IN THE COURT OF APPEALS OF IOWA

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No. 0-212 / 98-2012
Filed June 14, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JARMAINE ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1995). He contends (1) the district court erred in not declaring a mistrial and in certain evidentiary rulings; (2) his constitutional due process rights were violated in allowing a witness to identify him in court; (3) there is not sufficient evidence to support his conviction, and (4) his trial attorney was not effective in his closing argument. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Jamie Bowers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant-Appellant, Jarmaine Allen, appeals from the judgment and sentence entered after a jury found him guilty of first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1998). Defendant contends (1) the district court erred in not declaring a mistrial and in certain evidentiary rulings; (2) his constitutional due process rights were violated in allowing a witness to identify him in court; (3) there is not sufficient evidence to support his conviction, and (4) his trial attorney was not effective in his closing argument. We affirm.

Defendant was convicted of shooting Jody Stokes at about 5:21 on October 15, 1995. Stokes, who was standing near the intersection of Martin Luther King Drive and Forest Avenue in Des Moines when he was shot, died from multiple gunshot wounds. There were a number of witnesses at the scene who gave conflicting stories as to whether the perpetrator fled the scene by foot or by car. No weapon was ever found despite the statement of at least one witness that it was dumped near the scene of the crime.

Stokes was a known drug dealer and gang member. There was evidence that he had knocked the defendant unconscious a few days earlier and the shooting was in retaliation for that event. Defendant was indicted by a Polk County grand jury and convicted after his first trial ended in a hung jury. Witnesses for the state testified: (1) defendant was at or near the scene with a gun; (2) defendant shot Stokes; and (3) defendant confessed to the crime. However, the credibility of these witnesses is seriously challenged among other things by: (1) their prior inconsistent reports; (2) concessions they received for testifying; and (3) their ability to view the events to which they testified.

The most important of these witnesses to the State's case were Kelly Scott, Marquetta Slater, William Holder, Robert Hawthorne, Nick Jones and Shyrome Avant.

Kelly Scott testified he was in his backyard located at 1443 21st Street. The shooting occurred at the TNT Lounge on the corner of Martin Luther King and Forest Avenue. Scott testified at trial that his house is approximately a 10-15 minute walk from the location of the shooting. Scott testified he heard shots and saw a person dressed in black run through his yard. Scott picked defendant's picture as being the person who ran through his yard upon being shown several photo arrays. However, Scott was unable to identify defendant when he appeared at depositions and the first trial. Scott did identify defendant in the courtroom of this trial as the person who ran though his yard. However, his own testimony as to the limited observation he made of the defendant rendered his testimony questionable.

Shyrome Avant testified at the second trial that the defendant confessed he had murdered Stokes. The confession was to have come while the two men were in prison together in 1997. Avant did not come forward as a witness until the second trial in August of 1998. At the time he came forward with this information, Marquetta Slater, Stokes' fiancé at the time of his death, had become Avant's girlfriend.

William Holder testified some women had told him that defendant and Stokes had got in to a fight and defendant had been knocked out. The district court ruled the testimony was an excited utterance and therefore an exception to

the hearsay rule. At trial he testified he had previously lied under oath in regard to this case and was now testifying under a grant of immunity for his prior perjury.

Robert Hawthorne testified he saw defendant shoot Stokes in the back with a 9-millimeter handgun. Nine millimeter shell casings were found at the scene. Hawthorne originally knew nothing but came forth with his trial testimony while awaiting to be sentenced on a felony federal drug charge. As a condition of Hawthorne's plea agreement on the federal charge, he was required to testify truthfully against the defendant. And if he did not testify truthfully, his federal plea agreement would be void.

Nick Jones testified he saw defendant shoot Stokes. He earlier had said he was not at the scene of the shooting. He was testifying under a grant of immunity from perjury from his pervious statements regarding the events of the shooting.

Defendant first contends the district court erred in not declaring a mistrial after the jury heard: (1) evidence of gang membership, and (2) a witness testified she was frightened by a spectator in the courtroom.

There was testimony that Stokes was a member of a gang. There was also testimony that defendant told a police detective who interviewed him that a fight between Stokes and the defendant had occurred several days earlier and may have been because of the "colors" defendant was wearing. After the evidence came in, defendant made a motion for a mistrial. Defendant contends it was error for the district court not to grant the motion.

A trial court's rulings on the admissibility of evidence are discretionary. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). We will reverse an

evidentiary ruling only when a trial court is shown to have abused its discretion in balancing the probative force of the challenged evidence against the danger of undue prejudice or influence. *Id.*

The defendant contends the implication of this testimony concerning the fight was that he was a member of a different gang than the victim. Evidence of gang membership and activity is inherently prejudicial. *State v. Nance,* 533 N.W. 2d 557, 562 (Iowa 1995). The testimony of the police officer was not that defendant was a gang member. This distinguishes this case factually from *Nance* where a police officer testified in searching Nance's home he found a note with a series of numbers and letters similar to what the officer had found in other gang members homes. *Id.* The court did not abuse its discretion in admitting the evidence and not declaring a mistrial after the evidence came in the record.

Defendant also asked for a mistrial after a witness while testifying was asked if she knew a man in the gallery making head movements, and she said she did not and then commented, "That's scary." Outside the jury's presence it was learned the man in the gallery was defendant's uncle.

We review the trial court's denial of a motion for mistrial on an abuse of discretion standard. *State v. Brown*, 397 N.W.2d 689, 699 (Iowa 1986). Misconduct of a spectator can constitute grounds for a mistrial if the conduct is of such a character so as to prejudice the defendant or influence the verdict. *See State v. Hackett,* 197 N.W. 2d 569, 572 (Iowa 1972); *State v. Curtis,* 192 N.W. 2d 758, 761 (Iowa 1971). It is left to the sound discretion of the trial court to determine whether the misconduct was prejudicial since it had the opportunity to

see and hear everything that transpired. *Hackett*, 197 N.W.2d at 573. Such discretion will not be disturbed unless it clearly appears it has been abused. *Id.*

The district court concluded the defendant was not prejudiced by either the exchange between the witness and the prosecutor or the conduct of the spectator. The district court did not abuse its discretion in this ruling.

Defendant next contends the district court erred in not allowing him to call a witness who would have testified that about a week before the murder, a man who died before trial had approached her asking if she wanted to help him get rid of Stokes. The district court excluded the evidence as hearsay. The State now acknowledges the evidence was not excludable as hearsay, but claims it was subject to exclusion under Iowa Rule of Evidence 403 because it risked causing the trial to disintegrate into two trials.

A trial court's decision on the admissibility of evidence is within its discretion, subject to reversal only when that discretion has been abused. *State v. Chadwick*, 328 N.W.2d 913, 917 (Iowa 1983). Evidence offered by a defendant that tends to incriminate another must be confined to substantive facts and create more than a mere suspicion the other person committed the offense. *State v. Farmer*, 492 N.W.2d 239, 242 (Iowa App. 1992); *State v. Wilson*, 406 N.W. 2d 442, 447 (Iowa 1987).

The question we need to decide is whether the evidence is probative on the issue of whether a person other than defendant fired the shots that killed the victim. The State's theory was to convince the jury that defendant fired the fatal shots. If the excluded witness's testimony could cast significant doubt on that assumption, it would materially help defendant's case. The defendant is entitled

to present evidence relevant to his theory of defense. *State v. Nelson*, 480 N.W. 2d 900, 906 (Iowa App. 1991); *State v. Wilson*, 236 Iowa 429, 442-43, 19 N.W.2d 232 (1945); *State v. Kelly*, 196 Iowa 897, 902, 195 N.W. 614 (1923). The evidence presented must raise more than mere suspicion that someone else committed the offense. *Farmer*, 492 N.W.2d at 242; *Wilson*, 406 N.W. 2d at 447.

There was no evidence the deceased man was at the crime scene or in the vicinity at the time of the murder. The State asserts because of this and the fact that there was no other corroborating evidence connecting the dead man to the murder, the evidence did no more than raise a suspicion. We agree. The trial court did not abuse its discretion in refusing admission of this evidence.

The defendant next contends the district court abused its discretion in not allowing him to introduce a statement of Clifford Freeman to the police that Scott Lowery told him he killed the victim. Lowery told Freeman he wore a dark outfit with a hood and waited for the victim in the area where the shooting occurred, shot him, and then drove away. Freeman's statement was tape recorded while he was jailed on two charges of first degree robbery.

The defendant contends neither Freeman nor Lowery were available to testify. Defendant advances Lowery could not be located and Freeman exercised his Fifth Amendment privilege. The State contends the evidence was hearsay upon hearsay and unreliable. The district court ruled the testimony was hearsay upon hearsay and did not meet the residual exception.[1] Where a hearsay statement includes a further hearsay statement, both statements must

[1] Iowa Rule of Evidence Rule 803(24) and 804(b)(5).

conform to a hearsay exception for the statement to be admissible. Iowa R. Evid. 805; *see State v. Williams*, 427 N.W.2d 469 (Iowa 1988).

Defendant contends the tape was admissible, as exceptions existed for both parties. The defendant advances Lowery's confession was a statement against penal interest and he was unavailable. He cites Iowa Rule of Evidence 804(a)(4) and 804(b)(3) and *State v. Dewitt*, 597 N.W. 2d 809 (1999).

We review the district court's admission of hearsay evidence for errors at law. *State v. Moeller*, 589 N.W. 2d 53, 54 (Iowa 1999). On evidentiary issues we review for an abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). The requirements of 804(b)(5) are identical to the requirements of rule 803(24). *Nance*, 533 N.W.2d at 559. Before hearsay evidence can be admitted pursuant to rule 803(24) and 804(b)(5), the district court must make five findings concerning the nature of the evidence: (1) trustworthiness; (2) materiality; (3) necessity: (4) notice; and (5) service of the interests of justice. *State v. Weaver*, 554 N.W. 2d 240, 247 (Iowa 1996). The failure to satisfy one requirement precludes admission of the evidence. *Id.*

The State contends the hearsay evidence was properly precluded from admission because it was not trustworthy. Factors to consider in making a trustworthiness determination under rule 803(24) and 804(b)(5) include: (1) the declarant's propensity to tell the truth; (2) whether the alleged statements were made under oath; (3) assurance of personal knowledge; (4) time lapse between the alleged event and the statement concerning the event; (5) motivations of declarant to make the alleged statements; (6) corroboration, reaffirming or recanting the statement by the declarant; (7) credibility of the witness reporting

the statement, and (8) availability of the declarant for cross-examination.[2] *Id.*; 7 James A. Adams & Kasey W. Kincaid, *Iowa Practice – Evidence* 463-64 (1988); 2 Kenneth Broun et al., *McCormick on Evidence* § 324, at 363-65 (John W. Strong ed., 4th ed. 1992).

The district court concluded the statements offered were hearsay upon hearsay. The district court found the nature of the statements did not permit admissibility pursuant to rule 803(24) or 804(b)(5). The district court did not abuse its discretion in determining the statements to be inadmissible.

Defendant next contends that the district court abused its discretion in allowing Holder to testify that the night before the murder he came back to a party and heard people saying that defendant and the victim were in a fight and the defendant was knocked out. The defendant contends the declarants were unknown to the witness, the statements did not meet the requirements of an excited utterance and the evidence was prejudicial.

A statement of an unidentified bystander may be admissible as an excited utterance. *See State v. Rawlings*, 402 N.W. 2d 406, 408-10 (Iowa 1987). "A declarant's personal knowledge of the facts . . . may be inferred from the utterance itself." *Id.* at 409. Under Iowa Rule of Evidence 803(2), "[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" is an exception to the hearsay rule.

The application of the exclusion lies largely within the discretion of the trial court, which should consider (1) the time lapse between the event and the

[2] The Iowa Supreme Court does not believe the aforementioned factors are an exclusive list to be considered in any one given trustworthiness analysis.

statement, (2) the extent to which questioning elicited the statement that otherwise would not have been volunteered, (3) the age and condition of the declarant, (4) the characteristics of the event being described, and (5) the subject matter of the statement. *State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999); *State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986).

Holder said the event the witnesses were talking about had just happened and their tone and body language indicated they were excited. It was unclear exactly how much time had lapsed from when the witnesses observed the fight to when they conveyed what they had witnessed to Holder. However, lapse of time alone will not ordinarily preclude application of the excited utterance exception. *Mateer*, 383 N.W.2d at 535 (upholding a statement as an excited utterance, though made an hour or more after the event); *State v. Galvan*, 297 N.W.2d 344, 346 (Iowa 1980) (involving two days); *State v. Paulsen*, 265 N.W.2d 581, 586 (Iowa 1978) (two hours); *State v. Stafford*, 237 Iowa 780, 785-87, 23 N.W.2d 832, 835-36 (1946) (fourteen hours). The trial court did not abuse its discretion in allowing the statement to be admitted as an excited utterance.

Defendant also alleges the district court violated his constitutional due process rights by allowing the in-court identification by Scott, the witness who had viewed and identified him from a photo array. Defendant contends the photo array was impermissibly suggestive. Defendant contends his trial attorney was not effective if the issue is not properly preserved for appellate review.

Defendant's photo was included in a six-person photo array shown to various witnesses. Scott identified the defendant from the photo array as the man he witnessed run across his yard shortly after the shooting occurred.

Defendant was the only person in the photo array wearing a dark jacket. The other suspects in the photo array were wearing lightweight type clothing. Three of the photo array suspects were wearing tank tops, one was wearing an athletic jersey and one did not have a shirt on at all. Scott, before looking at the array, said the person running through his yard wore a dark type of jacket.

The only objection to the array by defense counsel was by way of a motion to suppress the out of court photo array identification made by the witness. No objection was made to the in-court identification of defendant made by the witness at trial. Even if the objection had been made it would have had no basis. The array was not overly suggestive because the defendant was the only suspect wearing a dark type of jacket in the photo array.

In 1997, the Fifth Circuit Court of Appeals addressed a factually similar photo array issue. *See United States v. Fletcher*, 121 F.3d 187 (5th Cir. 1997), *cert. denied*, 522 U.S. 1063 (1998). In *Fletcher*, a police officer in a vehicle pursuit of bank robbery suspects observed a black male wearing a suit and tie sitting in the passenger seat. *Id.* at 194. The officer was unable to apprehend the suspects at the time of the pursuit. *Id.* at 191. Three days after the pursuit, the officer was shown a display of six photographs. *Id.* at 194. The officer selected the only suspect in the photo array pictured wearing a suit and tie. *See id.*

The defendant contended that the district court's admission of the photographic identification was constitutionally infirm because his picture was the only one in the array in which the subject was dressed in a suit and tie. *Id.* The district court determined that although the photograph of the defendant was the

only one in which the subject was wearing a suit and tie, the photographic display was not impermissibly suggestive because "in all other relevant respects, the individuals shown on the photo spread were similar in apparent size, all had mustaches, all had approximately the same kind of hair." *Id.* Defendant did not dispute the district court's factual finding that the physical appearance, aside from the clothing, of the individuals in the six photos was very similar. *Id.*

The Fifth Circuit Court of Appeals affirmed the decision of the district court that the array was not overly suggestive merely because the defendant was the only individual pictured wearing a suit and tie. *Id.* at 194-95. Even if defendant's attorney made an objection it would have had no basis. We affirm on this issue.

Defendant next challenges a remark made by his trial attorney in closing arguments. As a part of the argument defendant's attorney was analyzing the testimony of Hawthorne who had testified that he saw defendant shoot the victim. The attorney talked about Hawthorn being seventy-five feet from the corner and then made the following statement which is challenged, "And you know what he is looking at? . . . He is looking at the back of my client's head." Defendant contends that the attorney in using the words "my client" implied to the jury that the defendant was at the scene and that he was guilty of the crime.

Defendant concedes that the reference was probably a misstatement but claims he was prejudiced. We disagree. A review of the record reveals that the statements were made in the context of a discussion of Hawthorn's testimony, and in that context the statements cannot be interpreted as being counsel's admission defendant was at the scene. We affirm on this issue.

Defendant next contends the district court should have allowed his attorney to cross-examine witness Marquetta Slater, the fiancé of the victim at the time of his death, about his hung jury for purposes of impeaching her. Defendant's theory was that the fact the prior jury hung provided the motivation for Slater to get together with her boyfriend Shyrome Avant to create Avant's testimony that defendant confessed to the murder when the two men were together in prison. Avant said he kept the story to himself for over a year and admitted that Slater told him the State was having trouble building a case against defendant. The district court ruled the fact the prior jury hung was not admissible.

A reasonable latitude must be accorded the person cross-examining, but the scope of the subject of the inquiry rests generally in the trial court's discretion. *State v. Damme*, 522 N.W.2d 321, 324 (Iowa App. 1994); *State v. Richardson*, 442 N.W.2d 91, 93 (Iowa 1989). The trial court's discretion in this respect is a legal discretion and should not be exercised so as to exclude matters vital and proper to the defense of one accused. *Damme*, 522 N.W.2d at 325; *State v. Van Rees*, 246 N.W.2d 339, 346 (Iowa 1976). The scope of cross-examination of a State's witness should be extended liberally on behalf of a defendant charged with a grave offense. *Damme*, 522 N.W.2d at 325; *State v. Carney*, 236 N.W.2d 44, 46 (Iowa 1975).

Defendant's counsel had other means of impeaching the witness's testimony. The district court did not abuse its discretion. We affirm on this issue.

The defendant also contends the evidence was not sufficient to support a conviction. He claims the witnesses presented by the State were all impeached

and therefore their testimony was not reliable enough to support a conviction. The defendant also argues there was no physical evidence to connect him to the death of the victim.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4; *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999). The jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). "Substantial evidence" is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16) (1998). A verdict can rest on circumstantial evidence alone. *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa App. 1999). We give consideration to all of the evidence, not just that which supports the verdict, including reasonable inferences that could be derived from all the evidence. *Pace*, 602 N.W.2d at 768. Generally, the credibility of witnesses is left to the jury; however, there are limitations to this rule. *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998). A witness's testimony "may be so impossible, absurd, and self-contradictory that the court should deem it a nullity." *Id.*

The testimony of the witnesses called by the State, if believed, would provide substantial evidence to prove beyond a reasonable doubt that the defendant committed the crimes with which he was charged. We recognize, as the defendant argues, that the testimony of the State's witnesses is impeachable

in a number of respects. A review of the cross-examination of each witness conducted by defendant's trial counsel shows that he did an very adequate job of bringing all factors that would question the credibility of each witness's testimony to the jury's attention. The members of the jury are the fact finders. We cannot say the testimony as a whole was so incredible that it should not be believed. We affirm the conviction.

AFFIRMED.