IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-523 / 95-1520

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CLIFTON WAYNE BELL,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of possession of a controlled substance with intent to deliver and failure to affix drug tax stamps in violation of Iowa Code sections 124.401(1)(c) and 453B.12 (1993). **AFFIRMED.**

Clemens Erdahl, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Realff H. Ottesen, Assistant County Attorney, for appellee.

Considered by Cady, P. J. and Huitink and Streit, JJ.

HUITINK, J.

Defendant Clifton Wayne Bell appeals his conviction for Possession with Intent to Deliver a Schedule II Controlled Substance in violation of Iowa Code section 124.401(1)(c) (1993), and for a violation of the drug tax stamp law, Iowa Code section 453B.12 (1993). We affirm.

On December 4, 1994, Davenport police engaged in a car chase with a person suspected of drug trafficking. The person was identified by an informant as a white male about 5'6" with brown shoulder-length hair, and with a scruffy beard and mustache. During the course of the chase, the suspected drug trafficker jumped from the car leaving a woman and a small child in the car while it was still moving.

After the car came to a stop, Officer Gregory Trudell approached the car and spoke with the woman, later identified as Kelli Striegel. He testified that Striegel was very emotional and upset. He asked who the driver of the car was to which she responded, "it was my old man". Trudell had Striegel get out of the car and sit on the curb with her child. He described her demeanor as "scared" at that point. He then asked her, "who is your old man?" and she replied, "Clifton Bell". The district court overruled Bell's hearsay objection to the officer's testimony and admitted the statements under the excited utterance exception to the hearsay rule. *See* Iowa R. Evid. 803(2).

A large amount of cocaine was found in the trunk after the officer's drug-trained dog detected the scent of contraband. Later that evening, Trudell was able to identify the individual that fled the vehicle from a photograph found in Striegel's home. Bell was arrested over a month later on January 18, 1995.

Bell was convicted following a jury trial on both counts and was sentenced to a term not to exceed ten years on Count I and a term not to exceed five years on Count II, both to run concurrently. His Motion for New Trial was denied by the district court.

Bell appeals the trial court's admission of Striegel's statements made to the officer at the scene of the incident. He contends that the statements were inadmissible hearsay and also violated his right to confront the witnesses against him. Bell also appeals the district court's failure to direct a verdict of acquittal upon the close of the State's case-in- chief and at the end of the trial. Finally, Bell asserts that the court erred by refusing to submit an accomplice or solicited person instruction.

I. Hearsay.

Bell argues that the district court abused its discretion by admitting hearsay statements made by Striegel to Officer Trudell. He contends the statements were not spontaneous but rather were made only in response to questioning by the officer. Thus, he argues, the statements did not fall within the excited utterance exception to the hearsay rule.

Bell further argues that his alleged impeachment of Trudell with prior deposition testimony demonstrates the unreliability of the hearsay statements. During Trudell's deposition, he testified that the identification of the driver by Striegel did not occur as earlier described but rather occurred later at the police station.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. The resolution of evidentiary matters is generally within the trial court's discretion. *State v. Hubka,* 480 N.W.2d 867, 868 (Iowa 1992). The trial court's decision will not be overturned absent an abuse of discretion. *Id.*

A statement is hearsay if it is made by an out-of-court declarant and is offered to prove the truth of the matter asserted. Iowa R. Evid. 801(c). The excited utterance exception to the hearsay rule applies generally to statements made under the influence of an exciting event, rather than on reflection or deliberation. *State v. Tillman,* 532 N.W.2d 482, 484 (Iowa App. 1995); *see also* Iowa R. Evid. 803(2). The admission of hearsay under the excited utterance exception lies largely within the discretion of the trial court. *State v. Augustine,* 458 N.W.2d 859, 861 (Iowa App. 1990). The rationale behind the excited utterance exception is that the declarant's statement is trustworthy because it is not the result of reflection and design. *State v. Watts,* 441 N.W.2d 395, 398 (Iowa App. 1989). Spontaneity indicates the statement is reactive to the situation and not carefully thought out. *Id.*

To determine if a statement is spontaneous, the trial court must consider the circumstances under which the statement was made. Relevant factors include the nature of the startling event, whether the use of questions led to statements which otherwise would not have been made, the age and condition of the declarant, the subject matter of the statement, and the lapse of time. *State v. Hy,* 458 N.W.2d 609, 611 (Iowa App. 1990).

Bell has correctly noted that the Iowa Supreme Court has rejected the use of the *res gestae* terminology to describe testimony which comes within the excited utterance exception. *State v. Ogilvie,* 310 N.W.2d 192, 196 (Iowa 1981). However, the use of the *res gestae* terminology by the district court does not change the scope of our analysis. The admission of the testimony under the more clearly defined excited utterance exception is permitted if the relevant factors are present. *See State v. Hy,* 458 N.W.2d at 611.

Upon review of the record, we find that the trial court did not abuse its discretion in admitting the officer's testimony. The circumstances under which the statement was made support the finding that the statement was made under the influence of an exciting event, i.e., a car chase. The excited utterance exception may also be used to admit statements made in response to questions, but responses may be admitted only when questions are not calculated to elicit information which would otherwise have been withheld. *State v. Brown,* 341 N.W.2d 10, 13 (Iowa 1983).

Trudell testified that Striegel was "upset and crying" when he asked her who was driving the car. There is no evidence from which it can be inferred that this information would have been withheld.

We are not persuaded by Bell's arguments that attempt to distinguish cases in which the exception applied to statements made by sexual abuse victims in response to questioning. None of the cases cited by Bell in support of his argument limited the application of the excited utterance doctrine to statements made by sexual abuse victims. *See State v. Olgilvie,* 310 N.W.2d 192 (Iowa 1981); *State v. Haynes,* 259 N.W.2d 806 (Iowa 1977); *State v. Watson,* 242 N.W.2d 702 (Iowa 1976); *State v. Swanson,* 228 N.W.2d 101 (Iowa 1975).

We have also reviewed the deposition record and find no discrepancy between the officer's trial testimony and his deposition testimony demonstrating the unreliability of the testimony. Even if this were true, the discrepancy does not sufficiently subtract from the reliability of Striegel's assertions to exclude their admission.

II. Right to Confrontation

Bell next argues that even if Striegel's statements qualify as an excited utterance, the admission of the testimony violated his right to confront the witnesses against him. *See Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.E.2d 638 (1990).

Our review of constitutional issues is de novo. *State v. Riley,* 501 N.W.2d 487, 488 (Iowa 1993); *State v. Evans,* 495 N.W.2d 760, 762 (Iowa 1993).

At trial, Striegel did not testify on behalf of the prosecution. Bell moved for a mistrial based on the denial of his right to confront and cross-examine Striegel. The district court denied the motion.

The State argues that Bell failed to preserve error on this issue by only making a hearsay objection to Officer Trudell's testimony. However, we note that the record reflects that Bell raised his Confrontation Clause objection after the officer's testimony. He did so upon learning that Kelli Striegel would not be testifying despite being apprised to the contrary in the Minutes of Testimony. Counsel objected as soon as he was aware of the grounds for the objection. We find error has been preserved on this issue.

We agree with Bell that exceptions to the hearsay rule are not in all cases co-extensive with the exceptions to the Confrontation Clause. *See Roberts,* 448 U.S. at 65, 100 S.Ct. at 2538, 65 L.Ed.2d at 607; *Wright* at 814, 110 S.Ct. at 3146, 111 L.E.2d at 651. However, the argument Bell raises has been previously rejected. *See State v. Campbell,* 539 N.W.2d. 491, 494-95 (Iowa App. 1995).[1] In *Campbell,* we held that a

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[1] *See also United States v. Inadi,* 475 U.S. 387 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), where the court specifically limited *Roberts* to its facts:

> The Confrontation Clause analysis in *Roberts* focuses on those factors which come into play when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial.

defendant's right to confrontation is not violated by the admission of evidence under the excited utterance exception to the hearsay rule. *Id.*, at 494-95. The state is not required to prove the declarant's availability or to produce the declarant as a witness before such evidence is admitted. *Id.* at 494-95:

> Given the evidentiary value of such statements, their reliability, and that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs, we see no reason to treat the out-of-court statements in this case differently from those we found admissible in *Inadi*. A contrary rule would result in exactly the kind of "wholesale revision" of the laws of evidence that we expressly disavowed in *Inadi*. We therefore see no basis in *Roberts* or *Inadi* for excluding from trial, under the aegis of the Confrontation Clause, evidence embraced within such exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment.

Id. at 495, quoting *White v. Illinois*, 502 U.S. at 357, 112 S.Ct. at 743, 116 L.Ed.2d at 860 (1992). The testimony by Trudell was admitted under a well-recognized exception to the hearsay rule.[2] Accordingly, we reject Bell's confrontation clause argument and affirm on this issue.

III. Sufficiency of the Evidence

Id. at 393, 106 S.Ct. at 1125, 89 L.Ed. at 397.

Since *Roberts* has been limited to its facts and deals with hearsay evidence involving prior testimony, we conclude that it does not apply to Bell's case. *See Campbell*, 539 N.W.2d at 494.

[2] *Cf. Wright*, 497 U.S. at 817, 110 S.Ct. at 3147-48, 111 L.Ed.2d at 653, where the Court held the residual exception is not a firmly rooted exception to the hearsay rule, therefore it does not share the same traditions of reliability that firmly rooted exceptions have. *See State v. Rojas*, 524 N.W.2d 659, 664 (Iowa 1994).

Bell also argues that the district court erred in denying his Motion for Directed Verdict of Acquittal at the close of the State's case-in-chief and again at the close of all the evidence. He contends the evidence was insufficient to establish his identity as the perpetrator of the crime.

On appeal, Bell has focused on the identification made by the officer. He emphasizes the deposition testimony of Officer Trudell describing the person he saw fleeing the vehicle as a man 5'6" tall with a scruffy beard and mustache. At trial he testified that the man he saw had shoulder length dark hair. He did admit that Bell's appearance had "changed drastically" from the day of the incident, but that the "eyes" of the man, as viewed by Trudell through the windshield of the driver's car, assured him that the person on trial was the same person he observed fleeing.

Bell cites the testimony of three alibi witnesses who stated that Bell was working the day of the incident and that company policy prohibited long hair and facial hair. Thus, he argues, the man police described could not have been him.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it, or it is clearly against the weight of the evidence. *State v. Schrier,* 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact that defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of the evidence, we view the record in a light most

favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). All evidence is considered, not simply the evidence supporting the verdict. *Id.*

We find sufficient evidence in the record to support the conviction. We have already determined that the identification of Bell by Kelli Striegel was admissible. Her statements to the police officer at the scene and also the identifications made by the officers themselves, provide ample evidence to convince the trier of fact that the driver of the car was Bell. The jury was free to resolve any conflicts in the evidence regarding the credibility of the witnesses and reject Bell's contrary assertions. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). We affirm the trial court's denial of his Motion for Directed Verdict of Acquittal.

IV. Accomplice or Solicited Person Instruction

At the close of the evidence, Bell requested the court to submit either a corroboration of Accomplice instruction or a Corroboration of a Solicited Person instruction.[3] The court refused the proposed instructions and Bell later raised the issue

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[3] The Uniform Jury Instructions requested by Bell read as follows:

200.4 Corroboration of Accomplice. An "accomplice" is a person who knowingly and voluntarily cooperates or aids in the commission of a crime.

A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime.

If you find (name of witness) is an accomplice, the defendant cannot be convicted only by that testimony. There must be other evidence tending to connect the defendant with the commission of the crime. Such other evidence, if any, is not enough if it just shows a crime was committed. It must be evidence tending to single out the defendant as one of the persons who committed it.

again in his Motion for New Trial.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *State v. Freeman*, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. *W. T. Rawleigh Medical Co. v. Bane*, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); *accord Borough v. Minneapolis & St. L. R. Co.*, 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); *see Miller v. International Harvester Co.*, 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. *See Borough*, 191 Iowa at 1223, 184 N.W. at 323; *see also Miller*, 246 N.W.2d at 301. "The sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party urging submission." *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854, 858 (Iowa 1972); *Campbell v. Martin*, 257 Iowa 1247, 1251, 136 N.W.2d 508, 511 (1965).

200.5 Corroboration of Solicited Person - Crime Actually Committed. A "solicited person" is a person who is commanded or persuaded by another to commit the crime with which the defendant is charged.

A person cannot be convicted only by the testimony of a "solicited person". The testimony of a "solicited person" must be corroborated by other evidence tending to connect the defendant with the crime.

If you find (name of witness) is a "solicited person", the defendant cannot be convicted only by that testimony, and there must be other evidence tending to single out the defendant as one of the persons who committed the crime. Evidence which only shows a crime was committed, but does not connect the defendant with the crime, cannot be considered corroboration.

Bell asserts that the proposed instruction was critical to his alibi defense. His theory of defense was that Striegel was involved in a drug transaction with another individual, Steven Evans, and sought by her statements to escape detection and implicate Bell.

We conclude that the district court properly refused to submit Bell's requested instructions. In rejecting his arguments, we note that the Uniform Jury Instructions cited by Bell refer exclusively to the ***testimony*** of an accomplice or solicited person. (emphasis added). Neither Kelli Striegel or Steven Evans testified at trial. Bell cites no authority that equates hearsay statements made by an alleged accomplice with testimony given at trial. Thus the proposed instructions are accordingly inapplicable in this case. Furthermore, insufficient evidence was presented to support Bell's allegations that either Striegel or Evans was an accomplice or solicited person. We affirm the district court's rejection of these instructions.

We affirm Bell's conviction in its entirety.

AFFIRMED.