

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 20, 1984

276

vs.

)

ORVILLE LUKE,

)

4-357

83-1336

Defendant-Appellant.

)

Appeal from the Iowa District Court for Lee County on change of venue from Henry County - D. B. Hendrickson, Judge.

Defendant appeals from his conviction on three counts of murder in the first degree in violation of Iowa Code section 707.2 and one count of arson in the first degree in violation of Iowa Code section 712.2. **AFFIRMED.**

Charles W. Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, P.J.

Defendant appeals from his conviction on three counts of murder in the first degree in violation of Iowa Code section 707.2 and one count of arson in the first degree in violation of Iowa Code section 712.2. He asserts: (1) evidence concerning defendant's presence at a building where another arson occurred should have been excluded; and (2) that the State's key witness was an accomplice as a matter of law and evidence was insufficient to corroborate his testimony. We affirm.

On May 5, 1983, defendant and Terry Vorhies were jointly charged with three counts of first-degree murder and two counts of arson arising out of fires in nearby apartment buildings. Prior to trial the arson charge unrelated to the three deaths was severed, as was the charge against Vorhies. Vorhies subsequently obtained a plea bargain in which he agreed to testify against defendant in exchange for a reduction of charges.

The record reflects that on March 19, 1983, at 2:16 a.m. the fatal fire was reported by a tenant at an apartment building at 206 North Main Street in Mount Pleasant, Iowa. Alan Nichols lived in a second floor apartment with Frank and Shirley Adler and their eight-month-old daughter. Nichols indicated he was awakened in the early morning hours by Shirley, who reported that the building was on fire. Nichols was able to escape; however, the Adlers died from smoke inhalation and/or carbon monoxide poisoning. Each victim also suffered a great deal of thermal injury.

Fire investigators determined that the apartment fire was intentionally set in an entryway storage closet. Another fire had been intentionally set in a second floor storage closet immediately outside the door of Bill Lambert's apartment, a tenant with whom defendant had argued at a time when he lived in the building with his sister.

Terry Alan Vorhies, the State's key witness, testified that at approximately

1:00 a.m. on the morning of the fire, he and the defendant purchased some beer and pickles and were dropped off at the town square by two drinking companions. Both of the companions testified that the next day defendant asked them to tell the police that they had seen Bill Lambert in front of the building as they drove home.

Vorhies testified that, after drinking beer and walking, he and defendant entered the apartment building and sat on the stairway steps. Vorhies then went to the second floor, looked out a west window and into a closet next to the window. The defendant told Vorhies to come back downstairs and to watch for the police, stating that he had borrowed a cigarette lighter and was going to "torch" the place.

Vorhies testified that he left the premises and hid while waiting for the defendant. He also stated that they subsequently watched the fire from a nearby apartment building at 405 North Broadway while consuming beer and pickles and that the defendant was still there when he left. Beer cans and a pickle jar were later found at the scene. Additionally, a resident of the second building, Mitchell Lowe, testified that he was awakened at about 3:30 a.m. by a fire in his own building and observed defendant there at the time. Defendant denied setting the fire and testified that he left Vorhies and returned home after 1:30 a.m. His sister testified that he returned home at 2:10 a.m.

The second apartment building was the scene of the arson forming the basis for the charge against defendant that was severed prior to trial. All evidence relating to defendant's presence at that scene was unsuccessfully objected to at trial on the ground that it was irrelevant with any probative value outweighed by prejudicial effect. The jury returned guilty verdicts on all counts after being instructed, inter alia, that they were to determine whether Vorhies was an accomplice and, if so, whether his testimony was corroborated.

Luke alleges on appeal that the trial court abused its discretion in allowing

into evidence testimony concerning events that occurred at the North Broadway apartment complex. Specifically, he claims the evidence was irrelevant since it did not relate to the fire at 206 North Main Street. Furthermore, he claims it was prejudicial since it made the jury aware of the fact that a second fire had occurred at the Broadway address.

"The test for relevancy is whether the evidence offered would render the desired inference more probable than it would be without such evidence. Irrelevant evidence is that which has no logical tendency to establish any material proposition." State v. Chadwick, 328 N.W.2d 913, 917 (Iowa 1983), quoting State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979).

We do not find an abuse of discretion in the court's determination of relevancy. As the State points out in its brief, testimony concerning events at 405 North Broadway was relevant to rebut the defendant's alibi defense. At trial, evidence showed that the arson was reported at 2:16 a.m. on March 19. Defendant testified that he had returned to his parents' home before that time. His sister also testified that defendant returned at 2:10 a.m. Testimony by Lowe and Vorhies, and evidence of the beer cans and pickle jar served to rebut defendant's claim by placing him at 405 North Broadway after 2:16 a.m.

We also agree with the State's assertion that such evidence was relevant to show defendant's intent. In order to support a conviction of murder, it was necessary for the State to present evidence indicating malice aforethought. Vorhies testified that defendant watched the fire from 405 North Broadway, ate snacks, and laughed at the flames. Essentially, the defendant's demeanor and activities subsequent to the arson would be relevant to infer that the fire was started with malice aforethought and with an intention to damage the apartment.

Finally, the evidence would also be relevant "to complete the story of the crime" and avoid "artificially bifurcating the whole incident." See State v. Fryer, 243 N.W.2d 1, 6 (Iowa 1976).

Defendant argues that even if the evidence is relevant, its probative value is outweighed by the prejudicial effect. The prejudice allegedly results from the fact that a fire also occurred at 405 North Broadway. Defendant claims the jury may have inferred from testimony that he started the fire at the Broadway apartment and thus had the propensity to start the fire at North Main.

Even assuming a jury would draw these inferences, we cannot agree with defendant's argument. We recognize that such evidence may be damaging. However, evidence is not unfairly prejudicial simply because it is damaging. State v. Walsh, 318 N.W.2d 184, 187 (Iowa 1982). Furthermore, the admissibility of evidence relating to a separate crime is largely within the discretion of the trial court. State v. Serr, 322 N.W.2d 96, 99 (Iowa Ct. App. 1982). We will reverse only when the trial court's exercise of discretion is "palpably and grossly violative of fact or logic." Such is not the case here. Pursuant to Federal Rule of Evidence 404(b), evidence of other crimes, wrongs or acts would be admissible to show, inter alia, identity and intent, both of which are applicable in this action. Thus, we conclude the trial court did not abuse its discretion in admitting evidence relating to defendant's presence at 405 North Broadway since it is relevant and not unduly prejudicial.

Defendant's second allegation of error is that the trial court improperly overruled his motion for judgment of acquittal. He argues that the trial court should have determined that Vorhies was an accomplice as a matter of law rather than submitting the question to the jury. He also claims that there was insufficient corroboration of the accomplice testimony. We disagree.

A witness is considered an accomplice if he could be indicted and convicted of the same crime as the accused. State v. Jennings, 195 N.W.2d 351, 356-57 (Iowa 1972). Mere knowledge that a crime is contemplated or presence at the scene of the crime is not sufficient to show someone is an accomplice. Id.

First, we cannot agree with defendant's claim that Vorhies was an

accomplice as a matter of law. In State v. Sallis, 238 N.W.2d 799, 802 (Iowa 1976), the supreme court stated:

The question of who are accomplices is one of law for the court when the facts as to the witness's culpability are neither disputed nor susceptible of different inferences; when these facts are disputed or susceptible of different inferences, the question is one of fact for the jury.

We believe that Vorhies' culpability is subject to some dispute. There is no evidence that Vorhies was present when the fires were started. Nor is there any evidence that he aided the defendant in starting the fires. Defendant points to some testimony that would support a finding that Vorhies was an accomplice. Vorhies testified that at one time he was on the second floor looking through a closet. He also testified that he went out of the apartment building and hid when defendant asked him to go outside and watch for the police. The defendant also points out that Vorhies was originally charged with the same offense. However, we believe these facts are insufficient to support a finding as a matter of law. The question of whether Vorhies was an accomplice was properly submitted to the jury.

Finally, assuming the jury concluded Vorhies was an accomplice, we believe there was sufficient corroborating evidence to support his testimony. The sufficiency of corroborating evidence is normally a question of fact for the jury. State v. Aldape, 307 N.W.2d 32, 41 (Iowa 1981). The evidence need not support every material fact testified to by the accomplice. Id. "All that is required is that the accomplice's testimony be supported in some material fact that tends to connect the defendant with the crime charged" Id. (emphasis added).

Examination of the record reveals that Vorhies' testimony was supported in some material fact. The defendant's drinking companions, Scott Waters and Brian Sammons, testified that defendant borrowed Waters' lighter on the night in question. Vorhies testified that this lighter was used to start the fires. We agree with the State's assertion that the instrument used in the crime is a material fact.

Additionally, Lowe's identification testimony and the fact that beer cans and a pickle jar were found at 405 North Broadway, support Vorhies' version of the events. Based on these facts, we conclude that the trial court did not err in overruling the motion for judgment of acquittal.

AFFIRMED.