IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed January 28, 1977
vs.	)	
MICHAEL CRAIG WHITE,	)	38 59382
Appellant.	)	

Appeal from Black Hawk District Court - C.E. Engelkes, Judge.

Defendant appeals from conviction of offense of conspiracy with intent to commit a felony. - Reversed and remanded for new trial.

John W. Ackerman, of Cedar Falls, for appellant.

Richard C. Turner, Attorney General, Lee M. Jackwig, Assistant Attorney General, David H. Correll, County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

FILED
JAN 28 1977
CLERK SUPREME COURT

OXBERGER, J.

Defendant appeals his conviction for the crime of conspiracy to commit a felony. The crux of this appeal is the following question posed to the police officer by the prosecutor. The question refers to an arrest statement made to Officer Zarifis by the alleged co-conspirator, William Branch:

"Q. Did that statement implicate any person other than William Branch: A. Yes." (Record at 32)

The State in its brief (page 4) states:

> "The State admits that the confession of the alleged co-conspirator, Mr. Branch, amounts to inadmissible hearsay against the defendant. ... However, the State urges that Officer Zarifis' 'yes' answer establishing merely that Mr. Branch had given a statement in the form of a confession implicating an unnamed person did not amount to prejudicial error."

We find that the testimony was inadmissible hearsay, and that it was prejudicial and reverse for a new trial.

The charge against the defendant originated in the attempted cashing of Roosevelt Taylor's social security check in the amount of $2,652.20 at Cedar Falls Trust and Savings Bank by William Branch on December 23, 1975. Defendant allegedly conspired with Branch in the production of a falsified identification card, accompanied Branch to the bank location, and waited in a car while Branch was in the bank. The check was received by mail at the home of Roosevelt Taylor, during the time the defendant lived with Mr. Taylor. Defendant had collected the mail in the past. He knew Mr. Taylor was expecting a social security check in the mail.

On December 23 the defendant went to a housing office to deliver keys for a friend. While there he asked a typist to type an I.D. card given to him by William Branch. Defendant told the typist to type in the name of Roosevelt Taylor as well as his address. There is a dispute in the evidence as to whether he gave the information regarding Mr. Taylor's disability. The

balance of the information on the I.D. card was given to the typist by William Branch. At some point Branch signed Mr. Taylor's name to the I.D. card. Defendant testified he never saw Branch sign the card.

Next, the defendant accompanied William Branch to have the I.D. card laminated, but he did not perform any act in furtherance of the lamination process. However, he testified he knew the picture laminated on the I.D. was that of William Branch and not Roosevelt Taylor. Branch then went to the bank and attempted to cash Roosevelt Taylor's social security check with the I.D. card just obtained. Defendant remained in a car outside the bank. The driver of the car was Branch's brother who had also driven them to the typist and to the laminator.

Defendant raises the following issues for review and urges each constitutes reversible error: (1) the admission into evidence of Officer Zarifis' testimony that the out-of-court statement made by William Branch after his arrest had implicated another person in the attempted cashing of the check; (2) the admission into evidence of testimony regarding the defendant's past conflict with law enforcement officers during the direct examination of the social security recipient, Roosevelt Taylor; and (3) the admission into evidence during cross-examination of the defendant's responses regarding William Branch's criminal record.

I. On appeal, defendant's first ground for reversal raises two questions: 1) was the testimony inadmissible hearsay and 2) if so, was the prejudice to the defendant of such magnitude as to require reversal.

Defense counsel objected upon hearsay grounds to the question posed Officer Zarifis, "Did the statement implicate any person other than William Branch?" The objection was overruled. The

defendant's objection specifically invoked the hearsay rule. Since it was overruled, the defendant is limited here, as the defendant in State v. Kidd, 239 N.W.2d 860 (Iowa 1976), in his challenge of the court's ruling to the specific ground of his objection. "If the hearsay rule can be found inapplicable here under any theory, the ruling will be upheld." Kidd, 239 N.W.2d at 864 citing Porter v. Iowa Power and Light Company, 217 N.W.2d 221, 231 (Iowa 1974).

The prosecutor's question was a direct request for the content of the statement made after arrest by William Branch. It was proffered directly to prove that a conspiracy in fact existed, that Branch was not acting alone. It was critical in persuading the jury that the case involved conspiracy and that the defendant was one of the conspirators.

In State v. Johnson, 237 N.W.2d 819, 823 (Iowa 1976) the court held that a challenged question merely asked the detective to state if he had received information from an alleged co-conspirator in a grand larceny. Since the questioning did not reveal what facts were received, the testimony did not qualify as hearsay under State v. Miller, 204 N.W.2d 834, 840 (Iowa 1973). The court in *Miller* adopted the definition of hearsay in rule 801 of the Federal Rules of Evidence: "'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." 204 N.W.2d at 840. The *Miller* question was framed in terms of whether "information" had been received. It did not ask for the disclosure of any particular fact.

In this case the key word in the alleged hearsay is "implicate." Webster's Third New International Unabridged Dictionary defines implicate as: "3a: to bring into intimate or incriminating connection: involve deeply or unfavorably [evidence *impli-*

cating many high officials in the conspiracy]." The word "information" in the *Johnson* case did not carry the same connotation of complicity that the word "implicate" does. The police officer was asked to relate whether the content of the Branch statement indicated culpable conduct on the part of some person other than Branch. The challenged testimony was inadmissible hearsay. It revealed to the jury that Branch's statement after arrest had implicated someone else. It sought to establish conspiracy, the very matter controverted at trial.

Conceding that the Branch confession itself amounts to inadmissible hearsay against the defendant, the State asserts that since the person implicated was not identified any error in the admission was not prejudicial. This is not a case, as the State urges, such as State v. Kelsey, 201 N.W.2d 921, 927 (Iowa 1972) in which the hearsay evidence may be ruled harmless beyond a reasonable doubt. In *Kelsey* the court refused to reverse on the basis of one hearsay item inadmissably received since the total record fairly "shrieked" of the guilt of the defendant.

In this case, whereas the circumstantial evidence indicates strong suspicion, the direct evidence is almost nil. Up to the point the defendant testified that he knew Branch had placed a picture of himself on Taylor's I.D. card, there was no direct evidence that the defendant had any knowledge of Branch's intent to engage in possible unlawful activity. The only direct testimony is the fact the defendant waited in an automobile while Branch cashed a check with a false I.D. on his person.

All of the other facts are circumstantial, i.e., that the stolen check was the property of the defendant's roommate, that the defendant assisted Branch in obtaining an I.D. for Taylor, that the defendant accompanied Branch while he had the I.D.

laminated, that the defendant was in the vicinity when the attempt to cash the check was made. All these acts are consistent with innocence, albeit a naive credulity. The defendant claimed he did not know that Branch had the social security check. He testified he thought Branch was cashing a disability check from his employer.

An examination of the total circumstances certainly could lead the jury to conclude that the Branch statement was directed toward the identification of the defendant as a conspirator. The statement was made to the police by William Branch. The only other person who could have been implicated was Branch's brother who drove the car. Even assuming that Branch would turn in his brother, the brother's activity was substantially less than that of the defendant. It was clearly prejudicial to the defendant for the prosecutor to reveal to the jury that Branch's statement after arrest had implicated someone else. It became crucial in deciding whether the defendant was guilty of any criminal activity. The admission of this testimony is reversible error.

II. The defendant also objects to the reference to the defendant's past conflict with police officers made during Mr. Taylor's testimony. However, this alleged error was not preserved for appeal. Counsel objected after the answer was given. The objection was sustained but no motion to strike was made. State v. Hill, 243 N.W.2d 567, 569 (Iowa 1976).

III. Defendant's last contention concerns a question the prosecutor asked the defendant on cross-examination concerning Branch's alleged prior incarceration. Defendant answered that he was not aware of such incarceration, thus there was no prejudice.

All judges concur except Donielson, J. who concurs in the result.

We find reversible error. REVERSED AND REMANDED FOR NEW TRIAL.