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STATE OF NEBRASKA, APPELLEE, V. WILLIAM HALLIGAN, APPELLANT.

818 N.W.2d 650

Filed August 14, 2012. No. A-11-775.

1. **Criminal Law: Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence.
2. **Trial: Juries: Evidence: Appeal and Error.** Allowing the jury to review exhibits during deliberations or rehear evidence is reviewed by the appellate court for an abuse of discretion.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court.
5. **Trial: Juries: Evidence.** At common law, the trial court traditionally has no discretion to submit depositions and other testimonial materials to the jury room for unsupervised review, even if properly admitted into evidence at trial.
6. **Trial: Juries: Evidence: Tape Recordings.** When a jury makes a request to rehear certain evidence, the common-law rule requires that a trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. If, after this careful exercise of discretion, the court decides to allow some repetition of the tape-recorded evidence for the jury, it can do so in open court in the presence of the parties or their counsel or under strictly controlled procedures of which the parties have been notified.
7. **Trial: Juries: Evidence.** A trial court has broad discretion in deciding whether to submit nontestimonial exhibits to the jury during its deliberations.
8. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record or record of law-abiding conduct, and motivation for the offense, as well as the nature of the offense, and the violence involved in the commission of the crime.
9. ____. In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
11. **Judges.** An abuse of discretion occurs when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

12. **Sentences: Appeal and Error.** So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, the sentence imposed is not an abuse of discretion.

Appeal from the District Court for Scotts Bluff County, LEO DOBROVOLNY, Judge, on appeal thereto from the County Court for Scotts Bluff County, JAMES M. WORDEN, Judge. Judgment of District Court affirmed.

David S. MacDonald, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

Following a jury trial in the county court for Scotts Bluff County, William Halligan was found guilty of false reporting of a criminal matter under Neb. Rev. Stat. § 28-907(1)(a) (Reissue 2008). Halligan appeals from the judgment of the district court for Scotts Bluff County which affirmed the judgment of the county court.

BACKGROUND

On August 30, 2010, during the afternoon, Roger Sishc was standing outside of his trailer and saw Halligan sneaking up toward the trailer with a note wrapped around a rock. Sishc knew Halligan was upset because a woman Halligan had previously been romantically involved with, Diana Applegate, was staying with Sishc. Sishc asked Halligan if he was going to throw the rock through Sishc's window, and Halligan, who had not seen Sishc until this point, dropped the rock and started wrestling with Sishc. The altercation was brief, and neither Sishc nor Halligan was injured.

Later that same day, the Scotts Bluff County communications center received a call from a man stating he was Sishc. The man said that Applegate was at his house, that she was

drunk and high on methamphetamine, and that she was "tearing" up his home. The caller requested that law enforcement "come up here and get her . . . out." Deputy Kristopher Still and two other deputies were dispatched to the residence. When the deputies arrived, they found Applegate and Sishc eating dinner and watching a movie; there was no evidence of a disturbance. Sishc told Deputy Still that he was having problems with Halligan. He said that he and Halligan had wrestled and that Halligan kept driving by and trying to call Applegate in an attempt to get her to talk to him.

An investigation of the telephone call led the deputies to believe the call originated from a convenience store on 10th Street in Gering, Nebraska. Sishc told the deputies he had not left his residence all afternoon and had not gone to the convenience store at any time. Then Deputy Still and another deputy went to the convenience store and spoke with the clerk. The clerk stated she had been outside having a cigarette in the designated smoking area, which is near the pay telephone, just outside of the building. As she was smoking, she saw a man walk up to use the pay telephone, and she overheard the man identify himself as Sishc and say there was a woman named "Applegate" who was high on methamphetamine and "tearing" up his home. The clerk did not know the caller by name, but she said she could identify him. Deputy Still went to the sheriff's office and obtained a photograph of Halligan from the Department of Motor Vehicles and showed it to the clerk, who confirmed the man in the photograph was the man she had seen talking on the telephone.

Then Deputy Still went to Halligan's home, which is a block away from the convenience store. Halligan denied going to the store earlier that night, and he was ultimately arrested.

The State alleged that on August 30, 2010, Halligan furnished material information he knew to be false to a peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter contrary to § 28-907(1)(a) and (2)(a), a Class I misdemeanor. Halligan was arraigned on September 10 and was appointed counsel from the public defender's office. Halligan filed a motion to suppress evidence

on September 22, and the hearing on this motion took place on November 17. The motion was taken under advisement, and it was overruled on November 30.

Trial was held on February 4, 2011. When the clerk testified at trial, she pointed to Halligan and identified him as the man who made the call. She stated there was no doubt in her mind that Halligan was the man she saw using the pay telephone on the night in question.

The director of the communications center in Scotts Bluff County also testified. The center handles dispatch calls for all agencies in the area, except the Nebraska State Patrol. If someone calls the 911 emergency dispatch service, the call goes through the communications center. The director retrieved the 911 call from August 30, 2010, and made a copy of that recording to be played, in its entirety, for the jury. The content of the 911 call is as follows:

> DISPATCH OPERATOR: 911.
>
> CALLER: This is Roger Sishc, at Monument View Trailer Court . . . . Diana Applegate is up here trashin' my trailer. I kicked her out, and she won't go, and she's just trashin' my trailer to . . . hell, and I want somebody to come up here and get her the [expletive] outta here. She's up, high on meth, and drunk. And I want somebody out here now.
>
> DISPATCH OPERATOR: Okay, and you said 68?
>
> (Phone call ends.)

Several witnesses testified that they recognized Halligan's voice on the recording of the 911 call. Sishc testified that he did not make the 911 call and that he recognized Halligan's voice on the recording. The convenience store clerk confirmed the 911 call was consistent with what she overheard on August 30, 2010. The dispatch operator who took this call testified that he had received calls from Halligan to the communications center before. He had also received calls from Halligan while working for the Gering fire department, and he recognized the voice on this call as Halligan's.

Halligan testified that he did not make the 911 call and that it was not his voice on the recording. Closing arguments were delivered, and the matter was submitted to the jury. During

deliberation, the jury asked permission to listen to the recording of the 911 call again. Halligan's counsel objected, and after consideration from the court, the objection was overruled. The judge reasoned that the recording is an extremely short portion of the trial and is at the core of the trial. The court allowed the jury to hear the recording one time, in the jury box, and did not allow either party to comment on the 911 call. After listening to the recording, the jury went back to the jury room.

The jury returned a verdict, and Halligan was found guilty. On February 9, 2011, the court sentenced Halligan to 1 year in jail, and on February 15, Halligan appealed this judgment to the district court for Scotts Bluff County. The district court, finding no clear error, affirmed the judgment of the county court in all respects, and on September 14, Halligan appealed to this court.

ASSIGNMENTS OF ERROR

Halligan's errors, consolidated and restated, are as follows: The county court erred when it (1) denied Halligan's motion to suppress the identification of Halligan by a witness through a photographic lineup, (2) allowed the jury to listen to the recording of the 911 call after deliberation began, (3) accepted the verdict of the jury, and (4) imposed an excessive sentence, although it was within the statutory limits.

STANDARD OF REVIEW

[1] It has long been the rule that in a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[2] Allowing the jury to review exhibits during deliberations or rehear evidence is reviewed by the appellate court for an abuse of discretion. *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989).

[3] When reviewing a criminal conviction for sufficiency of the evidence to sustain a conviction, the relevant question

for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011).

[4] An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

ANALYSIS

Motion to Suppress.

It has long been the rule that in a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence. *State v. Timmens, supra*. A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal. *Id.*

Halligan alleges that the county court should have granted his motion to suppress the identification of him by the convenience store clerk because the identification occurred through an inherently suggestive photographic lineup. Prior to trial, Halligan filed in the county court a motion to suppress the identification. Halligan argued that the clerk's identification was tainted by the suggestive lineup and that her testimony regarding the identification of Halligan should be suppressed. This motion was denied in the trial court's order dated November 30, 2010.

At trial, Halligan did not renew his motion to suppress the clerk's in-court identification of him at trial or object to testimony regarding her identification of him by photograph on the night of August 30, 2010. Halligan's failure to object or renew his motion to suppress waives the objection, and the issue is not preserved for appeal. Therefore, we will not consider whether the county court erred in denying Halligan's motion to suppress the identification by the convenience store clerk.

Replaying Recording of 911 Call.

[5] Allowing the jury to review exhibits during deliberations or rehear evidence is reviewed by the appellate court for an abuse of discretion. *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989). At common law, the trial court traditionally has "'no discretion to submit depositions and other *testimonial* materials to the jury room for *unsupervised review*, even if properly admitted into evidence at trial.'" *State v. Dixon*, 259 Neb. 976, 987, 614 N.W.2d 288, 296 (2000) (emphasis supplied) (emphasis in original). The common-law rule is designed to curtail the principal danger involved in allowing the jury to rehear only part of the evidence; that is, the jury may give undue emphasis to the part of the evidence which is reheard.

[6] The *Dixon* court stated that "[w]hen a jury makes a request to rehear certain evidence, the common-law rule requires that a trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis." 259 Neb. at 987, 614 N.W.2d at 297. If, after this careful exercise of discretion, the court decides to allow some repetition of the tape-recorded evidence for the jury, it can do so in open court in the presence of the parties or their counsel or under strictly controlled procedures of which the parties have been notified. *Id.* See, also, *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986).

[7] The Nebraska Supreme Court has stated that a trial court has "broad discretion in deciding whether to submit *nontestimonial* exhibits to the jury during its deliberations." *State v. Pischel*, 277 Neb. 412, 427, 762 N.W.2d 595, 607 (2009) (emphasis supplied).

Halligan argues that the court responded to the jury's request to rehear the recording of the 911 call without caution, because it did not inquire into the reason for the rehearing, which reason may have disclosed some improper motive. Thus, Halligan argues that it was an abuse of discretion not to inquire before replaying the recording, a practice "'fraught with some danger to a fair trial.'" Brief for appellant at 16.

Halligan relies heavily upon *State v. Dixon, supra*, where the court determined the district court erred in not conducting an

examination into the reasons for the jury's request, not weighing the probative value of the requested testimonial evidence against the danger of undue emphasis, and submitting two exhibits to the jury for unsupervised and unrestricted review. While it is true that in both cases, the jury was allowed to rehear evidence after the start of deliberations, the facts distinguish this case from *Dixon*.

Dixon prohibits testimonial evidence from going to the jury during deliberations. However, in *Pischel*, the Nebraska Supreme Court found that online conversations and statements therein were "evidence of the elements of the crime of use of a computer to entice a child or peace officer believed to be a child for sexual purposes; therefore, the transcripts of such conversations were substantive evidence of the crime charged." 277 Neb. at 428, 762 N.W.2d at 607. The same is true for this case; the recording of the 911 call is evidence of the elements of the crime of falsely reporting a criminal matter. As in *Pischel*, the evidence requested by the jury in this case was nontestimonial, substantive evidence, and the court has broad discretion in determining whether to allow the recording to be replayed.

Though the rule promulgated in *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), regarding testimonial exhibits does not apply to this case, the court still took steps to avoid undue emphasis during the rehearing of nontestimonial evidence during deliberations. Upon the jury's request to listen to the recording of the 911 call again, the trial court called the matter to the attention of the parties in open court. Though the court did not question the jury regarding the reason for requesting a rehearing of the recording, the court did discuss possible reasons with the parties. Further, there can be only one reason the jury would ask to hear the recording—to determine whether it is Halligan's voice on the recording. The court discussed the request with the parties and determined that the probative value of replaying the recording of the 34-second 911 call outweighed the danger of undue emphasis, given the short duration of the call and the fact that it was the crux of the case. The court allowed the recording to be reheard one

time, in the courtroom, and in the presence of the parties and their counsel, and the court did not allow any further comment from either party. At that time, the jury was asked to return to the jury room and continue deliberation.

The court has broad discretion under *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009), to submit nontestimonial exhibits to the jury during deliberation and did so after considering, and taking, steps to minimize the possible undue emphasis it might cause. We find the court did not abuse this discretion, and this assignment of error is without merit.

Accepting Verdict of Jury.

Halligan alleges that the court erred in accepting the verdict of the jury because the evidence did not support the charge alleged in the complaint and the jury instructions.

When reviewing a criminal conviction for sufficiency of the evidence to sustain a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011).

Halligan was charged with false reporting, in violation of § 28-907. The State's complaint included the language of the statute and alleged that on or about August 30, 2010, Halligan "did furnish material information he knew to be false to a peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter, contrary to the statutes of the State of Nebraska."

Four elements were described in jury instruction No. 4: (1) that the defendant furnished material information to a peace officer, (2) that the defendant knew such information was false when he furnished it to the officer, (3) that such furnishing of false information was done by the defendant with the intent on his part to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter, and (4) that the incident occurred on or about August 30, 2010, in Scotts Bluff County.

Halligan focuses on the first element in the instruction and alleges the jury was limited to determining whether the false report was made to a peace officer, because the words "or other official" were omitted from jury instruction No. 4. Therefore, he argues, there was no evidence offered at trial that alleged false statements were made to a peace officer, because the dispatch operator for law enforcement, fire, and ambulance calls is not a peace officer.

The record shows jury instruction No. 2 includes the full statutory description of the alleged offense, including the words "or other official." The evidence shows that the communications center in Scotts Bluff County is not a branch of law enforcement, but it is used to field 911 calls for law enforcement, fire, and ambulance, and that it dispatches peace officers to necessary areas. Though the man who answered the 911 call is not a peace officer himself, he is an intermediary used by the general public to reach peace officers. The caller described the alleged criminal incident and stated, "I want somebody out here now." The statements the caller made to the communications center were made with the intent to summon a law enforcement officer to the stated address.

After viewing the evidence in the light most favorable to the prosecution, we find any rational trier of fact could have found that the essential elements of the crime of false reporting were present and sufficient to find Halligan guilty beyond a reasonable doubt. Therefore, this assigned error is without merit.

Excessive Sentence.

[8-10] When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record or record of law-abiding conduct, and motivation for the offense, as well as the nature of the offense, and the violence involved in the commission of the crime. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011). In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's

observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

[11] An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court. *Id.* An abuse of discretion occurs when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

Following the jury trial, where Halligan was found to be guilty of making a false statement under § 28-907, he was sentenced to 1 year in jail. Under the statute, this offense is a Class I misdemeanor, punishable by not more than 1 year's imprisonment, a $1,000 fine, or both. See § 28-907(2)(a) and Neb. Rev. Stat. § 28-106 (Reissue 2008). The punishment is clearly within the statutory limits, so we must determine whether there has been an abuse of discretion.

Halligan argues that at the time of sentencing, he was a 67-year-old man with pervasive heart disease living with a disability. Further, he contends he has limited relevant criminal history. At sentencing, he requested a fine, which he stated would accomplish the State's purposes of punishing his behavior and deterring similar behavior in the future.

The court considered Halligan's request, but determined a 1-year jail sentence would be appropriate. The court explained that this was one of the most serious false reporting cases the judge had ever seen. As a result of the false report, three deputies were dispatched to Sishc's trailer and the deputies were on high alert due to the nature of the reported crime. This call wasted resources and left the rest of the community vulnerable, because they were the only three deputies on duty at that time.

[12] So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, the sentence imposed is not an abuse of discretion. *State v. Rivera*, 14 Neb. App. 590, 711 N.W.2d 573 (2006). We find that the court did not abuse its discretion, and the sentence imposed is affirmed.

CONCLUSION

We find that by not renewing his motion to suppress at trial, Halligan waived his objection to the admissibility of the photographic identification, and we cannot consider this assignment of error on appeal. We find that the district court did not err in affirming the decision of the county court to allow the jury to listen to the recording of the 911 call after deliberation began, because it was not an abuse of the court's broad discretion with regard to nontestimonial evidence. We find that the court did not err in accepting the verdict of the jury, because a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Finally, we find that there was no abuse of discretion and that the sentence imposed was within the statutory limits and not excessive, given the circumstances of this case. We affirm the decision of the district court which affirmed the decision of the county court.

AFFIRMED.

ROBIN L. COLLING, NOW KNOWN AS ROBIN L. LUND, APPELLANT, V. MARK D. COLLING, APPELLEE.

818 N.W.2d 637

Filed August 14, 2012. No. A-11-945.

1. **Child Custody: Visitation: Appeal and Error.** Child custody and visitation determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. ____. A move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal.