IN THE COURT OF APPEALS OF IOWA

3-347 / 92-0594

FILED
OCT 05 1993
CLERK SUPREME COURT
000599

STATE OF IOWA,

Appellee,

vs.

HARRIS KOLE EVANS, JR.,

Appellant.

Appeal from the Iowa District Court for Dallas County, Peter A. Keller, Judge.

The defendant appeals the judgment and sentence of the district court, following a jury trial, of two counts of first-degree murder, and one count of attempted murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; Thomas H. Miller, Assistant Attorney General; and David J. Welu, County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

000600

DONIELSON, P.J.

On July 12, 1991, several bodies were discovered in a farm house hear Adel. Bruce Orr, a friend of Jeffrey Thomas and Shari Exline, discovered Shari's body and noticed the house appeared to have been ransacked. Orr contacted the sheriff, and upon their return, they also found a child, Allen Thomas, his wounded father, Jeffrey, and the body of Melissa Maharis.

Patrick Dock testified that at approximately 2:00 a.m. one night during the summer of 1991 he received a telephone call from his nephew, Harris Evans, telling him that he had done something bad. The next day, Evans visited Dock's home and admitted being at a farmhouse in Adel where people had been shot and helping dispose of the gun in the river. Evans was taken into custody. The probable cause determination for his arrest was based on the statements he made to the Docks.

At trial, DCI agent John Quinn testified that Evans was very lighthearted at his initial interview. Quinn testified that when Evans asked to leave he showed Evans the arrest warrant. Evans asked to make a telephone call. After making several phone calls, Evans, having initially denied his being at the farmhouse, stated that he gone to the residence the Monday before the shooting. Evans later stated he was at the residence at the time of the shooting, but had not gone inside. Later still, Evans admitted he was at the farmhouse at the time of killings, but was

000601

upstairs looking for drugs when the shootings occurred. Evans stated Troy Mure shot the victims. Quinn then procured a tape recorder and conducted a recorded interview. At that time, Evans admitted being present when Mure shot the victims.

Joey Wheels, in an exchange for the State allowing him to plead guilty to reduced charges of second-degree murder and attempted murder, testified Evans told him there were some people on a farm that had some crack cocaine in their refrigerator. Wheels testified he, Troy Mure, Douglas Jones, and Evans proceeded to the farmhouse. Jones produced three handguns. Wheels testified the occupants of the house were ultimately brought into the house at gunpoint, at which time the men began searching for the drugs. Wheels said he was upstairs searching for drugs, when Jones called for him to come downstairs. Wheels testified he saw Evans shoot Jeffrey Thomas, and saw the body of another victim lying near Thomas. Wheels further testified that Mure later threw the gun into the Des Moines River.

The jury found Evans guilty as charged. Evans was sentenced to concurrent terms of life imprisonment and one twenty-five year term for attempted murder. Evans appeals.

He argues his arrest was invalid. He asserts the basis for the criminal complaint filed against him was statements he made to the Docks. Evans argues he never admitted to the Docks he had aided and abetted in the killings, only

that he had been a witness. Evans maintains, however, the State took his statements and construed them to be an admission he had aided and abetted the killings. Evans contends the complaint and the accompanying arrest warrant were unsupported by probable cause and therefore invalid.

Evans also contends the district court erred in instructing the jury on the theory of joint criminal conduct even though he was not charged with that crime in the trial information. Evans contends the district court added a new dimension to the State's case by instructing the jury the defendant could also be guilty if he was participating in a separate crime in concert with others. Evans additionally contends the district court erred in failing to submit a jury instruction on Evans' defense theory that he had withdrawn his participation in the criminal activity. Evans maintains he attempted to leave the scene before the criminal activity had commenced, but was forced to return to the scene at gunpoint by Mure.

I. **Probable cause for the arrest.**

Evans bases this portion of his appeal on fourth amendment grounds; therefore our review of this issue is de novo. State v. Harris, 490 N.W.2d 561, 562 (Iowa 1992). Probable cause depends on the unique circumstances of each case. State v. Bumpus, 459 N.W.2d 619, 624 (Iowa 1990). Something more than mere suspicion is required, but the facts "need not be so strong as to convince the

000603

officers . . . of a suspect's guilt." State v. Gregory, 327 N.W.2d 218, 220, modified, 331 N.W.2d 140, cert. denied, 464 U.S. 833, 104 S. Ct. 115, 78 L. Ed. 2d 115 (1982).

> Probable cause exists if the totality of the circumstances as viewed by a reasonable and prudent person would lead that person to believe that a crime has been or is being committed and that the arrestee committed or is committing it.

Bumpus, 459 N.W.2d at 624; see United States v. Bubis, 744 F.2d 61, 64 (8th Cir. 1984).

We find appellant's statements, related by the Docks to officers, sufficient to support the preliminary complaints used to obtain the warrant for his arrest. Appellant told the Docks "he had did something bad," "he made a mistake," "he had done something he shouldn't have," "he did something in Adel," "in a farmhouse way back in the woods," involving "two women, a man and a baby," "there was a shot upstairs and he was downstairs," and "he and the others had thrown the gun used in the incident into a river." Aiding and abetting "may be inferred from circumstantial evidence including presence, companionship and conduct before and after the offense is committed." Fryer v. State, 325 N.W.2d 400, 406 (Iowa 1982). It was not necessary for Evans to use the legal term "aided and abetted" for the DCI agents to draw that inference from his statements. Because the preliminary complaints and the arrest warrant were supported by probable cause, the trial court correctly refused to suppress the evidence obtained as a result of the arrest.

II. Jury instruction on joint criminal conduct.

Appellant asserts joint criminal conduct must be alleged in the trial information as a theory of murder before the court can give a joint criminal conduct jury instruction. We disagree. The trial court has broad discretion in instructing the jury. Bingham v. Marshall & Huschart Mach. Co., 485 N.W.2d 78, 80-81 (Iowa 1992). Jury instructions are designed to explain the law to jurors so they may correctly apply the law to the facts. Meck v. Iowa Power & Light Co., 469 N.W.2d 274, 276 (Iowa App. 1992) (citing State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978)). "When reviewing the trial court's instructions, we must view them as a whole and not on a piecemeal basis." State v. Lockheart, 410 N.W.2d 688, 691 (Iowa App. 1987) (Citation omitted).

> When a crime may be committed in different ways, and the State specifies one way, the offense must be proved to have been committed in the way charged. Where there is a variance between the crime charged and the proof at trial, we will require a new trial if a substantial right of the defendant is prejudiced. A variance between the information and the proof is prejudicial if the defendant is not fairly notified of the charges against him so that he may prepare to defend.

State v. Willett, 305 N.W.2d 454, 457 (Iowa 1981) (Citations omitted).

The trial information charged appellant with violations of Iowa Code sections 707.1 and 707.2 in that appellant "did commit murder in the first degree." Iowa Code section 707.2 defines murder in the first degree and reads in pertinent part:

000605

> A person commits murder in the first degree when a person commits murder under any of the following circumstances:
> 1. The person willfully, deliberately, and with premeditation kills another person.
> 2. The person kills another person while participating in a forcible felony.

Iowa Code § 707.2 (1991). The State did not specify in the trial information which way appellant committed murder in the first degree. Paragraph two describes what is termed the felony murder rule. "Under felony murder it is only required that the State prove defendant was participating in the underlying felony." State v. Phams, 342 N.W.2d 792, 795 (Iowa 1983) (Citations omitted). Iowa Code section 702.11 defines robbery and first degree burglary as forcible felonies. By appellant's own statements to his aunt and uncle and to DCI agent Quinn, and by other testimony at trial, it is clear appellant participated in the underlying forcible felony.

We find no variance between the trial information and the proof offered at trial. We also find the trial information gave appellant sufficient notice of the charges against him that he could prepare a defense. The jury instructions, taken together, correctly explain the law to the jury. We affirm the trial court's choice of jury instructions.

III. Jury instruction on a theory of defense.

Appellant requested language in a jury instruction on participation in a crime that addressed terminating

000603

participation:

> [A person is participating in a crime] unless the person terminates his participation in the crime. Termination occurs when the person notifies either directly or implicitly the other party or parties of his intention to withdraw from the commission of the crime.

We find no support for such a theory of defense in Iowa statutory or case law, nor does appellant cite any. He does cite to 2 W. LaFave and Scott, Substantive Criminal Law, section 6.8(d) (1986), but the language suggested is much broader than the discussion in the treatise. Nor does the evidence at trial constitute termination as described by the treatise.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. W. T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord Borough v. Minneapolis & St. L. R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. See Borough, 191 Iowa at 1223, 184 N.W. at 323; see also Miller, 246 N.W.2d at 301. Appellant's proposed instruction does not explain applicable Iowa law and is not supported by substantial evidence. Therefore the court did

000607

not err in refusing to give the proposed instruction to the jury.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent.

The defendant has contended the trial court erred in instructing on joint criminal conduct when a theory of joint criminal conduct was not alleged in the trial information. The majority, in addressing this issue, does not seem to focus on the issue as framed by the defendant.

The fact a person can bear responsibility for a crime because he or she acts in concert with other persons is provided for under Iowa Code section 703.2 that provides:

> When two or more persons acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense . . . and his or her guilt will be the same as that of the person so acting, . . .

The defendant had no notice the State intended to hold him responsible under this section. One must be charged with the code section under which he or she is to be found guilty in order for the jury to be instructed under the theory. See State v. Willet, 305 N.W.2d 454, 457 (Iowa 1981).

There is a difference between aiding and abetting in which the person is charged, tried, and punished as a principal, see Iowa Code § 703.1, and joint criminal responsibility.

In State v. Irvin, 334 N.W.2d 312, 314 (Iowa App. 1983), the court distinguished the theory of aiding and abetting from joint criminal conduct by quoting Kermit L.

000609

Dunahoo, The New Iowa Criminal Code, 29 Drake L. Rev. 237, 287 (1979-1980):

> The aiding and abetting provision in section 703.1 thus relates to crimes which the defendant himself participated in to some degree, and which were jointly planned. A companion provision in section 703.2 of the Code relates to additional or other crimes committed by defendant's accomplices without defendant's personal participation, and without joint planning of the crimes.

The Irvin court further stated:

> The essential elements for imposing vicarious criminal liability on the basis of joint criminal conduct have been defined as:
>
> > The conditions are that he must be acting in concert with another, that he knowingly be participating in a public offense (defined at § 702.13), that a different crime be committed by another participant in furtherance of that offense, and that the commission of the other crime could reasonably have been foreseen.

Id. (quoting John Yeager & Ronald Carlson, Iowa Criminal Law and Procedure § 63 (1979) (citing W. Lafave & A. Scott, Handbook on Criminal Law § 63, 66 at 515-17 (1972)).

To allow the State to place in a jury instruction verbatim language for joint criminal conduct when it was not charged in the trial information prejudiced the defense because the defendant did not know until after the case was submitted that the State would rely on his defense and the defendant did not have an opportunity to show the jury that the crime of first-degree murder was not, in the language of Iowa Code section 703.2, what he could "reasonably expect to be done in the furtherance of the commission of the offense." Being charged as a principle, the

defendant's defense was that he did not commit the offense or aid and abet in its commission. Suddenly with the jury instruction on joint criminal conduct, he had the additional burden in defending of placing those he was allegedly acting in concert with under scrutiny to display that they acted outside what one could "reasonably expect" in committing the robbery. The defendant was prejudiced by the giving of the instruction when he was not charged on this theory of the crime. I would reverse and remand for a new trial.