

IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case No. CR 18-37
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	Re: Motion for New Trial
AUBREY C. TRAIL,	)	
	)	
Defendant.	)	

NOW on this 30th day of December, 2019, the Defendant's Motion for New Trial and the State's Motion to Supplement the Record come on for decision. The record was left open for the receipt of other exhibits, which have been received and considered.

There are several grounds on which Nebraska law allows a new trial to be granted.

A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: (1) Irregularity in the proceedings of the court, of the prosecuting attorney, or of the witnesses for the state or in any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial; (2) misconduct of the jury, of the prosecuting attorney, or of the witnesses for the state; (3) accident or surprise which ordinary prudence could not have guarded against; (4) the verdict is not sustained by sufficient evidence or is contrary to law; (5) newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial; (6) newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act; or (7) error of law occurring at the trial. R.R.S. Neb. §29-2101.

The Defendant argues generally that irregularities in the proceedings of the Court occurred, thus depriving him of a fair trial.

The Defendant argues specifically that the following errors occurred:

1. Not granting a mistrial after the Defendant yelled “I curse you all” and cut his throat.
2. Not striking jurors for cause, forcing the Defendant to use peremptory strikes.
3. Denial of the Defendant’s Motion to Sever the charges, leading to the use of hearsay evidence.
4. Denial of Defendant’s Motion to Exclude Evidence of the Home Depot purchases because the cause of death was asphyxiation, not wounds.
5. Allowing the publication of gruesome photographs to the jury
6. Allowing the victim’s mother to remain in the courtroom after sequestration.
7. The family was given preferential treatment by being escorted in by law enforcement, and a spectator wore a button of support (later removed upon notice to the Court).

DISCUSSION

The Nebraska rule on disruptions caused by the Defendant is clear; a defendant may not cause his own mistrial through his own misbehavior. See *State v. Blackwell*, 184 Neb. 121 (1969). However, the Defendant argues that he was prejudiced by the Court’s overruling his Motion for Mistrial based on his misbehavior.

“A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial. Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. See *State v. Grant*, 293 Neb. 163, 193 (2016).”

After the Defendant slashed his throat on June 24, 2019, the Court conducted individual voir dire of the jurors. All indicated that they could proceed and remain neutral. Thereafter, the Court concluded that the Defendant could continue to receive a fair trial. A cautionary

instruction was given. The trial was recessed for the day while the Defendant was treated by medical personnel. The following morning, the Defendant waived his right to be personally present in the courtroom. This waiver was invoked daily until July 9, 2019, when the Defendant again appeared for trial.

The Defendant has adduced no evidence in support of his claim of actual prejudice. In fact, he has adduced no evidence at all in support of any of his claims. As a consequence, the Defendant has adduced no proof of prejudice to him. The evidence adduced by the State does not indicate that the Defendant was incompetent. His action was not caused by mental imbalance. It was, in fact, a calculating gesture resulting in superficial cuts. To paraphrase the Supreme Court, “Accepting [Trail’s argument] would render the rule from *Blackwell* meaningless and permit a defendant to benefit from his or her own bad behavior during trial.” *Id.*, at 194.

The Defendant also argues that the jurors deliberated for only two hours and were not in possession of the exhibits until 30 minutes prior to delivering a verdict due to their volume and the necessity of checking for accuracy. First, there is no evidence in support of this claim. Further, all exhibits were published to the jury during the trial. It must also be noted that the Defendant admitted to killing the victim. The only issue for the jury to decide was whether it was accidental or premeditated. Whether the jury had the exhibits for 30 minutes or two hours is irrelevant; the jury delivered its verdict. It is not proper to inquire further into their deliberations.

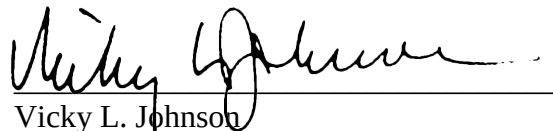
The remaining grounds have been previously addressed by rulings. These arguments remain for appeal.

CONCLUSION

The Motion for New Trial is overruled in its entirety.

IT IS SO ORDERED.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Vicky L. Johnson", is written over a horizontal line.

Vicky L. Johnson
District Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on December 31, 2019 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Benjamin H Murray
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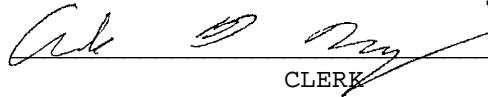
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Date: December 31, 2019

BY THE COURT:


CLERK

