were crossing the bridge into Davenport and again at the SA (Super America) station next door to the Howard house. When Millbrook and the others drove by the SA station, they heard a party at the Howard house and they drove by that house. He told police that Bogan drove the van down the alley and someone in the van said, "there they go." Millbrook opened the side door, and all the men in the van started shooting out the passenger side of the van.

Millbrook's gun had been fully loaded with seven rounds, and he shot the gun until it was empty.

Millbrook stated that at the end of the alley, the men stopped shooting and Bogan turned left towards Brady Street. As they turned, Bogan thought he saw "Stevie" near the pumps at the SA station, and Bogan fired shots out the driver's side in the direction of the SA. Millbrook stated that only Bogan fired towards the station from the driver's side.

Millbrook also told the officers that as they were fleeing from the shooting the van hit the ground hard as they went over some kind of bump on the street. Bogan pulled the van over, but did not put it in park—they just stopped the van, and all the men jumped out and started running. Millbrook told police that as he was running from the van, he realized he had left his cell phone in the van.

Millbrook was charged with murder in the first degree and with intimidation with a dangerous weapon. Trial began on December 18, 2006. The separate trials of codefendants Loblely and White began the same day in separate courtrooms at the Scott County Courthouse.

At trial, evidence was presented to corroborate Millbrook's statement to police. Stephanie Howard, Vincelina's mother, testified that on the evening of August 19 there was a gathering at the home of Shirley Burge, Vincelina's grandmother. She stated that at around 10:30 p.m. she was sitting in the yard with several other family members when she heard gunshots. She got face down on the ground. She testified she "was worried about getting shot." She testified there were "a lot of shots, and then, it was frozen and then more shots."

Several witnesses testified they saw the van go past the Howard house at the time the shots were fired. Phillip Potter testified he was driving north on Brady Street at about 10:30 p.m. on August 19 when he heard some “very loud pops” and noticed a person ducking behind a vehicle at the SA station. He also saw a van drive by him. Potter testified he saw hysterical people in the area where he had heard shots. He called “911” on his cell phone and continued driving. He noticed a van parked “oddly” on the side of the road: the doors were ajar and the lights were on. He returned to the scene of the shooting to give a statement to police.

Evidence was presented at trial that the police were able to lift fingerprints or palm prints from the van of each of the individuals Millbrook stated were in the van. A security camera located on 8th Street in Davenport captured footage at about 10:30 p.m. of a van hitting the curb and stopping briefly and shows four people running from the van. There were approximately twenty shots fired that night. The police recovered several shell casings from the shooting scene. Four guns were linked to the shootings through bullets and casings found at the scene: a Rossi .38 caliber revolver, a Springfield 1911 pistol, a 9 millimeter revolver, and a Colt Combat Commander .45 caliber semi-automatic pistol. One of the bullets fired from Millbrook’s gun was found in a pool of Vincelina Howard’s blood. More .45 caliber shell casings were found just west of the alley near the scene. These cartridges were all fired from the same weapon, but not fired from the Springfield .45.

Evidence was also presented that during the execution of a search warrant, a spent .45 shell casing was found in the alley behind Millbrook’s house.

Also found in a hole of one of the steps on Millbrook's back porch were a box of Winchester .32 caliber ammunition and a white plastic bag of Remington .45 caliber ammunition. Millbrook's fingerprints were found on the bag of ammunition. A tan car parked in front of Millbrook's house contained two handguns, each wrapped in a sock. One was a Rossi .38 Special revolver (four shell casings and a bullet were recovered from this weapon); the other was a Springfield 1911 Armory .45 caliber pistol (the magazine was in the gun but it was empty). The title to the tan car was found in Millbrook's pocket when he was arrested.

Forensic evidence was presented that a single bullet entered Vincelina's right shoulder, passed through her shoulder and re-entered the right side of her neck. The bullet passed behind the angle of her jaw bone and entered her mouth/nose cavity. No exit wound was found, but the forensic pathologist opined that the bullet was likely coughed out.

Millbrook testified at trial that there was a fifth unknown person in the van the night he and the others went "riding around to waste some time" before they went to a party. He testified he took his gun with him for protection. He stated they did not discuss where they were driving. He heard White say, "there they go" and pointed to a house with a party going on. He further testified that White told him to open the door and that he did so thinking White was going to yell to some men near the fence. Millbrook testified that White then reached over him and started firing shots and after that "others in the van started shooting. Then I started shooting." He testified that he was shooting into the air, not into the group of people. He stated Bogan was the only one who shot toward the SA

station out of the driver's side of the van. He denied there was a plan to retaliate against anybody.

On the fourth day of trial, a slight pause was taken during the testimony of a police officer to provide a pencil to a juror. At that time a commotion in the hallway of the courthouse could be heard. Millbrook was taken to a holding cell, and the jurors were sent to their jury room. Pepper spray was evident in the hallways. Millbrook moved for a mistrial, claiming the altercation in the hallway "spooked our jury to some degree that can't be overcome." The trial court denied the motion, concluding that any commotion was not in the courtroom, the jury could not hear what was being said, the courthouse was a busy place, and nothing indicated the commotion had anything to do with Millbrook.

The court overruled Millbrook's motion to exclude evidence of the Colt Commander gun, which Millbrook contended was noticed late.

Millbrook objected to the first-degree murder jury instruction which allowed the jury to use the forcible felony of intimidation with a dangerous weapon with intent to satisfy one of the elements. Noting there had been multiple shots fired from multiple guns, the court ruled that intimidation with a dangerous weapon was a separate crime and separate incident than the single shot that killed Vincelina.

Following guilty verdicts on both charges, the district court overruled Millbrook's motion for new trial.

Millbrook appeals, contending the district court erred in numerous respects.

II. Motion for Mistrial.

Millbrook contends the district court erred in denying his motion for mistrial following an altercation in the hallway of the courtroom.

Scope and Standard of Review. Generally, we review the denial of motion for mistrial for abuse of discretion. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003). A trial judge has considerable discretion to declare a mistrial, and we will not reverse that decision absent a showing that the trial court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *Id.* When a constitutional challenge is raised, our review is de novo. *Fryer v. State*, 325 N.W.2d 400, 407 (Iowa 1982).

*Merits.*¹ Here, the district court noted that while there was a commotion in the hallway, no one from the hallway entered the courtroom, no words could be heard, and everyone in the courtroom remained calm and quiet. The district court ruled that the commotion did not affect the jury's ability to return an impartial verdict. We find no abuse of discretion.

Millbrook contends his rights to due process and fundamental fairness were denied where he was to be "judged by a jury that has been put in fear by violence in the courthouse hallways." Nothing in the record before us would support a finding that the jury was put in fear of violence.

¹ The State claims Millbrook has waived his claims by failing to cite authority in support of his claim of error preservation. See Iowa R. App. P. 6.14(1)(f). Rule 6.14(1)(f) requires that each division of a party's brief begin with a discussion of the applicable scope of review and an identification of how error is preserved, with citation to the place in the record where the issue was raised and decided. While minimal, the appellant has provided adequate citation to the record of where each of the matters was raised and decided in the district court, along with governing authority. We thus address each claim. See *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999) (concluding that any omission by defendant did not result in court having to undertake appellant's research and review was thus not hindered).

III. Ineffective Assistance of Trial Counsel.

Millbrook next asserts his trial counsel was ineffective in failing to move for a change of venue and in failing to make a record concerning the extent of media coverage. Millbrook correctly notes that the record is devoid of any evidence on this issue and the record before us is insufficient to address his ineffective-assistance-of-counsel claim. See *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We conclude the claim for ineffective assistance of counsel should be preserved for postconviction relief to permit the development of a full and complete record.

He also contends his trial counsel was ineffective in failing to request that the State's witnesses be sequestered during trial. However, the record indicates trial counsel did make such a motion and it was denied. This claim is thus without merit.

IV. Felony Murder Instructions. Millbrook argues that the district court erred in overruling his challenges to the jury instructions on grounds they violated the supreme court's ruling in *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006).

Scope and Standard of Review. We review challenges to the jury instructions for errors of law. *Heemstra*, 721 N.W.2d at 553.

Merits. The *Heemstra* case was decided shortly before Millbrook's trial. In *Heemstra*, 721 N.W.2d at 558, our supreme court ruled that if the act causing willful injury as a forcible felony is the same act that causes the victim's death, the former is merged into the murder and cannot serve as the predicate felony for felony-murder purposes.

Millbrook argues that the trial court erred in instructing the jury that he could be convicted of felony-murder based upon his participation in the predicate felony of intimidation with a firearm. The State relies on the exception noted in *Heemstra* to uphold Millbrook's convictions contending that the charges were based on separate acts. The *Heemstra* court stated:

For example, if the defendant assaulted the victim twice, first without killing him and second with fatal results, the former could be considered as a predicate felony, but the second could not because it would be merged with the murder.

Id. This theory was presented to the trial court and argued to the jury. Noting there had been multiple shots fired from multiple guns, the court ruled that intimidation with a dangerous weapon was a separate crime and separate incident than the single shot that killed Vincelina.

The record supports the instructions given. Millbrook stated to officers that he fired at least seven shots out of the van and in the vicinity of a group of people at the Howard home; the others in the van with Millbrook fired several more shots. The witnesses at trial who were at the Howard home that night testified they took cover on the ground because they were fearful of being shot. The only two bullets found on the Howard property were traced to Millbrook's gun. One of those bullets was found in a pool of Vincelina's blood. We agree with the district court that under these circumstances the underlying felony of intimidation with a dangerous weapon was a separate crime and separate incident than the single shot that killed Vincelina. We find no error.

V. Evidentiary Rulings. Millbrook finally argues that the district court erred in various evidentiary rulings. Our review of such claims is for abuse of

discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001). We have reviewed each of the defendant's claims and the record before us. We find no abuse of discretion. Even were we to presume error occurred as contended, reversal is required only when an abuse of discretion is prejudicial. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999). Here, in light of the overwhelming evidence of the defendant's guilt, any error did not result in prejudice. See *id.* at 33 (noting prosecutor's isolated misrepresentation of defendant's testimony is insignificant in the context of the overwhelming evidence). We therefore affirm.

AFFIRMED.