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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed February 23, 1983
Plaintiff-Appellee,	)	
vs.	)	2-366 66510
ALBERT ANGELO CLAUSI,	)	
Defendant-Appellant.	)	

Appeal from Polk District Court, Luther T. Glanton, Jr., Judge.

Defendant appeals from his conviction for willful injury in violation of Iowa Code section 708.4. AFFIRMED.

Francis Hoyt, Jr., Appellate Defender, and Scott Rosenberg, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Johnson, JJ.

OXBERGER, C.J.

Defendant Albert Angelo Clausi appeals from his conviction for willful injury in violation of Iowa Code section 708.4. He asserts: (1) that the evidence was insufficient to show that the injury suffered by the victim was serious as defined by Iowa Code section 702.18; (2) that hearsay objections to the admission of certain evidence should have been sustained; and (3) that he was denied effective assistance of counsel by counsel's failure to object to certain evidence allegedly constituting hearsay and by counsel's failure to object to the introduction into evidence of an admission of a co-defendant who did not testify at trial. We affirm.

I. Sufficiency of the Evidence

The evidence showed that the victim, William Smith, was stabbed by the defendant and his two brothers during a fight at a party, which was provoked by a comment made by Debra Hainline Smith's sister and some other person. At trial, Smith described his own condition after the stabbing. In addition, the physician who treated him testified that Smith had a one-inch stab wound in the abdomen; that during surgery, it was determined that he had suffered two stab wounds internally, one in the stomach and the other in the duodenum; that these wounds were four to six inches deep; that blood, gastric juices, and alcohol had entered Smith's abdominal cavity from his stomach; and that following surgery, Smith remained in intensive care for three days.

We find that this evidence was sufficient to enable a rational fact finder to determine that Smith suffered a serious injury which created "a substantial risk of death. . . or protracted loss or impairment to the function of any bodily member or organ." Iowa Code § 702.18 (1979).

II. Hearsay

Clausi contends that a number of objections raised by his counsel at trial on the ground that the testimony was hearsay should have been sustained.

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." Fed. R. Evid. 801(c); State v. Fingert, 298 N.W.2d 249, 251 (Iowa 1980); State v. Miller, 204 N.W.2d 834, 840 (Iowa 1973).

Clausi claims that the following testimony should have been excluded:

(a) Testimony by the victim, William C. Smith, that his girl friend, Debra Hainline, told Albert Clausi that the comment that provoked Clausi "was a misunderstanding and we're not talking about him," but about Dave Alberts.

(b) Smith testified further that he told Albert Clausi that "it was a misunderstanding."

(c) On direct examination, Debra confirmed that she told Albert Clausi that she was talking about Dave Alberts, and not about Albert Clausi, and that Bill Smith told Albert Clausi that Debra "didn't mean anything."

(d) Debra testified that after Albert Clausi told Smith that he was "butting into something," Smith told Clausi that Debra was his girl friend and that he was taking her home.

(e) Debra also testified that Smith said to Albert, "Listen, she's my girl friend, and I'm in everything she's in."

(f) Debra testified that as she tried to rescue Smith from the beating he had been administered, two of his assailants began to drag him out of the van into which she was trying to pull him and told her "that I couldn't have him because they were going to kill him."

(g) She said that as Smith was being dragged into the middle of the street, someone said, "Go get the knife, go get the knife."

Statements (a) throught (f) were simply not intended to prove the truth of the statements reported to have been made by the declarants. The truth or falsity of these statements is not crucial, not material, and not relevant to the issue of Clausi's guilt or innocence. These statements were introduced, as Clausi concedes on appeal, in order to demonstrate that Clausi's attack on Smith by beating, kicking, and stabbing him was not justified. They do accomplish that purpose, not because of the truth or falsity of the statements therein, but because they reveal the intentions and states of mind of the parties concerned.

In determining whether a statement is hearsay, the crucial issue is the purpose for which it was offered into evidence. State v. Williams, 305 N.W.2d 428, 432 (Iowa 1981). Our review is limited "to abuses of discretion, and a ruling by the trial court will be upheld so long as there is one hearsay theory of admission applicable under the circumstances." Id., citing State v. Baker, 293 N.W.2d 344, 346 (Iowa 1980).

Even if these statements are considered to be hearsay, they are nevertheless admissible in order to show the state of mind or the intentions of the parties concerned. See, e.g. United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978), cert. denied, 439 U.S. 967 (1978); United States v. Calvert, 523 F.2d 895 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976); United States v. Taglione, 546 F.2d 194 (5th Cir. 1977). In addition, they are admissible under the excited utterance exception. State v. Haines, 259 N.W.2d 806 (Iowa 1977).

As for (g), it is clearly not hearsay under any possible interpretation, since it is not a statement, but a command, a performative utterance.

III. Right of Confrontation

In reliance upon Bruton v. United States, 391 U. S. 123, 88 S. Ct. 162, 20 L. Ed. 2d 476 (1968), and State v. Waterbury, 307 N.W.2d 45 (Iowa 1981), Clausi argues that his constitutional right of confrontation was violated by admission of

testimony identified as (f) and (g) in division II of this opinion. That is, he claims that under the Bruton doctrine, admission of testimony concerning his co-defendant's utterances, "You can't have him because we're going to kill him" and "Go get the knife, go get the knife," was erroneous and so prejudicial as to nullify the trial court's instruction to the jury not to hold a statement of one defendant against another. He claims that this alleged error justifies reversal. We disagree.

In Bruton the principal evidence against the defendant in his joint trial with an accomplice was testimony concerning the accomplice's oral confessions implicating himself and Bruton. On appeal, the court of appeals for the Eighth Circuit set aside the accomplice's conviction on the ground that his oral confessions should not have been received into evidence against him. Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1967). However, under a doctrine enunciated in Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278, the Court came to the anomalous conclusion that the accomplice's confession was admissible against Bruton, and affirmed his conviction. The Solicitor General conceded that without the accomplice's confession, the case against Bruton was "not strong." Bruton, 391 U. S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479.

In reversing, the Supreme Court distinguished between those cases in which the jury could and would follow the judge's instructions to disregard the inadmissible evidence, and those in which it could not or would not. The latter situation was present in cases like Bruton, the Court said, "Where the powerfully incriminating extra-judicial statements of a co-defendant... are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect...." Id., 391 U.S. 135-36, 88 S. Ct. 1627-28, 20 L. Ed. 2d at 485, emphasis added. The unreliability of such evidence is compounded where the accomplice's statements cannot be tested by cross-examination. Id.

Since Bruton, numerous cases have arisen in which the courts have found that the admission of testimony concerning extrajudicial confessions or statements of an accomplice was harmless error because the statements erroneously admitted were merely cumulative, since other clearly admissible evidence introduced at the trial amply supported the conviction. See especially Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), where the Court held that although the Bruton rule applied, the case against the defendant without the inadmissible testimony "was so overwhelming that this violation of Bruton was harmless beyond a reasonable doubt...." 395 U.S. at 254, 89 S. Ct. at 1728, 23 L. Ed. 2d at 287.

In other cases, the courts have found that admission of a co-defendant's inculpatory confession or statement was not erroneous at all under Bruton because the statements were not "powerfully incriminating" or "devastating to the defendant," since they formed no vital part of the prosecution's case against the defendant. See e.g., United States v. Martinez, 573 F. 2d 529 (8th Cir. 1979); McLaughlin v. Vinzant, 522 F. 2d 448 (1st Cir. 1975), cert. denied, 423 U.S. 1037, 96 S. Ct.573, 46 L. Ed. 2d 412, reh. denied, 423 U.S. 1092, 96 S. Ct. 890, 47 L. Ed. 2d 105 (1976)(admission of accessories' statement under the spontaneous utterance exception to the hearsay rule by declarant who was not available for cross-examination does not contravene the policy embodied in the confrontation clause); United States v. Glasser, 443 F. 2d 994, 999 (2d Cir. 1971) cert. denied, 404 U.S. 854, 92 S. Ct. 96, 30 L. Ed. 2d 95 (1971)(extrajudicial statements that are spontaneous and against the declarant's penal interests are sufficiently reliable that cross-examination would not be likely to weaken significantly the effect of the statements in the jury's mind); Slawek v. United States, 413 F. 2d 957, 960-64 (8th Cir. 1969)(the statement does not rise to the "substantial risk" and "powerfully incriminating extrajudicial statement of a co-defendant" required by Bruton).

As we have already indicated in division II, we find that the utterance, "Go get the knife, go get the knife," is not a statement but a command. It has no truth value, and the person who uttered it need not be cross-examined, since in uttering it, he neither accused anyone nor stated any fact which might be subject to elucidation by cross-examination. The only possible question concerning it was whether the witness who testified to having heard it was being truthful, and that witness was subject to cross-examination.

As for the statement, "You can't have him because we're going to kill him," we find that it is neither a confession nor an admission, but that it was both a spontaneous declaration of the declarant's intentions and an excited utterance. As such, it was clearly admissible.

Moreover, neither of these utterances was powerfully incriminating or devastating to the defendant. In view of the substantial evidence of Clausi's assault upon Smith, the jury could have found that he was guilty without these extrajudicial utterances.

We find, therefore, that admission of this testimony did not violate the principle laid down in Bruton and that there was no violation of Clausi's rights under the confrontation clause.

IV. Ineffective Assistance of Counsel

Clausi has not demonstrated that his attorney at trial acted in any way inconsistently with what one would expect of a normally competent attorney. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Nor has he demonstrated that he was prejudiced by any act or omission of his counsel. Id. We therefore find that he was not denied effective assistance of counsel.

Inasmuch as Clausi has failed to demonstrate there was any prejudicial error at his trial, we affirm.

AFFIRMED.