

IN THE COURT OF APPEALS OF IOWA

No. 8-726 / 98-0443

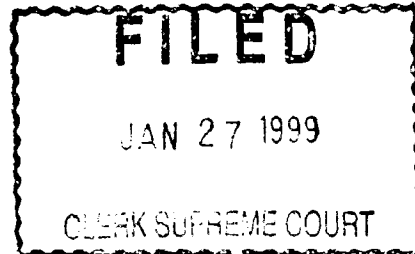
STATE OF IOWA,

Plaintiff-Appellee,

vs.

SEAN CASTINE,

Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister,
Judge.

Defendant appeals his conviction for first-degree murder. **AFFIRMED.**

Patricia Reynolds, Assistant State Appellate Defender, until withdrawal, and
then Maggi Moss and Patrick Wegman of Parrish, Kruidenier, Moss, Dunn,
Montgomery & Thomas, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, and Thomas Ferguson, County Attorney, for appellee.

Heard by Sackett, C.J., and Streit and Vogel, JJ.

SACKETT, C.J.

Defendant -appellant Sean Castine appeals from his conviction for first-degree murder. Defendant contends (1) he was denied a fair trial when the district court allowed the State to introduce hearsay testimony, and (2) he was denied effective assistance of counsel because his trial attorney (a) failed to file a motion to suppress statements he made during a police interrogation, (b) failed to file a motion to suppress the results of a search of his person and car, (c) failed to call a witness who supported his defense, and (d) failed to move for witnesses to be sequestered. We affirm.

Larry Casto's body was found on the morning of August 6, 1997, in the auditorium of the Mini Cinema 16, an adult theater in Waterloo, Iowa. Casto, who worked as a clerk at the theater, had been stabbed fifteen times. More than two hundred dollars, mostly in five and one dollar bills, twelve dollars in coins, two VCR's, adult videotapes, and the videotape from the VCR connected to the security camera were reported missing from the cinema.

Earlier that same morning, at about 1:50 a.m., a deputy sheriff found defendant asleep in a car between Waterloo and Cedar Rapids. The car was owned by Casto. The deputy saw VCR's and several videotapes in the car. The deputy noticed defendant had bills in small denominations on his person. The deputy also noticed several dark stains on defendant's clothing. The deputy drove defendant to Independence, Iowa, and dropped him off at a convenience store.

After the murder was discovered, police returned to where defendant was found in ~~the~~ parked car. The officers found a damaged surveillance tape from the cinema's surveillance camera. Investigators restored parts of the videotape showing defendant in the theater's lobby, both alone and with the victim.

On August 8, 1997, defendant was arrested in Polk County and taken to the Polk County jail. Waterloo police officers came to Des Moines. After defendant signed a paper waiving rights established by *Miranda*, see *State v. Schwartz*, 467 N.W.2d 240, 245-46 (Iowa 1992), the officers interviewed him. Defendant told officers a series of stories about his whereabouts at or near the time Casto was murdered. Defendant was taken back to Waterloo the same day and again interviewed. Again, defendant gave a series of stories about his whereabouts at or near the time Casto was murdered.

Defendant was charged with and found guilty of first-degree murder and sentenced to life in prison.

Defendant first contends the trial court should not have admitted certain hearsay evidence. When questioned by police, defendant said he went to Waterloo with \$400 he earned working at Dee Zee's north of Des Moines, at Burger King on 73rd Street in Des Moines, and doing siding and roofing. At trial, a Waterloo police officer testified he investigated defendant's statements. The State asked the officer what he had found. Defendant objected the answer called for hearsay. The State's attorney said in front of the jury he was not offering the testimony for its truth but to show the course of the investigation. The trial court overruled defendant's objection

and the officer testified he contacted Dee Zee and learned no one named Sean Castine had worked there.

Defendant also contended he called a former girlfriend from a pay telephone in downtown Cedar Rapids. During interviews he gave two different names for the girl. An officer testified he got records of calls made from the pay telephone to see if any call had been made around the time defendant said he was in the area. The State's attorney asked what the records showed. Defendant objected the answer called for hearsay and the objection was overruled. In doing so, the trial court stated with the jury present, "I'm going to let this in for the purpose of showing efforts made to corroborate defendant's statement but not for the truth of whether or not there were any calls made." The officer then testified the information he received from the telephone company did not show calls at the relevant time. The trial court allowed the testimony as to the telephone records as "circumstantial evidence reasonably necessary to complete the whole story of the crime charged."

Defendant contends the evidence of what the officer was told at Dee Zee's and the telephone company was hearsay and should not have been admitted. In the case of hearsay rulings, our review is for correction of errors at law because admission of hearsay evidence is prejudicial to the party not offering the evidence unless the contrary is shown. *See State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996). We review constitutional challenges de novo. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998); *State v. Mitchell*, 568 N.W.2d 493, 499 (Iowa 1997).

Article VIII of the Iowa Rules of Evidence codifies the law on hearsay. Rule 801 defines the following:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "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.

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if --

....

(2) *Admission by Party-Opponent.* The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Iowa R. Evid. 801.

Thus, a statement is hearsay if it is offered to prove the truth of the matter asserted. Statements not offered for the truth of the matter asserted do not constitute hearsay and should not be excluded on such grounds. *Ross*, 573 N.W.2d at 914; *State v. Waterbury*, 307 N.W.2d 45, 50 (Iowa 1981).

The State advances the statements were not offered to prove the truth of the matters asserted by the police officer. Rather, the State advances the statements were offered to prove the officers investigated defendant's statements as to his presence at or near the time of the murder.

The statements were admitted to show the truth of the matter asserted, that is, defendant had not been employed at Dee Zee's and no calls were made from the

Cedar Rapids telephone. We agree with defendant the statements were hearsay and should not have been admitted.

Our inquiry does not end here. Error in the admission of hearsay is presumed prejudicial unless the contrary is affirmatively established. *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992). The contrary is established if the record shows the challenged evidence did not impact on the jury's finding of guilt. *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). Prejudice will not be found where substantially the same evidence is in the record without objection. *McKettrick*, 480 N.W.2d at 60.

Defendant contends he was prejudiced by the evidence. While defendant claims the hearsay evidence attacks his credibility, there is substantial other evidence in the record that also attacks defendant's credibility. Defendant said he had never been in the Mini Cinema theater. Several witnesses placed defendant inside and outside the theater at the approximate time the victim was killed. Defendant's sandals matched sandal prints found at the theater. The security camera at the theater captured images of defendant alone with the victim in the lobby of the theater. Defendant admitted at trial he was the person shown in these images and he had been in the theater several times on the night of the crime. Defendant repeatedly said the blood on his clothing came from a cut on his hand or a bloody nose suffered by someone he met at a party. The blood was tested and matched the victim's DNA profile.

We agree these and other instances where defendant's credibility was challenged by his own inconsistent statements or other facts affirmatively establish the challenged hearsay was not prejudicial. Additionally, the evidence connecting defendant to the commission of the crime was so overwhelming we fail to find defendant prejudiced.

Defendant also maintains he was denied effective assistance of counsel. He complains of his trial attorney's failure to file a motion to suppress evidence of a statement taken after he involuntarily waived his *Miranda* rights and evidence seized after the unconstitutional inventory search of the car in which he was found. Defendant further contends his counsel was ineffective in not calling an important witness and in not seeking the sequestration of witnesses.

To succeed on this issue, defendant needs to show his trial counsel was not effective and he was prejudiced. *See Breuer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The State's case was so strong, defendant cannot show the required prejudice to succeed on this issue.

AFFIRMED.