FILED
1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-354 / 92-1041

STATE OF IOWA,
Plaintiff-Appellee,

000799

vs.

CHAD DOUGLAS HOHLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, John R. Sladek, Judge.

Chad Douglas Hohle appeals from his conviction, following a jury trial, of assault causing injury and assault in violation of Iowa Code sections 708.1, 708.2(2) and (4) (1991). **WE AFFIRM IN PART; REVERSE IN PART; AND REMAND FOR A NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, J. Patrick White, County Attorney, and Kelly G. Raines, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J. 000000

A scuffle on a street in Iowa City as the bars were closing resulted in Bryant Gourdie suffering a depression fracture and nose injury and defendant-appellant Chad Douglas Hohle being charged with two counts of assault causing injury in violation of Iowa Code sections 708.1 and 708.2(2). Defendant was found guilty of assault causing injury in violation of Iowa Code sections 708.1 and 708.2(4) (1991). Defendant appeals the conviction and sentence. We affirm in part; reverse in part; and remand for a new trial.

Brian Lumbard and some friends walked by the Airliner, an Iowa City bar, during the early morning hours of August 16, 1991, on their way home from Mickey's, another Iowa City bar. Lumbard testified he accidentally bumped into a young lady. A large number of people were standing on the sidewalk because the bars had just closed. Defendant, who was standing near the young lady, confronted Lumbard. Lumbard testified when he attempted to talk to defendant, defendant grabbed him and shoved him against a car. Lumbard asserted he then fell, landing on a beer bottle, and sustained a laceration to his knee.

Gourdie had been with Lumbard, but they were separated as they walked by the Airliner. Gourdie said when he turned around he saw Lumbard attempting to stand up by a car and Lumbard was surrounded by four or five young men. Gourdie said he ran behind the car and pulled Lumbard over the hood of the car.

Lumbard and Gourdie continued to walk on the sidewalk when a group of men, including defendant, ran up to them and confronted them. Gourdie said when he asked the group what they wanted, someone hit him on his left temple, and then defendant struck his right eye while someone else struck his right temple. Gourdie said he started swinging, fell to the ground, and was kicked in the face and thigh. A physician, who examined Gourdie a few days later, testified Gourdie had sustained a depression fracture to the bone below his right eye as well as an injury to his nose.

Several people with the defendant testified defendant did not start a fight with Lumbard or Gourdie, and defendant did not participate in the altercations.

Defendant first contends the trial court should not have instructed the jury on joint criminal conduct. The jury was instructed:

> When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. The defendant's guilt is the same as the other persons' unless the act could not reasonably be expected to be done in aiding the commission of the crime.

Defendant asserted the record failed to support submission to the jury of the theory of joint criminal conduct. The district court stated the record supported a finding that several people were involved in the second assault "in a joint criminal conduct effort" and submitted the proposed instruction to the jury. The instruction was based on Iowa Code section 703.2 which provides:

000802

> When two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and his or her guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.

Iowa Code § 703,2 (1991).

In State v. Irvin, 334 N.W.2d 312, 314 (Iowa App. 1983), the court distinguished the theory of aiding and abetting from joint criminal conduct by quoting Kermit L. Dunahoo, The New Iowa Criminal Code, 29 Drake L. Rev. 237, 287 (1979-1980):

> The aiding and abetting provision in section 703.1 thus relates to crimes which the defendant himself participated in to some degree, and which were jointly planned. A companion provision in section 703.2 of the Code relates to additional or other crimes committed by defendant's accomplices without defendant's personal participation, and without joint planning of the crimes.

The Irvin court further stated:

> The essential elements for imposing vicarious criminal liability on the basis of joint criminal conduct have been defined as:
>
> > The conditions are that he must be acting in concert with another, that he knowingly be participating in a public offense (defined at § 702.13), that a different crime be committed by another participant in furtherance of that offense, and that the commission of the other crime could reasonably have been foreseen.

Id. (quoting John Yeager & Ronald Carlson, Iowa Criminal Law and Procedure § 63 (1979)) (citing W. Lafave & A. Scott, Handbook on Criminal Law § 63, 66 at 515-17 (1972)).

000803

Defendant's position is although the State alleged joint criminal conduct, it failed to present evidence of any crime other than the assault of Gourdie. Defendant contends he was prejudiced by the instruction.

The State advances different crime does not mean a different type of crime, but only means a separate crime. The State says defendant's friends, acting in concert with defendant, surrounded Gourdie and backed him up against a car. Gourdie was then hit by at least two people. The State argues these assaults on Gourdie were additional other crimes committed by the defendant's accomplice(s).

We agree with the State that it introduced evidence of joint criminal conduct when it showed assaults on Gourdie by more than one person.

We affirm on this issue.

Defendant next contends the court erred in failing to give an instruction on eyewitness testimony that defendant requested, Iowa Criminal Jury Instruction 200.45, which states:

> The reliability of eyewitness identification has been raised as an issue. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to see the person at the time of the crime and to make a reliable identification later.
>
> In evaluating the identification testimony of a witness, you should consider the following:
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> 1. If the witness had an adequate opportunity to see the person at the time of the crime. You may consider such matters as the length of time the witness had to observe the person, the conditions at that time in terms of

000804

visibility and distance, and whether the witness had known or seen the person in the past.

2. If an identification was made after the crime, you shall consider whether it was the result of the witness's own recollection. You may consider the way in which the defendant was presented to the witness for identification, and the length of time that passes between the crime and the witness's next opportunity to see the defendant.

3. An identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

4. Any occasion in which the witness failed to identify the defendant or made an inconsistent identification.

The State argues the eyewitness evidence was strong and the court gave an instruction on credibility of witnesses.

The witnesses were people who were either friends of the victims or defendant or people who received information from those friends. The majority of the eyewitnesses to the altercations had been drinking alcohol during the evening, were watching the incident surrounded by a large crowd of people who had just exited bars, were concerned about police arriving on the scene and perceived only fragments of the whole occurrence.

The district court abused its discretion by refusing to instruct the jury about eyewitness identification. The record lacked indicia of reliability and evidence corroborating the witnesses who identified defendant as an aggressor in the assaults. Further, the jury instruction discussing witness credibility was phrased in very general

terms. This instruction failed to significantly address the specific issue of eyewitness identification in light of the circumstances of defendant's case involving many eyewitnesses presenting conflicting descriptions of the incident. We reverse on this issue.

WE AFFIRM IN PART; REVERSE IN PART; AND REMAND FOR A NEW TRIAL.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. I would affirm the trial court on both issues. The trial court has broad discretion in instructing the jury. Bingham v. Marshall & Huschart Machinery Co., 485 N.W.2d 78, 80-81 (Iowa 1992). Jury instructions are designed to explain the law to jurors so they may correctly apply the law to the facts. Meck v. Iowa Power & Light Co., 469 N.W.2d 274, 276 (Iowa App. 1992) (citing State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978)).

Appellant first asserts the court erred in instructing the jury on joint criminal conduct. The court used Iowa Criminal Jury Instruction 200.7 which explains the requirements of Iowa Code section 703.2 (1993). The trial court stated the record supported a finding that several people were involved in the second assault. I believe the State introduced evidence of joint criminal conduct when it showed assaults on the victim by more than one person. I do not believe the law requires other types of crimes be committed before appellant could be found guilty of joint criminal conduct. See State v. Lockheart, 410 N.W.2d 688, 691 (Iowa App. 1987); State v. Irvin, 334 N.W.2d 312, 314-15 (Iowa App. 1983). Since the instruction correctly explains the applicable law for the evidence introduced at trial, the court acted within its discretion to give the instruction.

Appellant next asserts that the court erred in not instructing the jury on eyewitness identification. Appellant requested the court give Iowa Criminal Jury Instruction 200.45. The court stated "that the instruction with regard to the credibility of witnesses [instruction 100.7] will cover 200.45." The victim and his friends all gave the same description. The police on the scene testified that appellant was the only person in the crowd that matched the description and that appellant had blood on the front of his shirt. Appellant's friends all testified that he did not participate in the second assault. They do not dispute that the identification given by the victim, his friends, and the police on the scene correctly described appellant. Nor does appellant assert that the description fit someone else in the crowd. The issue, therefore, is not eyewitness identification but credibility of the witnesses. The court correctly instructed the jury on credibility of the witnesses and did not abuse its discretion by refusing to give an instruction on eyewitness identification. I would affirm.