FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-261 / 89-1355

675

STATE OF IOWA,

Appellee,

vs.

WALTER JAMES CLARK,

Appellant.

Appeal from the Iowa District Court for Scott County, James A. Havercamp, Judge.

The defendant appeals from his conviction, following a jury trial, for second-degree robbery. He contends the district court erred by refusing to sever his trial from the trial of a codefendant. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; William E. Davis, County Attorney; and James D. Hoffman, Assistant County Attorney; for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

PER CURIAM

Defendant Walter Clark and Haley Wiggins were jointly charged, tried, and convicted of second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 for an incident occurring in April 1989. Defendant contends he was prejudiced by Wiggins' allegedly antagonistic defense. We affirm.

On the evening of April 23, 1989, defendant Walter Clark, codefendant Haley Wiggins, and a third man, entered a SuperAmerica convenience store. Each wandered about the store or indicated he wished to use the restroom near the store's back. The third man eventually returned to the front of the store and waited. After several minutes, Ronald Darnell, one of the store's clerks, went to the back of the store to investigate the sound of the storage room door slamming and discovered both of the defendants in the storage room. Each defendant was holding a large jar of "Slim Jims," and Clark was holding a six-pack of beer. After a brief confrontation, during which time Darnell blocked exit from the storage room, Darnell instructed another clerk to telephone the police. A struggle ensued, and one of the defendants struck Darnell on the back of the head with a large glass bottle. Much contention at trial and on appeal centers around which of the defendants struck the clerk and the relevance of this fact.

At trial, defendant Clark admitted he intended to steal from the store, but from the front, or customer area, of

the store. He testified that he intended to act alone and was unaware of Wiggins' intentions. Although he could not explain his reasoning, defendant testified that he entered the back, or storage, room to dissuade codefendant Wiggins from stealing from that particular room. Wiggins did not testify.

Despite conflicting testimony about which of the defendants ran out of the store first and, although he had not seen the bottle in Clark's hand, Darnell was certain that it was Clark's arm he had seen strike the blow to the back of his head. In their respective defenses, each man sought to leave the jury with the impression that he had fled the store first and that the other had struck the clerk with the bottle. Defendant contends that these defenses were irreconcilable.

There is no dispute in this case that each man was found in the storage room with merchandise in his hands, each in the process of committing a theft. The factual dispute centers around which of the defendants committed the last element of robbery, namely the assault. The prosecution and the defense seem to agree that each defendant sought to show that the other had committed the assault. The evidence conflicted as to where the men were standing, whether both struggled with Darnell, and who escaped the back room and the store first.

The defendants were charged with second-degree robbery in violation of Iowa Code sections 711.1 and 711.3. The

defendants were tried jointly pursuant to Iowa Rules of Criminal Procedure 6(4) for second-degree robbery or aiding and abetting or acting jointly in the commission of a public offense. See Iowa Code §§ 703.1, 703.2 (1989).

The defendants timely objected to a joint trial, but their motions were overruled. Relying on State v. Brown, 397 N.W.2d 689 (Iowa 1986), State v. Sauls, 356 N.W.2d 516 (Iowa 1984), and State v. Snodgrass, 346 N.W.2d 472 (Iowa 1984), the trial court found that the defenses were merely antagonistic and that any antagonism did not rise to the level at which a jury must necessarily disbelieve the testimony of one defendant to believe that of another. The court further stated that under the State's theories of concerted activity the identity of the person who assaulted the clerk was irrelevant to the guilt or innocence of the defendants of the robbery.

Defendant Clark attempted to show at trial, and argues on appeal, that the defendants were acting independently, there being no preconceived plan, and that the jury was allowed to draw an inference from the evidence, especially evidence of the assault that he was responsible for the acts of his codefendant. At the conclusion of the joint trial for robbery, and in which the jury received instructions about aiding and abetting, id. § 703.1, and joint criminal conduct, id. § 703.2., the jury found both Clark and Wiggins guilty of second-degree robbery. Clark has appealed. As we indicate below, we find that the trial court did not err in refusing to sever the trials.

Iowa Rule of Criminal Procedure 6(4) places the decision to conduct joint or separate trials within the discretion of the trial court provided the parties are not prejudiced thereby. In State v. Belieu, 288 N.W.2d 895 (Iowa 1980), the Iowa Supreme Court first examined Iowa Rule of Criminal Procedure 6(4) and reversed the defendant's conviction for first-degree robbery. Noting its similarity to Federal Rule of Criminal Procedure 14, the court found persuasive authority in numerous federal cases:

> When a trial court denies severance in the exercise of its discretion, the ruling will be reversed on appeal only if the defendant demonstrates an abuse of discretion. [Citations omitted.] To establish an abuse of discretion, the defendant must show sufficient prejudice to constitute denial of a fair trial. [Citations omitted.]
>
> Mere hostility among codefendants is insufficient to show an abuse of discretion. [Citations omitted.] Nor does an effort of a codefendant to incriminate the defendant, even if successful, by itself demonstrate the requisite prejudice. [Citations omitted.] Prejudice may usually be avoided in such situations by the existence of the right to cross-examine the codefendant and the use of limiting instructions.

Id. at 900. Each defendant had a different defense theory, none of which attempted exculpation by inculpating defendant in that particular crime. Rather, their defenses depended on their knowledge of or involvement in the defendant's past criminal activities. The supreme court went on to find that Belieu's codefendants were allowed to present evidence that was highly prejudicial to Belieu and that this evidence would have been legally irrelevant and

prejudicial had it been introduced by the State. The court went on to hold that limiting or cautionary instructions would have been insufficient to prevent prejudice.

In State v. Snodgrass, 346 N.W.2d 472 (Iowa 1984), and its companion case State v. Hood, 346 N.W.2d 481 (Iowa 1984), the Iowa Supreme Court, in 6-3 decisions, upheld the defendants' first-degree murder convictions. The court cited the above quoted language from Belieu, 288 N.W.2d at 900, and again found persuasive support in federal case law:

> [T]he defense of a defendant reaches a level of antagonism (with respect to the defense of a codefendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant must necessarily disbelieve the testimony on behalf of his codefendant.

Snodgrass, 346 N.W.2d at 475 (quoting United States v. Berkowitz, 662 F.2d 1127, 1134 (5th Cir. 1981) (citations omitted)). The defendants were tried for murder or aiding and abetting and, although each accused the other of pulling the trigger, each invoked the self-defense justification. Over the vigorous dissent of Justice Harris, joined by Justice McCormick, who wrote Belieu, and Justice Wolle, the court held that the defenses were not antagonistic and no prejudice resulted.

Later that same year, in State v. Sauls, 356 N.W.2d 516 (Iowa 1984), the Supreme Court, in a 6-3 decision, reversed the defendant's conviction for first-degree murder. The court examined the foregoing authority and stated:

> We think unfairness exists when the core of the defense of two defendants is that the other defendant committed the crime, and the State forces the defendants to stand trial together and convict each other. The State can absolutely force each defendant to stand trial alone and, with modern joinder, it can generally force them to stand trial together. But we do not think it should be able to force them to convict each other where their defenses are diametrically opposed. The State should convict the defendants; it should not be given the absolute power to force the defendants to do so. That smacks of unfairness.

Id. at 518. The court distinguished Snodgrass, finding that there was no "common core defense," but merely each party blaming the other.

In State v. Brown, 397 N.W.2d 689 (Iowa 1986), a unanimous supreme court considered numerous assignments of error, including one involving severance of a joint trial, and affirmed the defendant's conviction for first-degree murder. Again looking at Belieu and Snodgrass, and the quoted language from Berkowitz, the court indicated that prejudicial error would occur if "the defendants' guilt will have been derived not from the evidence presented but rather from the mere presence of irreconcilable and mutually exclusive defenses." Id. at 696. The court held that the defenses, which sought only to disprove responsibility (there being a possibility the crime was perpetrated by a third person), were not antagonistic. Alternatively, the court stated, the State had not, in effect, forced the defendants to convict each other as in Sauls.

Brown seems to bring the supreme court's logic full circle to Belieu's concern about receiving evidence prejudicial to one defendant on behalf of the other defendant while the State passively awaits the outcome. This is evident from the court's statement that trials should be severed if "the defendants' guilt will have been derived not from the evidence presented but rather from the mere presence of irreconcilable and mutually exclusive defenses." Id. at 696; see Belieu, 288 N.W.2d at 900-901; see also Sauls, 356 N.W.2d at 518. The court also reiterates the importance of limiting and cautionary instructions, noting that such instructions are usually sufficient to avoid prejudice. See Brown, 397 N.W.2d at 697; Snodgrass, 346 N.W.2d at 477 ("jury was clearly and completely instructed"); Belieu, 288 N.W.2d at 900 ("Prejudice may usually be avoided in such situations by the existence of the right to cross-examine the codefendant and the use of limiting instructions." (citations omitted)); id. at 901 ("[Cautionary instructions] are deemed insufficient only in extreme cases." (citing State v. Bolds, 244 Iowa 278, 282, 55 N.W.2d 534, 535-36 (1952))).

With this case law in mind, we find that the jury could have concluded from the evidence presented by the State that defendant either acted alone or in concert in the robbery. As we discuss further below, although the defenses were hostile, we find that they were not

irreconcilable or mutually exclusive at their core. We note that Clark's codefendant did not offer evidence that was particularly damning; rather, he emphasized aspects of the State's evidence. To the extent that the defenses were hostile, and even to the extent that they may have been mutually exclusive or irreconcilable, we find that proper instructions were given to the jury and that these instructions were sufficient to prevent prejudice.

Finally, we are not convinced that the jury necessarily had to disbelieve Clark's defense to convict him. The two men were tried on theories of joint conduct or aiding and abetting. The jury could have concluded that either man had acted in concert with the other, in which case they had to disbelieve one defendant's factual argument, but could still convict that defendant. Thus, the identity of the defendant who "pulled the trigger"

> [W]ould be irrelevant because the other defendant would also be viewed as committing the act. The jury need only find that one of the defendants pulled the trigger and that the other was knowingly aiding and abetting. Therefore, the argument by each defendant that the other pulled the trigger cannot be considered to be antagonistic defenses because such fingerpointing is not even a defense to the indictment. "[T]hat two defendants may completely disagree on some detail of the facts is not sufficient to compel severance."

Snodgrass, 346 N.W.2d at 476 (quoting United States v. Berkowitz, 662 F.2d 1127, 1134 (5th Cir. 1981)). Furthermore, the often-quoted language from Berkowitz, 662 F.2d at 1134, indicates that even if the defenses are

antagonistic at their cores, it is only a possibility that the jury will draw improper inferences, and the federal court was concerned, as was the Iowa Supreme Court in Brown, that some conflict between defendants would lead to that inference. Here, we are concerned more with differing factual accounts as in Brown and Snodgrass than with introduction of evidence that would not have been admissible against the defendant but for its use by a codefendant as in Belieu. We find no prejudice in jointly trying defendants before a properly-instructed jury when the core of their respective defenses is merely differing factual assertions.

Having found no prejudice of defendant's rights, we hold that the trial court did not err in overruling defendant's motions to sever. We therefore affirm the trial court.

AFFIRMED.

Donielson, P.J., and Sackett, J., concur; and Schlegel J., dissents.

SCHLEGEL, J. (dissenting)

Because I believe this case clearly falls under State v. Sauls, 356 N.W.2d 516 (Iowa 1984), I respectfully dissent.

The majority, in effect, attempts to overrule Sauls by ignoring that case. The Iowa Supreme Court has distinguished that case from State v. Snodgrass, 346 N.W.2d 472 (Iowa 1984), and State v. Brown, 397 N.W.2d 689 (Iowa 1986). By seeking refuge in the broader language of Brown and Snodgrass, the majority ignores the very clear and cogent concerns expressed in Sauls by Justice Uhlenhopp, who stated:

> We think unfairness exists when the core of the defense of two defendants is that the other defendant committed the crime, and the State forces the defendants to stand trial together and convict each other. The State can absolutely force each defendant to stand trial alone and, with modern joinder, it can generally force them to stand trial together. But we do not think it should be able to force them to convict each other where their defenses are diametrically opposed. The State should convict the defendants; it should not be given the absolute power to force the defendants to do so. That smacks of unfairness.

Sauls, 356 N.W.2d at 518.

The essence of Clark's defense is: (1) that he was working alone when he stumbled into Wiggins' crime; (2) that Wiggins completed his crime with an assault (raising the theft to a robbery); and (3) therefore, that Clark could not have, or had not, aided and abetted or acted jointly.

The core defenses in this case, as in Sauls, were that one defendant was not culpable for the greater crime and that the other defendant was culpable. It is not so simple as differing factual accounts.

It is not so clear that the result reached by the majority is compelled even by Snodgrass. In Snodgrass, the defenses did contain an element of exculpating self while attempting to inculpate the other, but the defenses had the additional common core of justification. The critical difference, as pointed out by both that court and the Sauls court, is that the actual defense raised by one defendant in Snodgrass did not have the effect of prosecuting the other defendant. The same could be said of Brown. In Brown, the court indicated that the defendants never really attempted to incriminate each other.

We should not be so eager to allow the trial court or the State to have unfettered control over the decision to hold a joint trial. This case presents a prime example of possible disastrous effects on a defendant. Here, Clark was clearly guilty of the simple misdemeanor of fifth-degree theft. If the jury must consider the two contradictory defenses, they may draw an inference from the conflict between them that Clark should be held accountable for the assault as well. See Snodgrass, 346 N.W.2d at 475 (quoting United States v. Berkowitz, 662 F.2d 1127, 1134 (5th Cir. 1981)). If Clark did not, in fact, take part in Wiggins' crime and if Clark did not, in fact, strike the

clerk, the improper inference raises defendant from a simple misdemeanor to a class "B" felony.

I do not suggest that we should adopt a rule that requires an evaluation of the possible outcomes. Nor do I suggest we restrict rule 6(4). We must, however, strive to maintain a minimum level of fairness in trying criminal defendants. This process should not degenerate into an evaluation of whether the State was active or passive in convicting the defendant, for that puts too much control in the hands of the prosecution. If this should happen, the appeals process will be a mockery as the courts will seek only to find enough participation on the State's part and "merely antagonistic" participation by the codefendant.

In short, I would follow Sauls:

> Under this record, where the sole contention of each defendant which could be claimed to be a defense was that he was innocent and the other defendant was culpable and each defendant so testified at trial, . . . the trial court abused its discretion in refusing to grant a severance.

Sauls, 356 N.W.2d at 519.

I would reverse and remand for separate trial.