

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1989

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

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STEVEN EARL FRASIER,)

8-417
87-504

Defendant-Appellant.)

Appeal from the Iowa District Court for Woodbury County
(No. 42225), Dewie J. Gaul, Judge.

Defendant appeals from the judgment entered following
his convictions for murder in the first degree and burglary
in the first degree after a jury trial. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, for
defendant-appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett
and Charles N. Thoman, Assistant Attorneys General, for
plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

SACKETT, J.

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We address a series of evidentiary challenges made by defendant-appellant Steven Earl Frasier to a jury trial where he was convicted of murder in the first degree and burglary in the first degree. Defendant, together with codefendants Simon C. Tunstall and James D. Simpson, was charged with burglary and murder following the death of Jeffery Jones. Defendant, Tunstall and Simpson were tried together. Jones died as a result of three gunshot wounds. Defendant admitted firing the three shots. Defendant contended he shot Jones in self-defense.

Defendant and Jones were both pimps. Jones was shot in an apartment he occupied with Christine Buddi. Buddi worked as a prostitute for Jones. The shooting happened on Sunday, August 31, 1986. On the Friday before Jones had been abusive to Christine Buddi. She spent Friday night with a friend. On Saturday Buddi was with Kayleen Hoskins, a prostitute who worked for defendant on the Sioux City streets. Jones drove by, stopped and assaulted Hoskins. Jones was arrested for the assault and incarcerated. Buddi then spent Saturday night with defendant and Hoskins. Buddi indicated she would rather work for defendant.

Buddi left Sunday morning telling defendant she would go to her apartment, get her baby and belongings and return to live with the defendant. By midday Sunday Buddi had not returned. Defendant contends, thinking Jones was still in

jail, he and his two codefendants went to Buddi's apartment to check on her. Defendant said upon entering the apartment he was attacked by Jones and he shot Jones in self-defense.

The State contended defendant knew Jones was out of jail and went with his two codefendants looking for Jones, broke into the apartment and shot him.

I.

Defendant first alleges the trial court erred in allowing a police officer to testify to what Dennis Jackson, another pimp, told the police officer about a visit defendant and his codefendants made to Jackson at the Bel-Aire Motel in Sioux City on the Sunday Jones was shot. The police officer testified Jackson told him three or four black subjects in a white over green Buick with Nebraska license plates came to his room looking for decedent. The officer said Jackson told him the men threatened him with a 25 caliber, small handgun. Jackson was called as a witness but invoked his fifth amendment privilege and was not required to testify.

Defendant admitted he talked to Jackson at the motel on Sunday. He denied displaying a gun. He contends when he spoke to Jackson he believed Jones was still in jail. The policeman's testimony of what Jackson said contradicted defendant's theory of self-defense because they indicated defendant intentionally sought out Jones.

The officer's statements as to what Jackson told him were hearsay. The trial court determined the statements were excited utterances. Hearsay under the excited utterance exception is admissible under Iowa Rule of Evidence 803(2), which provides:

Hearsay exceptions: availability of declarant immaterial.

* * *

(2) Excited utterance: A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The State as the offering party has the burden of proving the applicability of the hearsay exception. State v. Fingert, 298 N.W.2d 249, 253-54 (Iowa 1980). The admission of hearsay under the excited utterance exception lies largely within the discretion of the trial court. State v. Matier, 383 N.W.2d 533, 535 (Iowa 1986); State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981); State v. Paulsen, 265 N.W.2d 581, 586 (Iowa 1978).

The trial court has discretion to determine whether a statement is induced by stress of excitement caused by the startling event or condition. Ogilvie, 310 N.W.2d at 196; Paulsen, 265 N.W.2d at 586. The excited utterance exception will apply if the statement relates to a startling event and the declarant was under stress of the event at the time of the statement. State v. Rawlings, 402 N.W.2d 406, 409 (Iowa 1987).

The statement must be spontaneous in the sense that what is said is part of the event or condition and is not dependent for its force on the veracity of the declarant. Slough, Spontaneous Statements and State of Mind, 46 Iowa L. Rev. 224, 252 (1961). The statement must be spontaneous as well as contemporaneous and must be made with little or no opportunity for reflection. Id.

Probably the most important of the many factors entering into this determination is the time factor. McCormick on Evidence 297, p 856 (3rd ed. 1984). As the time between the event and the statement increases, so does the reluctance to find the statement an excited utterance. Id. Where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process. Id. Testimony that the declarant still appeared "nervous" or "distraught" and that there was a reasonable basis for continuing emotional upset will often suffice. Id.

It is recognized that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse in time is allowable. Slough, 46 Iowa L.Rev. at 243 The standard of measurement is the duration of the state of excitement. Id. There are no pat answers and the character of the transaction or event will largely determine the significance of the time factor. Id.

The trial court must inquire to determine whether the State offered evidence to show the statements were made without an opportunity for reflection. The State did not establish the time lapse between the making of the statement and the observation of the event. The State suggests an hour and one-half may have passed.

The real question is did the interval allow Jackson time for reflective thought. The State offered no evidence of what the witness did in the hour and one-half period. We know only that he probably remained at the motel and he called the police. The time involved is not dispositive. See United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980); Garcia v. Watkins, 604 F.2d 1297, 1300 (10th Cir. 1979). A similar period of time has been held not to remove the evidence from exception particularly where declarant is a young child. Wheeler v. United States, 211 F.2d 19, 24 (D.C. Cir.) cert. denied, 34 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140 (1954). Jackson, however, is an adult who himself has been involved in illegal activities.

Because time passed in which there was no record of Jackson's activities, it is critical we focus on the demeanor of the declarant, Jackson, at the time the statements were made to the police officer. We must also look at his age, experience and condition. See State v. Matier, 383 N.W.2d 533, 535 (Iowa 1986).

The policeman testified Jackson was in an excited state and was talking very fast. The police contrasted his behavior with an observation he made of Jackson at another time. The question is extremely close but we determine the trial court did not abuse its discretion.

II.

Defendant next contends the trial court erred in not allowing him to introduce evidence showing the victim's propensity for violence.

A homicide victim's prior violent or turbulent character or reputation is ordinarily immaterial and furnishes another no excuse to become his or her private executioner. State v. Jacoby, 260 N.W.2d 828, 837 (Iowa 1977). But an exception to this general rule applies where the accused asserts he or she acted in self-defense and the slightest supporting evidence is introduced. Then the violent, quarrelsome, dangerous or turbulent character of the deceased may be shown, both by evidence of his or her reputation in that respect and by witnesses who can testify from an actual knowledge of the victim's character. Id. State v. Wilson, 236 Iowa 429, 442-43, 19 N.W.2d 232, 238 (1945); State v. Rhone, 223 Iowa 1221, 1232-234, 275 N.W. 109, 115-16 (1937). This type of evidence concerning the deceased's character is admissible for one or both of the following purposes: (1) To show the state of mind of the defendant, the degree and nature of his or her apprehension

of danger which might reasonably justify resort to more prompt and violent measures of self-preservation. Id. Rhone, 223 Iowa at 1232-233, 275 N.W. at 115-16; State v. Abarr, 39 Iowa 185, 189 (1874); 40 Am.Jur.2d, Homicide, § 302 at 570. Of course such evidence is admissible for this purpose only if these character traits were known to the accused. State v. Norton, 227 Iowa 13, 16, 286 N.W. 476, 478 (1939); State v. Sale, 119 Iowa 1, 3, 92 N.W. 680, 681 (1902); 1 Wigmore on Evidence § 63 at 470 (3rd ed. 1940).

Defendant sought to admit evidence he was in Omaha when decedent was shot and when decedent ran some people down and shot them. Defendant also sought to show decedent called scars from these wounds battle scars. On voir dire, the State showed defendant was not at the place the shooting occurred and relied on what others told him about the event. The evidence was excluded as hearsay.

We find the evidence was admissible to show defendant's state of mind and the degree of apprehension he had of Jones which might prompt measures of self-preservation, and was evidence of decedent's reputation. See State v. Jacoby, 260 N.W.2d at 837; State v. Wilson, 236 Iowa at 442-43, 19 N.W.2d at 238. We do not however find the failure to admit the evidence to be reversible error.

The jury found defendant guilty of first-degree murder premised on his participation in the forcible felony of first-degree burglary. The jury had been instructed

defendant was not justified, and could not be found not guilty for reason of self-defense, if the State proved he had been participating in the offense of first-degree burglary. The defense of justification is not legally available to one who is participating in a forcible felony. Iowa Code § 704(1) (1985). The felony-murder rule is a specific method by which the State may show a defendant was acting with the evil state of mind necessary to support a finding of first-degree murder. State v. Williams, 285 N.W.2d 248, 270 (Iowa 1979). The rule allows for punishment as first-degree murders those who kill while participating in a forcible felony, even if the killing was unintended or not within the actual contemplation of a defendant. Killings which otherwise would constitute lesser degrees of homicide become first-degree murder. See Conner v. State, 362 N.W.2d 449, 455 (Iowa 1985); State v. Ware, 338 N.W.2d 707, 715-16 (Iowa 1983); State v. Rowley, 216 Iowa 140, 248 N.W. 340, 343 (1933); State v. O'Blasney, 297 N.W.2d 797, 798 (S.D. 1980).

The jury's finding defendant committed a murder while he was participating in a forcible felony, which finding is not challenged here, relieved the jury of any duty to consider the lesser offenses of second-degree murder and voluntary and involuntary manslaughter. We therefore find no error in excluding the evidence.

III.

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Defendant's third claim is the trial court erred in allowing the State to use out of court statements of his codefendants to impeach him. Each defendant had given an out-of-court video statement. Codefendant Simpson also gave a written statement. The State in introducing the statements asserted they would be admissible only against the defendant making the statement. The trial court instructed the jury that the statements were to be considered as evidence only against the defendant making the statement.

Defendant was asked on cross-examination if his codefendant Tunstall lied on the videotape shown the prior day when Tunstall said he saw defendant with the gun before defendant went into the apartment. Defendant answered the question by saying Tunstall lied. The State then showed codefendant Simpson's written statement to defendant. The State said the purposes in doing so was to develop either consistencies or inconsistencies between what this defendant and other witnesses said. The State noted Simpson said he was never at Jones's apartment. The defendant then testified Simpson was at Jones's apartment.

Defendant objected to the use of the codefendant's statements in this manner. Defendant contends the court in allowing the cross-examination of defendant about remarks in Tunstall's video statement and about Simpson's written

statement effectively undercut its admonition to the jury the statements could only be considered as evidence against the defendant making the statement. Defendant contends Tunstall's out-of-court statement was damaging to him because a major portion of his defense was the assertion he went to the apartment to see Buddi not to kill Jones. Tunstall's statement said defendant went to the apartment to talk to Jones. Simpson's statement said defendant knew Jones had been released from jail prior to going to the apartment. Defendant contends the State was using the codefendants' statements to impeach defendant's testimony on crucial issues. We find it unnecessary to address this issue.

This issue comes to us in a strange posture. Defendant objected to the introduction of the video and written statements of the codefendants as hearsay. The trial court admitted the statements as to each defendant subject to the giving of the limiting instruction. The codefendants both testified at trial. The initial admission of the statements before the testimony of any defendants was error. See Burton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Cf. State v. Hollins, 397 N.W.2d 701, 707 (Iowa 1986); State v. Waterbury, 307 N.W.2d 45, 48 (Iowa 1981). However, each codefendant subsequently took the stand and was subjected to cross-examination by defendant. When they did so the error

was cured. See Nelson v. O'Neil, 402 U.S. 622, 626, 29 L.Ed.2d 222, 227, 91 S.Ct. 1723, 1726 (1971). We find no error on this issue.

IV.

Defendant's last claim is the State improperly used a statement of codefendant Simpson. Simpson entered a plea bargain wherein he gave a statement and was to testify against defendant and Tunstall. In exchange Simpson was to be allowed to plea a lesser charge. The trial court rejected the plea and Simpson's statement was suppressed by the court and determined inadmissible for any purpose. At trial the State in cross-examining Simpson asked a series of questions about whether Simpson had heard defendant say he had to slow decedent down and Tunstall had told him he broke in with defendant in case he needed someone to back him up. Simpson denied making the statement and he was not impeached. Defendant contends because of the manner of questioning the jury could basically infer Simpson had made such prior statements. While asking the questions the attorney for the State thumbed through Simpson's transcript. Defendant contends the State violated the court's suppression order and placed inadmissible evidence before the jury.

A defendant is denied procedural fairness when the State attempts to secure a conviction based on innuendo and insinuation having no basis in evidence. See State v.

Johnson, 222 N.W.2d 483, 488 (Iowa 1977). A prosecutor should not under the pretense of challenging a witness's credibility ask questions solely to cast insinuations on the defendant. See State v. Monroe, 236 N.W.2d 24, 30 (Iowa 1975); State v. Wright, 203 N.W.2d 247, 251 (Iowa 1972); State v. Burris, 194 Iowa 628, 636, 190 N.W. 38, 41 (1922).

A party, however, has reasonable latitude in cross-examination. State v. Jackson, 259 N.W.2d 796, 800 (Iowa 1977). The State, however, has an obligation not to infer from a question or the manner in which it is asked that an inadmissible statement exists.

We disapprove of the county attorney asking the questions while reading from a transcript of suppressed evidence. We caution prosecutors to avoid this procedure in the future. The trial court instructed the jury not to draw inferences from questions asked. We find the instruction corrected the error if it did exist. We note too Simpson gave negative answers. See State v. Hess, 256 Iowa 794, 129 N.W.2d 81, 83-4 (1964); Shaw v. Stone, 506 F.Supp. 571, 576 (N.D. Ga. 1981) Aff. Sub. Nom.; Shaw v. Boney, 695 F.2d 528 (11th Cir. 1983).

We affirm the conviction.

AFFIRMED.