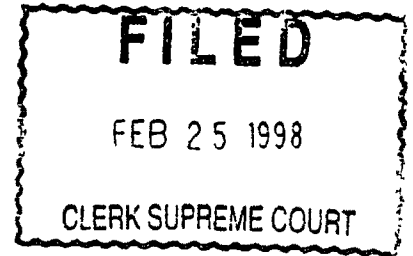


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IN THE COURT OF APPEALS OF IOWA

No. 7-760 / 97-0301
Filed February 25, 1998



STATE OF IOWA,
Appellee,

vs.

HENRY GIOVANI CLAROS-REYES,
Appellant.

Appeal from the Iowa District Court for Greene County, Joel E. Swanson,
Judge.

Defendant appeals his convictions for assault with intent to inflict serious
injury, terrorism with intent, going armed with intent, and carrying weapons.
AFFIRMED.

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney
General, and Nicola J. Martino, County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

STREIT, J.

I. Background & Facts.

On May 28, 1996, two to five shots were fired from a pistol aimed at Tim Pittman and Vicki Mitchell in a residential area of Rippey, Iowa. The bullets struck a fence and garage. Defendant Henry Giovanni Claros-Reyes was charged with assault with intent to inflict serious injury in violation of Iowa Code sections 708.1 and 708.2(1), terrorism with intent in violation of Iowa Code section 708.6, going armed with intent in violation of Iowa Code section 708.8, and carrying weapons in violation of Iowa Code section 724.4.

The State filed a motion in limine seeking to exclude from evidence the criminal records of the victim Pittman and other State witnesses. The court granted the motion in limine ruling the prejudicial effect of the criminal records outweighed the probative value of the evidence. Counsel for Claros-Reyes said he would make an offer of proof regarding the criminal records later in the trial. No offer of proof was ever made.

At trial, Pittman testified he was visiting his brother's home in Rippey when he heard an engine in the alley behind the house being revved repeatedly. He and Mitchell hastened to the rear of the house and saw two automobiles in the alley—one was dark blue or grey and the other was white. As soon as Pittman came out, the white car drove out of the alley. The dark car then motored past the front of the

house. Pittman recognized three people in the dark car. While driving past, a man inside the car, identified as Claros-Reyes, fired shots at Pittman and Mitchell.

A jury found Claros-Reyes guilty of two counts of assault with intent to inflict serious injury, terrorism with intent, going armed with intent, and carrying weapons. Claros-Reyes appeals.

II. Instruction to Jury on Aiding & Abetting.

Defendant contends the trial court erred by instructing the jury, over objection, it could find the defendant guilty of attempted murder on an aiding and abetting theory.¹ Our review of the submission of a jury instruction is for corrections of errors of law. Iowa R. App. P. 4; *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Instructions submitted to the jury must be supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). Substantial evidence means there is evidence on the record which could convince a reasonable jury the defendant is guilty

¹ The court submitted the following instruction to the jury:

All persons involved in the commission of a crime, whether they directly commit the crime of knowingly “aid and abet” its commission, shall be treated in the same way.

“Aid and abet” means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the Defendant’s earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not “aiding and abetting.” Likewise, mere knowledge of the crime is not enough to prove “aiding and abetting.”

The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person’s guilt.

If you find the State has proved the Defendant directly committed the crime, or knowingly “aided and abetted” other person(s) in the commission of the crime, then the Defendant is guilty of the crime charged.

beyond a reasonable doubt. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). Even if the trial court did err in submitting an instruction, we will reverse only when the error has caused prejudice. *Coker v. Abell-Howe, Co.*, 491 N.W.2d 143, 143 (Iowa 1992).

We first assess whether there was substantial evidence supporting the instruction. A person cannot aid and abet *himself* in the commission of a crime. *State v. Mays*, 204 N.W.2d 862, 864 (Iowa 1973). To convict a person on an aiding and abetting theory, the State must produce substantial evidence the individual “assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission.” *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa 1995). Knowledge of the criminal act at or before its commission is essential. *Id.* Knowledge can be inferred. *Id.* Knowledge of the crime and proximity to the scene, circumstantial evidence such as companionship, combined with conduct before and after the crime is committed, is sufficient to infer a defendant’s participation. *Id.*

Defendant relies on *Mays* to support his contention the jury instruction was improperly submitted. In *Mays*, the State conceded defendant was the only person who could possibly have been convicted of the crime. *Mays* was not a case of joint criminal conduct. For that reason, the aiding and abetting instruction was improper. There is substantial evidence of joint criminal conduct in this case. Defendant is not the only person who acted criminally.

The evidence at trial showed Claros-Reyes was either in the blue car, from which the shots were fired, or in the white car, which accompanied the blue car to the scene of the crime. If the jury was not convinced defendant was in the blue car firing the shots, there was substantial evidence to support he was an aider and abettor of the shooter.

There were three or more people in both the blue and white cars. Claros-Reyes was either a passenger in the blue car or the driver of the white car. Even if he did not fire the shots from the blue car, he acted in concert with his cohorts in attempting to murder Pittman and Mitchell. Even if defendant was driving the white car, as he asserts, the jury could properly infer he aided and abetted the attempted murder by accompanying the blue car to the scene and encouraging the crime. The State sought to have the aiding and abetting instruction submitted to the jury as an alternate theory of guilt in case Claros-Reyes convinced the jury he was not the shooter. Because there is substantial evidence which supports defendant, if not the principal of the crime, aided and abetted the crime, the court did not err in submitting the aiding and abetting instruction to the jury.

III. Admissibility of Prior Crimes Under Rule 609.

Claros-Reyes argues the trial court erred in not allowing evidence of the State's witnesses' past crimes into evidence under Iowa Rule of Evidence 609.² Although

² Rule 609 states:

(a) General Rule. For the purpose of attacking the credibility of a witness:

(1) Evidence that a witness other than the accused has been convicted of a crime shall

defense counsel represented to the court that Pittman and other State witnesses had criminal records, there was never an offer of proof made on the criminal records.

We review admissibility of evidence issues for abuse of discretion and reverse the district court's rulings on admissibility of evidence only when there is a clear abuse of discretion. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). It is well settled that failure to make an offer of proof of excluded testimony leaves nothing for review. *State v. Johnson*, 312 N.W.2d 144, 147 (Iowa App. 1981). The rationale behind the rule is that an appellate court cannot predicate error upon speculation as to what the excluded evidence would show. *Id.* Because the defendant failed to make an offer of proof, he failed to preserve this issue for review.

be admitted, *subject to rule 403*, if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted, and *evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused*; and

(2) Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Looking at the record before us, we can only speculate as to whether the evidence referred to by defense counsel exists and, if so, whether it is admissible under a Rule 609 analysis. *See State v. Langley*, 265 N.W.2d 718, 720-722 (Iowa 1978). However, whether the criminal records should have been admitted under Rule 609 should be considered in the context of the defendant's ineffective assistance of counsel claim. *See Johnson*, 534 N.W.2d at 124.

IV. Ineffective Assistance of Counsel.

Claros-Reyes argues his counsel was ineffective for not making an offer of proof regarding the criminal records. By not making an offer of proof the issue was not adequately preserved for appeal.

Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve Claros-Reyes' claim for postconviction proceedings so the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

We can only speculate based on this record as to why defendant's counsel did not make an offer of proof regarding the criminal record after expressing his intention

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to do so. Because there is an inadequate record to decide whether counsel was ineffective, this issue is preserved for postconviction proceedings.

AFFIRMED.