STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0868

State of Minnesota,
Respondent,

vs.

Jeff L. Johnson,
Appellant.

Filed August 12, 2008
Affirmed
Stoneburner, Judge

Becker County District Court
File No. K1051721

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael Fritz, Becker County Attorney, P.O. Box 476, Detroit Lakes, MN 56502 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Lansing, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

On appeal from his conviction of second-degree assault, appellant argues that the district court committed reversible error by exempting the investigating officer from the sequestration order and allowing him to assist the prosecutor during trial. Appellant also argues that the prosecutor committed misconduct entitling him to a new trial. We affirm.

FACTS

Appellant Jeff L. Johnson was involved in a standoff with the police outside his home in Becker County. Johnson pointed a loaded rifle at Becker County Deputy Sheriff Bradley Skoog, who was standing approximately 30 feet away. Afraid that Johnson was going to shoot him, Deputy Skoog attempted to shoot Johnson first, but his rifle misfired, and he quickly moved away from Johnson. Johnson then dropped his rifle and was subdued by police officers. Because the police officers were concerned that Johnson was suicidal, they transported him to the hospital. Johnson was subsequently charged with second-degree assault.

Prior to trial, Johnson moved to sequester the witnesses. The state did not object but requested that the investigating officer be allowed to remain in the courtroom to assist the state. Johnson asked if the investigating officer could be called first, but the state indicated that it could not properly question him if he were called first. The district court granted the state's request and stated that the investigating officer would "be allowed to assist at counsel table" and be called as a witness "in the natural flow of things."

At trial, Deputy Skoog testified about the incident. On direct examination, the state asked him how the incident had affected him. Johnson's objection to the question was overruled. Deputy Skoog testified that he had trouble sleeping for several weeks after the incident and that "every time I shut my eyes to go to bed, all I would see [was] the slow motion of the gun barrel coming up. And it took me . . . a couple of months to work through it."

The investigating officer's testimony about the incident was consistent with Deputy Skoog's testimony. In addition, the investigating officer testified about statements that Johnson made as he was transported to the hospital, including that "he was going to take one of us with him and he wanted us to shoot him," and that he was "too scared or afraid to shoot himself."

Johnson testified about the events leading up to the confrontation and his belief that he had done nothing wrong and should not have to drop his weapon while he was on his own property. He acknowledged that he told the officers they would have to shoot him to make him drop the weapon because he had done nothing wrong. He admitted yelling "[w]hat do I have to do, commit a crime for you guys to leave?" He testified that he heard Deputy Skoog's weapon misfire, but he did not recall what happened immediately after that. Johnson testified that he did not intentionally point the rifle at anyone and that he did not intend to hurt himself or anyone else. Johnson testified that he was only joking when he made the reported statements on the way to the hospital.

The jury found Johnson guilty of second-degree assault, and he was sentenced to 24 months in prison. This appeal followed.

D E C I S I O N

I. Exempting the investigating officer from the sequestration order and allowing him to assist at counsel table was not reversible error.

"At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ." Minn. R. Evid. 615. "Ordinarily, in criminal cases the question of sequestration of witnesses rests in the sound discretion of the trial court, and where there is no showing that failure to sequester witnesses was prejudicial to the accused, the court's refusal to require it does not in itself constitute reversible error." *State v. Garden*, 267 Minn. 97, 112, 125 N.W.2d 591, 601 (1963).

Johnson argues that the district court committed reversible error by granting the state's request to exempt the investigating officer from the sequestration order and permitting the investigating officer to assist the prosecutor at counsel table. The state argues that the district court's decision to exempt the investigating officer from the sequestration order was justified, citing the advisory committee comment to Minn. R. Evid. 615, which states: "The committee agrees . . . that investigating officers, agents who were involved in the transaction being litigated, or experts essential to advise counsel in the litigation can be essential to the trial process and should not be excluded." Minn. R. Evid. 615 1989 comm. cmt.

Although the comment contemplates the exemption of witnesses essential to advise counsel in litigation from a sequestration order, the supreme court has disapproved of an investigating officer's presence at the prosecutor's table during trial. *See State v. Koskela*, 536 N.W.2d 625, 630-31 (Minn. 1995) (declining to retreat from disapproval of

this practice as expressed in *State v. Schallock*, 281 N.W.2d 186, 187-88 (Minn. 1979); *State v. Biehoffer*, 269 Minn. 35, 49, 129 N.W.2d 918, 927 (1964); and *State v. Schwartz*, 266 Minn. 104, 111, 122 N.W.2d 769, 774 (1963)).

> Clearly the opportunity for prejudice to the defendant is present where the investigating officer sits at prosecuting counsel's trial table throughout the trial—if for no other reason than the potential for confusion with the jury in the perception of a close alignment between the neutral fact-finding function of the police investigator with the adversary role of the prosecution.

Id. at 631. Despite disapproving of the practice in *Koskela*, the supreme court concluded that the investigating officer's presence at the prosecutor's table throughout the trial was not prejudicial error requiring reversal or a new trial. *Id.* There, the investigating officer was the first witness to testify, was not in uniform, and there was "no indication of inappropriate intimidation." *Id.*

Similarly, in *Schallock*, the supreme court concluded that the district court erred by permitting the highway patrol officer who signed the complaint against the defendant to sit at the prosecutor's table, but a new trial was not warranted because the patrol officer's role as a witness was minimal and any effect of his presence on the jury was too speculative. 281 N.W.2d at 187-88. And *Schwartz*, in which a new trial was granted, is distinguishable because that trial involved numerous errors and the investigating officers who were present and involved in the trial also interacted with the jury. 266 Minn. at 111-14, 122 N.W.2d at 774-75. There, the supreme court determined that the combination of errors resulted in sufficient prejudice to affect the fairness of the trial

even though the presence of the sheriff at the prosecutor's table was not, by itself, reversible error. *Id.* at 113-14, 122 N.W.2d at 775-76.

In this case, there is no information in the record that demonstrates any prejudice to Johnson by the investigating officer's presence in the courtroom. Although the district court stated that the officer would be permitted to assist the state at counsel table, there is no record that the investigating officer actually sat at the prosecutor's table for any portion of the trial, that he was in uniform, or that his testimony was in any manner affected by his not having been sequestered. The investigating officer's testimony was consistent with his report, which was admitted as an exhibit at trial.

Johnson appears to be asking this court to establish a rule that permitting an investigating officer to assist the prosecutor at counsel table during trial is per se prejudicial, contrary to established precedent. *Koskela* and *Garden* respectively hold that absent demonstrated prejudice, allowing an officer at counsel table or denying a sequestration motion does not constitute reversible error. *Koskela*, 536 N.W.2d at 631; *Garden*, 267 Minn. at 112, 125 N.W.2d at 601. Because Johnson has failed to establish any prejudice resulting from exempting the investigating officer from the sequestration order and permitting him to assist at the prosecutor's table during trial, Johnson is not entitled a new trial on these grounds.

II. Asking the victim about effect of incident was not reversible error.

Johnson does not argue that the district court committed reversible error in overruling his objection and allowing the prosecutor to ask the victim how he was affected by the incident. Rather, he contends that the prosecutor used the question to

improperly appeal to the passions of the jury. Reversal for prosecutorial misconduct when the defendant objected to the alleged misconduct at trial is warranted "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005). "[T]he defendant will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt." *Id.* (quotation omitted).

"[I]t is improper for the [prosecutor] to appeal to the passions and prejudices of the jury" or to "evoke sympathy for a victim." *State v. Paul*, 716 N.W.2d 329, 339 (Minn. 2006); *State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003). But the state contends that the effect of the incident on Deputy Skoog was evidence of Johnson's intent. Although "the effect of the assault on the victim is frequently introduced at trial as evidence of the defendant's intent," *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998), the intent of the actor, not the effect on the victim, should be the focal point of the inquiry. *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 769 (Minn. App. 2001). And "[p]ointing a weapon at a police officer or another person has been held to supply the requisite intent to cause fear." *Id.* at 770. But, even if the question was improper and irrelevant to Johnson's intent, we conclude that any misconduct was harmless beyond a reasonable doubt. The two-sentence answer was hardly inflammatory, and the entire exchange comprises less than half a page in a nearly 400-page trial transcript.

III. Johnson's pro se supplemental brief does not present reviewable issues.

In a pro se supplemental brief, Johnson has not assigned any errors or briefed any issues. He complains about the length of time between his arrest and the charges, asserts

that the police blew the incident out of proportion, decries Deputy Skoog's handling of the weapons, and explains that, due to her health, his mother overreacted by thinking that he might have been suicidal and calling the police. We have fully considered Johnson's claims and conclude that nothing raised in his supplemental brief entitles Johnson to a new trial.

Affirmed.