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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Appellee,

)

Filed November 10, 1977

vs.

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MICHAEL GEORGE TOTH,

)

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59597

Appellant.

)

Appeal from Polk District Court - M. J. V. Hayden, Judge.

Defendant appeals his conviction of assault with intent to inflict great bodily injury, a violation of § 694.6, The Code, asserting error in the admission of a hearsay statement as res gestae evidence.

AFFIRMED.

John C. Wellman, of Des Moines, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, and Dan Johnston, Polk County Attorney General, counsel for appellee.

Heard by Allbee, C. J., and Donielson, Snell, Oxberger and Carter, JJ.

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DONELSON, J.

Defendant-Michael George Toth appeals his jury conviction of assault with intent to inflict great bodily injury, a violation of § 694.6, The Code. He argues that the admission of testimony regarding a certain conversation as res gestae evidence constitutes reversible error. We disagree. In order to understand the context of the trial court's evidentiary ruling, a detailed recitation of crucial facts is necessary.

In the late evening of February 28, 1976, or the early morning of February 29, defendant-Toth and Larry Jaggie entered Jim's Five and Ten, a tavern located at 428 E. Locust in Des Moines, and sat down on stools at the bar in the front of the tavern. After they ordered beers, Toth walked toward the back of the tavern while Jaggie remained seated on the stool at the bar. While Toth was in the back, the victim, Thomas Leichter, entered, sat at the bar near Jaggie, had a short conversation with him, ordered a drink and then went to the phone booth against the wall in order to make a call.

At that point, Jaggie walked toward the rear of the club. According to Leichter's testimony, Jaggie went to the part of the tavern in which Toth was seated. Jaggie then returned to the bar and again sat on the stool. Over defendant's objection that the testimony constituted hearsay, the tavern owner was permitted to testify that Jaggie stated to him: "That is the gay S.O.B. that snitched on Mike."

In chambers the State argued that it sought to introduce this statement on the theory that Jaggie and Toth were co-conspirators and therefore the statement did not constitute hearsay. The court overruled the defendant's objection subject to a reversal of that ruling and admonition of the jury if the State failed to connect up the conspiracy. In open court, defendant again objected to the statement as hearsay, and the court overruled the objection on the basis of res gestae.

Further testimony revealed that after Jaggie made the above statement, Toth approached Leichter at the telephone, put his arm around him, and apparently struck him in the stomach. Subsequently, a scuffle ensued. By this time, Jaggie had gotten off the stool and had gotten involved in the fight as well. This encounter only lasted 30 or 40 seconds, and Leichter ran out the front door of the tavern, pursued by Jaggie. Jaggie returned to the bar, and he and Toth left immediately, as requested by the tavern owner.

Marlene Armstrong, a barmaid and friend of Leichliter, testified that while Toth and Jaggie were coming out of the tavern, Jaggie told her to "tell that punk we are going to get him." Other testimony reflects that after the fight, Leichliter went to the Des Moines Police Station, where he stated that he had been stabbed with a knife in the tavern. He also told police that Toth stabbed him and Jaggie held him.

Merle Powell testified that he went into the tavern on the night in question. Approximately one-half hour later, Toth entered the tavern and shortly thereafter asked him if he had a pocket knife, stating that he wanted to use it to work on his car. Powell said that he had one and loaned it to Toth. According to Powell, Toth then went to the front of the tavern by the phone, where he got into a fight. Powell indicated he saw Toth strike Leichliter several times. Later, Toth handed the knife back to Powell with the blade open and with blood on it.

The supreme court has adopted the definition of hearsay contained in rule 801, Federal Rules of Evidence. *State v. Miller*, 204 N.W.2d 834, 840 (Iowa 1973). Two aspects of this rule are relevant to the instant case: 1) a statement is hearsay only when it is offered to prove the truth of the matter asserted, and 2) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy is not hearsay. Under either alternative the statement at issue is admissible.

I. Defendant argues that the statement "that is the gay S.O.B. that snitched on Mike" constitutes hearsay. However, according to rule 801(c), Fed. R. Evid., hearsay is a "statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Thus, in order for this statement to be hearsay, it must have been offered to assert that the victim was indeed homosexual and had in fact previously "snitched" on the defendant. This out-of-court utterance was not offered to prove the truth of these assertions and the statement does not constitute hearsay. It was admissible on the theory that it was not received to prove the truth of Jaggie's remark, but was offered without reference to the truth or falsity of any assertion in it. *State v. Leonard*, 243 N.W.2d 887, 889-891 (Iowa 1976).

II. Additionally, the statement is admissible as non-hearsay since it constitutes a statement made by a co-conspirator of a party during the course and in furtherance of a conspiracy, in accordance with the theory espoused by the State and presented to the trial court in chambers. See rule 801(d)(2)(E), Fed. R. Evid.

Although the parties in the instant case were not charged with conspiracy, they need not be in order for statements of a co-conspirator to be admissible. As the court stated in *State v. Kidd*, 239 N.W.2d 860, 864 (Iowa 1976):

"...When there is substantial evidence of a conspiracy, whether the offense charged is conspiracy or not, everything said by any conspirator in furtherance of the common purpose is deemed to have been said in behalf of all parties to the conspiracy. *State v. Dewey*, 220 N.W.2d 629, 631 (Iowa 1974). A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy is thus admissible against the party as an admission. *State v. Blyth*, 226 N.W.2d 250, 269 (Iowa 1975); see rule 801(d)(2), Federal Rules of Evidence." (emphasis added)

A conspiracy may be established by direct or circumstantial evidence. *State v. Blyth*, 226 N.W.2d 250, 263 (Iowa 1975). In this case, there was substantial evidence from which a conspiracy could have been inferred. In addition to the testimony of the tavern owner and Leichliter previously recited and the statement of Jaggie to the barmaid to "tell that punk we are going to get him," (emphasis added), Powell also testified that Jaggie was behind Leichliter punching him in the back and holding his arms while Toth struck him from the front. All of this testimony provides a sound basis for a conspiracy theory.

In *State v. Kidd*, supra, at 864, the court stated that two conditions must be met in order for the rule regarding statements by co-conspirators to be applicable:

"...First, the statement must have been made during the pendency of the conspiracy. Second, it must have been in promotion of the object or design of the conspiracy. *State v. Gilmore*, 151 Iowa 618, 620, 132 N.W. 53, 54 (1911).

The record reflects that a time span of at best a few minutes occurred from the time Toth, Jaggie and the victim entered the bar until they left. Since Jaggie made the statement almost immediately prior to the attack, it was most assuredly made during the "pendency" of the conspiracy. The second requirement is more difficult to meet, however. The *Kidd* court cites extensively from *State v. Gilmore*, 151 Iowa 618, 624, 132 N.W. 53 (1911), where the court states:

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"... [D]eclarations which are either acts in themselves purporting to advance the objects of the criminal enterprise, or which accompany and explain such acts, are to be distinguished from statements, whether written or oral, which, though made pending the plot, are mere narratives of acts or measures which have already been done or taken. . . . Only such acts and declarations as are done and made in accomplishing the object intended can be said to have been authorized by the body of conspirators as a whole." (emphasis added)

The court in Kidd, supra, at 865, adopted this posture:

"It is not the purpose of the rule to exclude statements relating to the conspiracy uttered during the active life of the conspiracy under circumstances indicating reliability. The furtherance requirement is construed broadly with this in mind. United States v. Overshon, 494 F.2d 894, 899 (8 Cir. 1974), cert. denied, 419 U.S. 853, 95 S.Ct. 96, 42 L.Ed.2d 85. A narrative declaration is in furtherance of the conspiracy if it has some connection with what is being done in promotion of the common design."

Keeping in mind the broad construction of the furtherance requirement, we conclude that there is nothing in this record which indicates unreliability under the circumstances. Since we hold that the statement is admissible as non-hearsay, we affirm the trial court. In so doing, we need not reach the more troublesome *res gestae* issue, since we find that the hearsay rule is inapplicable under a different theory. See State v. Kidd, supra, at 864; Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 231 (Iowa 1974).

AFFIRMED.

Allbee, C. J., and Snell, J., concur in division I only. Oxberger and Carter, JJ., dissent.

OXBERGER, J. (dissenting)

I dissent. The defendant in this case is charged with assault with intent to inflict great bodily injury. He contends the statement in question was used by the prosecution to establish intent—that is, a lingering malevolence against Leichliter for "snitching" which erupted into the bar fight.

At trial the bartender James Raymond testified that defendant Toth's companion, Lawrence Jaggie commented of the complaining witness Thomas Leichliter, "That is the gay S.O.B. who snitched on Mike." Subsequently a bar fight ensued giving rise to the charges filed in the instant suit. The question before this court is whether the statement was impermissible hearsay introduced to establish specific intent to inflict an aggravated injury or whether the statement merely served to explain the conduct of the witness under the rule in *State v. Lyons*, 210 N.W.2d 543 (Iowa 1973).

To uphold the admissibility of the statement under the hearsay exception of res gestae two standards must be met: 1) spontaneity and 2) such closeness of connection with the transaction as to exclude any presumption of fabrication. *State v. Swanson*, 228 N.W.2d 101, 104 (Iowa 1975). Jaggie's statement was made in advance of any altercation in the bar. It cannot seriously be claimed that it enjoys a special trustworthiness as an utterance emitted in the heat of the moment. Nor can it be claimed that it was uttered as an accompaniment of the principal litigated fact—assault with intent to inflict great bodily injury. *State v. Oppedal*, 232 N.W.2d 517, 521 (Iowa 1975). I believe where the statement introduced goes to the very heart of the State's case—the intent of Toth to inflict serious injury—that Toth was entitled to the safeguards of cross-examination of the declarant. *State v. Leonard*, 243 N.W.2d 887, 890 (Iowa 1976). I think the trial court erred in overruling on res gestae grounds Toth's objection.

Nevertheless, if the hearsay rule is inapplicable under any theory, the ruling must be upheld. *Leonard*, 243 N.W.2d at 890. The State argues the statement is admissible under *State v. Lyons*, 210 N.W.2d 543 (Iowa 1973):

... as necessary to complete the story of the crime on trial, the acts being so closely related in point of time and place and so intimately associated with each other they form a part of the whole transaction. *State v. Hinkle*, 229 N.W.2d 744, 748 (Iowa 1975).

Hinkle ruled the statement in issue was admissible "for the purpose of showing it was said, under the Lyons rule, in explaining the actions of these witnesses." The Hinkle statement was testimony by the victim's next door neighbor that the victim had told another neighbor just prior to the homicide that she was afraid of the defendant and that her husband was changing the locks on the door. The statement explained the witness's retreat in fear, as she approached the victim's home, merely upon hearing the defendant's voice coming from the porch. Citing to Hinkle, State v. Nowlin, 244 N.W.2d 596, 600 (Iowa 1976) held:

Evidence of an utterance which is offered to explain subsequent action of the person to whom it was addressed is not hearsay. Such evidence is not offered as an assertion but to give character to conduct.

See also State v. VanRees, 246 N.W.2d 339, 344 (Iowa 1976).

The witness in the instant case was the bartender; his presence or actions in the bar required no explanation whatsoever. His testimony regarding Jaggie's statement is not rendered admissible by the Lyons rule. However, even if the statement could be upheld under Lyons, as somehow explanatory of the declarant Jaggie's actions or conduct, I would rule reversible error occurred in the trial court's instructions to the jury. When Lyons is applicable, the trial court must inform the jury that the statement is introduced for the limited purpose of showing that it was said, and that it is not introduced to prove the truth of any of the facts stated in the conversation. VanRees, 246 N.W.2d at 344. The trial court gave no such cautionary instruction.

Furthermore, I object to the majority's reliance upon the statement as that of a co-conspirator. After the in-chambers colloquy in which the state urged the statement be admitted to establish the state's theory of a "conspiracy to attack this man", no further attempt to establish conspiracy was made. During that in-chambers colloquy the judge said he would allow the statement in as a co-conspirator's statement subject to withdrawal and admonition of the jury if the state failed to connect up the conspiracy theory. The state abandoned the conspiracy theory at trial. On appeal, the state has not urged the statement was admissible as a co-conspirator's statement. Indeed, the state has not mentioned conspiracy. I do not believe the record supports a finding of "substantial evidence"

of a conspiracy" which State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976) acknowledges is a threshold showing which must be made before a statement can be characterized as that of a co-conspirator and thereby rendered admissible.

I would reverse and remand for new trial.

Carter, J. joins in this dissent.