

**IN THE COURT OF APPEALS OF IOWA**

No. 9-209 / 07-1835  
Filed June 17, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ANDREA MARIA MORRIS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Michael D. Huppert,  
Judge.

A defendant appeals her judgment and sentence for first-degree murder, raising multiple issues, including that the district court judge should have recused himself from considering her motion for new trial and that the district court erred in instructing the jury and in making certain evidentiary rulings. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Angela Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat and Steve Foritano, Assistant County Attorneys, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**VAITHESWARAN, P.J.**

Andrea Morris appeals her judgment and sentence for first-degree murder. She contends the district court judge abused his discretion in denying her motion to recuse himself from considering her new trial motion. She raises several claims of error. In this amended and substituted opinion filed pursuant to Iowa Rule of Court 21.26(2), we delete the last two sentences of our original opinion and affirm in part, reverse in part, and remand.

***I. Background Facts and Proceedings***

The State charged Morris with first-degree murder in connection with the stabbing death of a Des Moines man. On the second day of trial, a substance abuse counselor who happened to be at the courthouse informed the trial judge presiding over the Morris matter that she smelled alcohol on one of Morris's defense attorneys, Robert Powers. The judge's court reporter also told the judge that she smelled alcohol on Powers earlier in the day. The district court judge met with Powers privately and confronted him with this information. Powers told the judge that he consumed one or two glasses of wine the night before. The district court also met and discussed the situation with the State Public Defender. It was later discovered that Morris's co-counsel and one of the prosecutors trying the case smelled alcohol on Powers. After learning this information, a second prosecutor discussed the matter with Morris's co-counsel, who worked under the supervision of Powers. Co-counsel did not advise Morris of her observations or the observations of the prosecutor. Trial proceeded to conclusion and a jury found Morris guilty as charged.

Following trial, Morris's attorneys withdrew and a new attorney was appointed. Morris's new attorney filed a motion for new trial and requested that the trial judge recuse himself from consideration of the motion because of the conversation he had with Powers. Morris's new attorney deposed the prosecutors and the trial judge. After the depositions, the district court denied the recusal motion, stating there was no dispute as to what was said during the private conference with Powers and there was no claim that the conference "resulted in evidence that Mr. Powers was either intoxicated or impaired." The district court held an evidentiary hearing on the new trial motion, at which his deposition transcript was admitted. The court subsequently denied the motion.

On appeal, Morris asserts that (1) the trial judge abused his discretion in not recusing himself from consideration of her motion for new trial, (2) both her trial attorneys had a conflict of interest created by Powers's apparent alcohol use and co-counsel's failure to report it, and both attorneys provided ineffective assistance as a result, (3) she was excluded from meetings with and about Powers which, in her view, were critical stages of her trial, (4) there was insufficient evidence to support the finding of guilt, (5) the district court erred in instructing the jury, and (6) the district court abused its discretion on certain evidentiary rulings.

## ***II. Recusal***

As noted, the district court denied Morris's motion to recuse himself. In its subsequent ruling on Morris's new trial motion, the court included a footnote stating, "At no time did the court independently smell any odor of alcohol coming from Mr. Powers's breath or person."

Morris contends the trial judge should have recused himself because (1) his deposition transcript was admitted, (2) he had personal knowledge of facts that were in dispute in the pending motion for new trial, as revealed by the footnote in the court's ruling, and (3) he had an ex parte conversation with Powers.

The first ground is dispositive. Iowa Rule of Evidence 5.605 provides, "The judge presiding at the trial may not testify in that trial as a witness." In *State v. Gardner*, 661 N.W.2d 116, 118 (Iowa 2003), the Iowa Supreme Court stated, "This rule is violated whenever the judge functions as a witness, even though the judge may not actually take the stand to testify." The reason for this rule is clear: "a presiding judge's assumption of the role of witness is inconsistent with the impartiality expected of the court." *Gardner*, 661 N.W.2d at 118.

The judge's deposition transcript was admitted as evidence in connection with the new trial motion. In the deposition, the judge summarized his contacts with Powers, the State Public Defender, and those who smelled alcohol on Powers during the trial, and commented that he did not see signs of intoxication during the trial. The judge later ruled on Morris's new trial motion, specifically citing his own testimony that he did not see signs of intoxication during the trial. Under Rule 5.605, this was impermissible. *Id.* at 119 (finding no violation of Rule 5.605 only because the trial judge who was listed as a witness did not preside over the proceeding in which he would have been called).

We recognize that Powers was also called as a witness and he corroborated the judge's impressions. This corroborating testimony does not alter the fact that the judge had to assess his own credibility in evaluating the

competing claims of Morris and her attorneys. *Id.* at 118 (“We think it runs against the grain of fairness to say that the same judge may consider his own crucial testimony and recollection rebutting petitioner’s claim and simultaneously pass upon the credibility of all witnesses in weighing the evidence.”) (quoting *Tyler v. Swenson*, 427 F.2d 412, 415 (8th Cir. 1970)). This was the fact that required recusal.

Finally, we are not convinced that Morris had to show actual prejudice as would have been required for a claim of extra-judicial bias. See *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005). Under *Gardner*, the fact that the judge presided over a proceeding in which he was also a witness was sufficient to warrant recusal. Accordingly, the district court abused its discretion in denying Morris’s recusal motion.

Turning to the remedy, we disagree with Morris that she is entitled to a new trial. Instead, we are convinced she is entitled to a hearing on her new trial motion before a different trial judge. See *Taylor v. State*, 632 N.W.2d 891, 896 (Iowa 2001); see also Iowa R. Civ. P. 1.1802(1) (specifying procedure in the event of death or disability of trial judge). We reverse the district court’s denial of Morris’s new trial motion and remand for a new hearing on Morris’s new trial motion before a different trial judge.

As appeal issues 2, 3, and 4 summarized on page 3 were also raised in Morris’s new trial motion, we decline to address them at this juncture. We proceed to issues 5 and 6, Morris’s challenge to certain jury instructions and to evidentiary rulings.

### **III. Jury Instructions**

Morris takes issue with two jury instructions. First, she contends the instructions improperly allowed “robbery to be the underlying felony for felony murder, regardless of whether the assault element of the robbery was independent of the assault which resulted in the death of the victim.” Second, she contends the instructions improperly allowed “the jury to infer malice aforethought from both the commission of the robbery and the commission of the willful injury.”

We agree with the State that Morris did not preserve error on the first challenge. See *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) (stating that failure to object to a jury instruction at the trial court level waives the issue on appeal). At the conference on the instructions, both the State and the defense focused on willful injury rather than robbery as the underlying felony for purposes of the felony-murder rule, and the court’s ruling was limited to willful injury as being an inappropriate “predicate offense for purposes of felony murder.” Because robbery was not discussed, we decline to consider this issue.

With respect to the second issue, the pertinent jury instruction stated, “Malice may be inferred from the commission of Willful Injury Causing Serious Injury or Robbery which results in death.” At trial, Morris’s attorney only stated, “[T]he robbery language should be stricken.” Therefore, Morris has not preserved error with respect to her contention that malice cannot be inferred from the commission of willful injury, and we will discuss the merits only as it pertains to robbery.

On that issue, the Iowa Supreme Court has repeatedly held that malice may be inferred from the commission of a forcible felony, including robbery. See *State v. Oliver*, 341 N.W.2d 744, 747 (Iowa 1983); *State v. Taylor*, 287 N.W.2d 576, 578 (Iowa 1980). Nothing in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), cited by the defense, abrogated that case law. Accordingly, we conclude the district court did not err in instructing the jury that malice could be inferred from the commission of robbery.

#### ***IV. Evidentiary Rulings***

Morris contends that the district court (1) should not have allowed the State to display a replica of the knife used in the killing and (2) should have allowed Morris's attorneys to cross-examine a key prosecution witness about his nickname "Mickey," which, according to her, was the name of a character in a violent movie. Evidentiary rulings are reviewed for an abuse of discretion. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008).

On the first issue, there was sufficient evidence to establish the type of knife Morris had in her possession at the time of the stabbing. Additionally, the knife was only used for demonstrative purposes and the district court advised the jury of its limited purpose. For these reasons, the district court did not abuse its discretion in allowing demonstrative use of a replica of the knife. See *State v. Henderson*, 268 N.W.2d 173, 179 (Iowa 1978) (affirming admission of replica gun).

On the second issue, the witness's nickname initially may have appeared relevant on the question of whether he, rather than Morris, was the true killer, but that marginal relevance evaporated with the witness's explanation of how he

obtained the nickname. In an offer of proof, he testified that his girlfriend, Morris, used the name of another character from the movie, causing an acquaintance to dub him “Mickey.” According to the witness, that name “kind of stuck.” Based on this offer, we conclude the nickname was not relevant to a fact at issue and the district court did not abuse its discretion in disallowing questioning about the witness’s nickname.

***V. Disposition***

We affirm the district court’s rulings on the challenged jury instructions and evidentiary issues. We reverse the district court’s ruling on Morris’s motion to recuse and motion for new trial and remand for the limited purpose of having a different trial judge hear and consider the new trial motion.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**