

IN THE COURT OF APPEALS OF IOWA

No. 0-546 / 89-1266

FILED

NOV 29 1990

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

HAROLD TRAYWICK,

Appellant.

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Appeal from the Iowa District Court for Scott County,
Margaret Briles, Judge.

The defendant appeals his convictions, following a jury trial, for two counts of second-degree burglary. **REVERSED AND REMANDED.**

Linda Del Gallo, Acting State Appellate Defender, Shari Barron, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, William E. Davis, Scott County Attorney, James D. Hoffman, Assistant County Attorney, for plaintiff-appellee.

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

PER CURIAM

A rural resident, Richard Cavanaugh, saw a strange car in a neighbor's driveway. The driver claimed to have an overheated engine. However, Cavanaugh believed the car was suspicious; he therefore took its license number. Upon learning the neighbor's house had been burglarized, Cavanaugh reported the license number to police. Police officers later spotted the car and stopped it. Inside the car they found two persons, including Harold Traywick, and certain items later determined to be stolen. (The stolen items did not come from the home of Cavanaugh's neighbor, but from another house burglarized the same day.)

Harold Traywick was charged with two counts of second-degree burglary. A jury found him guilty of both charges. He has appealed the resulting convictions.

First, Traywick contends the district court should have suppressed all evidence resulting from the vehicle stop noted above. He argues the officers had no reasonable suspicion to justify the vehicle stop. He asserts the facts reported by rural resident Cavanaugh were entirely consistent with innocence. Traywick acknowledges his trial attorney did not move to suppress the evidence on this ground, but he argues this omission should not be held against him because it resulted from ineffective assistance of counsel.

Second, Traywick contends his trial attorney rendered ineffective assistance in a matter concerning the striking

of a jury panelist. Counsel allegedly intended to strike a certain panelist, Huebner, due to his friendship with the county attorney and an assistant county attorney. Instead, according to Traywick, counsel inadvertently struck the wrong person. Huebner remained on the jury and eventually became its foreperson. Traywick contends the attorney rendered ineffective assistance by mistakenly striking the wrong person and by failing to bring the mistake to the attention of the court at any time before sentencing.

Third, Traywick contends the district court abused its discretion by excluding his proposed evidence from the girlfriend of his alleged accomplice. First, the girlfriend proposed to testify the accomplice had called her immediately after his arrest and instructed her to dispose of three men's rings. Three men's rings were later determined not to have been recovered by the police. Second, the accomplice told her Traywick had not been with him at the time of the burglaries. The district court excluded this proposed testimony on the ground it was hearsay.

Our standard of review is on assigned errors of law. Iowa R. App. P. 4. We are bound by the trial court's findings of facts if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

We go immediately to the third argument by Traywick, as our ruling on this issue is determinative of this case on appeal. Traywick contends the trial court erred in keeping

out certain out-of-court statements made by an accomplice arrested with Traywick. Traywick was tried separately after a motion to sever was sustained.

The first out-of-court statement was made when the accomplice called his girlfriend immediately after being arrested. The accomplice allegedly instructed her to get rid of three men's rings. Apparently three men's rings had not been recovered from the burglaries.

Traywick offered this statement to show a person other than himself was responsible for the burglaries and the disposition of the stolen property. It is upon the exclusion of this statement we base our decision.

"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.

Iowa R. Evid. 801(c).

This instruction by the accomplice was not offered to show the accomplice either had control of the rings or the girlfriend got rid of the incriminating rings. Rather, it was offered by Traywick to show one other than himself had control of the whereabouts and disposition of the stolen property. This statement was not offered for the truth of the matter asserted. Thus, it was not hearsay and should have been admitted. The trial court erred by excluding this evidence.

We next examine if Traywick was prejudiced by this exclusion. "[W]e must assess whether the other evidence is

so overwhelming as to prove the error harmless beyond a reasonable doubt." State v. Sowder, 394 N.W.2d 368, 372 Iowa 1986) (citing Chapman v. California, 386 U.S. 18, 23-24, 87 S. Ct. 824, 827-28, 17 L. Ed. 2d 705, 710-11 (1967); State v. Craney, 347 N.W.2d 668, 673-76 (Iowa 1984); State v. Ware, 205 N.W.2d 700, 704-05 (Iowa 1973). In making our determination, we find the trial court's impression of the State's case against Traywick instructive.

[DEFENSE COUNSEL]: Your Honor, at this time I would renew the motion to dismiss, again based upon -- there is not any evidence which is located within the evidence presented to the Court which places the defendant within or breaking the door of either of these residences.

THE COURT: Well, it's thin, but I think it's a little more than a scintilla, so I'm going to overrule your motion, and we'll submit the issue to the jury.

Based upon this record, we cannot say Traywick was not prejudiced beyond a reasonable doubt by the trial court's exclusion of the accomplice's statement regarding the rings. We reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hayden and Sackett, JJ., concur; Schlegel, P.J., specially concurs.

SCHLEGEL, P.J. (specially concurring)

I concur in the result reached by the majority and with its conclusion that "[b]ased upon this record, we cannot say Traywick was not prejudiced beyond a reasonable doubt by the trial court's exclusion of the accomplice's statement regarding the rings." (Maj. op. at 5.) I write to clarify what I believe to be an unneeded statement in the opinion.

After discussing the hearsay statement which was excluded, and upon which the majority bases its decision, it is said:

We next examine if Traywick was prejudiced by this exclusion. "[W]e must assess whether the other evidence is so overwhelming as to prove the error harmless beyond a reasonable doubt."
[Citations.]

(Maj. op. at 4-5.) One of the cases cited by the majority for that explanation is the case of State v. Ware, 205 N.W.2d 700, 705-05 (Iowa 1973).

Reviewing the quoted statement leaves the impression that our court has adopted the rule that "if there is overwhelming evidence of the guilt of the defendant, any error that occurred as a result of the exclusion of the proffered evidence is harmless, beyond a reasonable doubt." Although I am personally given to the belief that the phrase "harmless error" is a contradiction in terms--akin to an oxymoron--its use has become more and more pronounced. It is because we must guard against its violation of rights of accused persons that I believe we should closely scrutinize its use and deny the expansion of

the doctrine. So, in this case, we should determine that the error in excluding the hearsay statement of the accomplice is prejudicial unless we are able to say that it is highly probable that its exclusion did not affect the judgment--or the jury verdict. I do not believe we can say it is highly probable that the exclusion did not affect the verdict. Consequently, its exclusion results in a reversal.

To make the determination as to whether there is overwhelming evidence of guilt in deciding whether there is prejudice places the appellate court in the position of substituting its judgment for that of the trial court jury. Determining whether there is a high probability that a particular error affected the judgment places the court in the position of determining the effect of the particular error, as a matter of law. I find this to be a more satisfactory position for our court to occupy.

As stated, I find I cannot say that it is highly probable the exclusion of the hearsay evidence did not affect the verdict and judgment. Consequently, I agree with the result reached by the majority.