

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

LESLIE RICHARD KRUSE,)

Defendant-Appellant.)

Filed September 25, 1984 173

4-245
83-943

Appeal from the Iowa District Court for Muscatine County - Linda K. Neuman and J. L. Burns, Judges.

Defendant appeals from his convictions following a jury trial for two counts of second-degree robbery. AFFIRMED.

Charles Harrington, Appellate Defender, and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

DONIELSON, J.

The defendant, Leslie Kruse, appeals from his convictions following a jury trial for two counts of second-degree robbery. He contends the trial court erred by refusing to sever the two counts for separate trials and by refusing to sever his trial from that of a codefendant. He also contends the evidence did not support the trial court's "flight instruction." Finally, he contends the evidence was insufficient to implicate him in one of the robberies or to establish that the other alleged robbery even took place. We affirm.

On February 2, 1983, Leslie Kruse and Charles Bair were in a tavern named Edward's during the early evening. While there, Kruse played pool with Erwin McCallister. Cindy Davis was bartender at the time, but she finished work sometime between 8:00 and 8:30 p.m. After Davis finished work, she, Kruse, Bair, and McCallister left Edward's, along with two other women. All six people rode in Davis's mother's car to a tavern named Herky's. Shortly after they arrived at Herky's, McCallister decided he wanted to return to Edward's tavern. Davis loaned the car to Bair and Kruse so they could give McCallister a ride.

The car stalled on the way to Edward's tavern. What happened immediately after the car stalled is subject to conflicting testimony. Kruse and Bair testified that after some efforts to start the car, McCallister started to walk to Edward's. McCallister, however, testified that he was robbed by Kruse and Bair, who hit him with their fists to get his money. McCallister did not report this to the police.

After the men left the car, Kruse and Bair walked to a nearby tavern, the Southside. Kruse testified that his father often patronized the Southside and that the two men went there to see if Kruse's father could help them start the car. Kruse walked into the bar and saw that no one but the bartender, Tammy Truesdale, was there. He picked up a pack of matches and left.

Kruse and Bair testified that after they left the Southside, they went toward Kruse's home. They testified that Kruse went into his home and that Bair waited

in Pete's Tap. After that, they returned to Herky's where Davis and her friends were waiting. Truesdale, however, testified that Bair robbed the Southside approximately 35 to 45 minutes after Kruse had been there. She stated he used what looked like a gun to aid his robbery.

When Kruse and Bair returned to Herky's, both men and Davis arranged to get a ride to the stalled car. The car started, and the three returned to Edward's. All three testified that McCallister was in Edward's when they returned. Allegedly, Kruse and Bair did not speak to McCallister, but Davis did. McCallister contradicted this. He testified that he did not see the three.

Kruse, Bair, and Davis then left Muscatine and went to Ft. Madison to see a friend of Kruse's. Davis testified that during the trip to Ft. Madison she saw Bair count a wad of money and give some of it to Kruse. She also testified Bair told her he robbed a tavern. Kruse and Bair testified Davis was asleep during the trip.

The three spent the night in Ft. Madison. The next day, instead of returning to Muscatine as they had originally planned, Kruse and Bair decided to stay in Ft. Madison. Davis had to work in Muscatine that night, so she returned alone, upset at Kruse and Bair for staying.

Both Kruse and Bair were arrested. They were charged by joint information with two counts of second-degree robbery. Count 1 alleged the robbery of McCallister; count 2 alleged the robbery of the Southside. The State accused both men as principals in the robbery of McCallister (count 1). With respect to the robbery of the bar (count 2), the State alleged that Bair had committed the robbery as a principal and that Kruse had aided and abetted him by entering the bar 30 to 45 minutes earlier to observe it.

Prior to trial Bair and Kruse filed motions to sever asking that count 1 and count 2 not be tried at the same time for either defendant, and also asking that Bair and Kruse be tried separately on count 2. The trial court overruled these motions to sever, and both men were tried on both counts at a single joint trial. Both men were found guilty of two counts of second-degree robbery.

On appeal, Kruse contends: (1) the trial court erred in refusing to grant him a trial separate from Bair's trial on count 2, the robbery; (2) the trial court erred in refusing to grant separate trials for the two counts; (3) the trial court erred by giving the jury a "flight" instruction that was not supported by the evidence; and (4) there was insufficient evidence to support his conviction on either count. Our review is limited to correcting errors of law; findings of fact are binding on this court if supported by substantial evidence. See State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980).

I. Severing Defendants. Iowa Rule of Criminal Procedure 6(4)(b) provides:

When an indictment or information jointly charges two or more defendants, those defendants may be tried jointly if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties. Otherwise, defendants shall be tried separately. When jointly tried, defendants shall be adjudged separately on each count.

This rule vests the decision of a motion to sever in the discretion of the trial court. When the trial court exercises its discretion and denies severance, the ruling will be reversed on appeal only if the defendant shows an abuse of discretion. State v. Snodgrass, 346 N.W.2d 472, 475 (Iowa 1984); State v. Belieu, 288 N.W.2d 895, 900 (Iowa 1980). An abuse of discretion is established by showing sufficient prejudice to constitute denial of a fair trial. Snodgrass, 346 N.W.2d at 475. Such prejudice exists when the defenses conflict to the point of being irreconcilable and mutually exclusive. Id. The court looks to see whether the "core" of the codefendants' defenses were . . . completely antagonistic to each other." Id. at 476 (emphasis in original).

Applying this standard, we find no abuse of discretion. The core of Kruse's defense was that he did not help anyone rob the Southside. The core of Bair's defense was that he did not rob the Southside. Neither defense inculcates the other codefendant. These defenses are easily reconciled. The defenses are not completely antagonistic to each other. Therefore, the trial court did not err in refusing to sever the trial of the defendants for count 2.

II. Severing Counts. Kruse contends that the trial court acted improperly in refusing to sever the two counts and that a new trial should be granted. In summary, he argues that the circumstances surrounding the two robberies are so different that the prejudicial effects that resulted from prosecuting the two counts together outweigh the State's interest in judicial economy. We cannot agree.

The decision of whether to sever the counts is within the discretion of the trial court. Cf. State v. Belieu, 288 N.W.2d 895, 900 (Iowa 1980). When the trial court refuses to sever a case, the ruling will be reversed on appeal only if the defendant demonstrates an abuse of discretion. Id. To establish an abuse of discretion, the defendant must show sufficient prejudice to constitute denial of a fair trial. Id.

The rule in effect at the time the case was decided provided:

When the conduct of a defendant may establish the commission of more than one public offense arising out of the same transaction or occurrence, the defendant may be prosecuted for each of such offenses. Each of such offenses may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

Iowa R. Crim. P. 6(1) (1981) (emphasis added).

Kruse argues that these two incidents are so distinct that they cannot be considered to have arisen from the same transaction or occurrence. The phrase "the same transaction or occurrence" has never been interpreted within the context of rule 6(1). However, in 1983 this rule was clarified by an amendment. It now reads:

Two or more public offenses which arose from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

Iowa R. Crim. P. 6(1) (amended 1983) (emphasis added).

In interpreting the new provision, we recognize that our ultimate goal is to ascertain and give effect to the intention of the legislature. Kohrt v. Yetter, 344 N.W.2d 245, 246 (Iowa 1984). The legislative intent can be derived from the language used in the statute and the objects sought to be accomplished. Lau v. City of Oelwein, 338 N.W.2d 202, 203 (Iowa 1983).

Applying these principles, we conclude that the amendment to rule 6(1) was intended to clarify existing law rather than to alter it. The supreme court has recognized:

Changes made by revision of a statute will not be construed as altering the law unless the legislature's intent to accomplish a change in its meaning is clear and unmistakable. An intent to make a change does not exist when the revised statute is merely susceptible to two constructions.

State v. Peterson, 327 N.W.2d 735, 738 (Iowa 1982) (quoting Emery v. Fenton, 286 N.W.2d 6, 10 (Iowa 1978)) (emphasis added). We do not find that the language of rule 6(1) "clearly and unmistakably" manifested a legislative intent to alter the standard for severance of counts. Therefore, we hold that the amended rule 6(1) and the prior rule should be interpreted in the same manner.

In view of this conclusion, we believe the two charges would appropriately be tried together. The evidence in the record is sufficient to show a common scheme or plan as required by Iowa Rule of Criminal Procedure 6(1). The term "common scheme or plan" has not been defined within the context of this rule. However, federal decisions interpreting similar language found in Federal Rule of Criminal Procedure 8(a) are instructive on this point. The Court of Appeals for the Eighth Circuit has stated that "[w]here the evidence overlaps and the offenses are similar and occurred over a relatively short period of time, joinder is usually proper." United States v. Riley, 530 F.2d 767, 770 (8th Cir. 1976); see also United States v. Jordan, 602 F.2d 171, 172 (8th Cir. 1979). Additionally, the Supreme Court of Iowa has interpreted the phrase "single plan or scheme" found in Iowa Code section 714.3 (aggregation of theft charges). In construing this phrase, the court stated:

If each taking is the result of a separate, independent impulse, each is a separate crime; but where the successive takings are all pursuant to a single, sustained, criminal impulse and in the execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may lapse between each act.

State v. Amsden, 300 N.W.2d 882, 884 (Iowa 1981).

In light of these definitions, we conclude that the evidence in the record more than adequately demonstrates the existence of a common scheme or plan. The robberies in question were closely connected in time as well as location. The record indicates that the two defendants were drinking together on the evening of February 2, 1983. At one bar they joined Erwin McCallister and Cindy Davis and went to another bar. Between 8:30 p.m. and 9:00 p.m., they then left with McCallister to take him back to the first bar and robbed him along the way. Shortly thereafter, defendant Kruse entered a third bar (the scene of the second robbery) apparently to inspect the premises because he merely picked up a book of matches and then left. At approximately 10:00 p.m., the bar was robbed by defendant Bair.

Essentially, the defendants were on a crime spree with the common purpose of stealing money. This is precisely the type of situation rule 8(1) was intended to cover. The offenses are sufficiently related to render joinder appropriate under this rule. Finding no error, we affirm the district court in this respect.

III. Flight Instruction. At the close of the trial the jury was instructed that it could consider evidence that the defendants fled from the community for the purpose of avoiding or retarding prosecution as a circumstance in determining guilt or innocence. Kruse argues that the evidence did not support submission of that instruction. We disagree.

The record shows that Kruse left Muscatine for Ft. Madison only a few hours after the robberies occurred. In State v. Webb, 309 N.W.2d 404, 409 (Iowa 1981), the court held that leaving town three days after a robbery occurred and again,

after the death of the robbery victim more than a week later, constituted a sufficient evidentiary foundation for submission of the flight instruction. Leaving town a few hours after the robbery—as Kruse did—must also be a sufficient evidentiary foundation for submission of the flight instruction.

Lack of knowledge by the defendant that he is under suspicion, or the existence of a reasonable excuse for him to leave town do not by themselves make submission of the flight instruction improper. See State v. Horstmann, 222 N.W.2d 427, 431 (Iowa 1974) (and cases cited therein). Kruse's claim that he left town because he had made prior plans to visit his friends created a question of fact. "It was for the jury to say, under all the circumstances, whether he departed because of his consciousness of guilt." State v. Bige, 195 Iowa 1342, 1348, 193 N.W. 17, 20 (1923). The trial court did not err in submitting the instruction.

IV. Insufficiency of Evidence. Kruse's final argument is that the trial court acted improperly in overruling his motion for judgment of acquittal on count 1, the McCallister robbery, as well as the robbery alleged in count 2. We cannot agree.

It is well settled that a trial court should not direct a verdict if there is substantial evidence reasonably tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). If there is evidence sufficient to raise a fair inference of guilt, then the court should not direct a verdict but should allow the case to go to the jury. Id. In determining whether the trial court acted properly, we view the evidence in a light most consistent with the verdict and in doing so, we conclude that there was ample evidence to justify presenting the issue to the jury.

McCallister testified that Bair and Kruse hit him with small rabbit punches while demanding his money. The fact that McCallister did not report the robbery does not lead to the conclusion that it did not occur. There was testimony that Bair and Kruse threatened to come after McCallister if he reported the robbery. Davis testified that McCallister told her that Bair and Kruse had robbed him and

also that she overheard Bair say that Kruse had hit McCallister over the head and that Bair then took McCallister's money.

We find that this evidence raises a fair inference of guilt and is more than suspicion, speculation, or conjecture. See State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976). Therefore, the trial court acted properly in overruling the motion for a judgment of acquittal on count 1.

We also conclude that there was sufficient evidence to establish that Kruse aided and abetted in the robbery alleged in count 2.

Aiding and abetting may be established by circumstantial evidence. State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977). The State need not prove that the aider or abettor was physically present at the specific time and place an illegal act was committed. State v. McClelland, 162 N.W.2d 457, 464 (Iowa 1968). Furthermore, participation may be inferred by presence, companionship and conduct before and after the offense is committed. State v. Marsan, 221 N.W.2d 278, 280 (Iowa 1974).

The record before this court discloses adequate evidence to support the charge against Kruse. Tammy Truesdale, the bartender at the tavern that was robbed, testified that the defendant came into the bar between 9:00 and 9:10 p.m. on the night in question. She further testified that Kruse got a book of matches, and simply turned around and left. Shortly before Kruse went into the bar, Truesdale saw someone who she later identified as Bair looking in the window at the front of the bar. Approximately 30 to 45 minutes later, the bar was robbed by Bair. Significantly, Truesdale testified that prior to the robbery it appeared that the person she saw in the window and the defendant were together.

Additionally, the testimony of Cindy Davis further evidences Kruse's involvement with the robbery. Davis was with the defendant and Bair when they left Muscatine to go to Fort Madison on February 2, 1983. She testified that Bair pulled money out of his pocket, counted it, and gave some to Kruse. She also testified that Bair told her they got the money by robbing a bar in Muscatine.

Viewing this evidence as a whole, we conclude that it raises a fair inference of guilt. Since sufficient evidence exists to support the charge under count 1 and count 2, we affirm the trial court decision in this respect.

AFFIRMED.

All judges concur, except Snell and Schlegel, JJ., who dissent.

I respectfully dissent from Division II of the majority opinion.

The trial court erred in refusing to sever the two counts under the old Iowa R. Crim. P. 6(1). The rule in effect at the time the case was decided provided that separate charges may be joined for trial if they arose out of the same transaction or occurrence. Although the phrase "same transaction or occurrence" has never been interpreted within the context of rule 6(1), cases which have considered the term stress such things as: "all offenses charged are of the same general nature, growing out of a series of transactions or connected transactions, are committed by the same offender . . ., and require the same or similar proof and punishment." City of Greenville v. Chapman, 210 S.C. 147, 160, 41 S.E.2d 865, 867 (1947); "transactions involving the same persons and the same law," State v. Gibb, 303 N.W.2d 673, 677 (Iowa 1981).

The McCallister robbery involved the two defendants roughing up a lone man and getting approximately \$30. There was no apparent injury and there was no allegation that any type of weapon was used. The tavern incident involved one man, supposedly Bair, holding up a bartender. The bartender testified that the robber appeared to have a gun. There is no evidence that Kruse was there or nearby at the time. The only similarity between the two robberies is that they both occurred on the same evening. The facts indicate that these constituted two separate actions, rather than the "same transaction or occurrence."

Because of the difference between the two incidents, the refusal to sever under the old rule was prejudicial to Kruse and he is entitled to a new trial. The purpose of the severance rule is to protect the defendant from the prejudicial inferences that arise when trying two separate offenses together.

The majority holds that it matters not whether these robberies arise from the same transaction or occurrence because they constitute parts of a common scheme or plan. To reach this conclusion, a new criminal rule that became law

after defendant was convicted is superimposed on the standard by which he was tried. I cannot accept the notion that the new rule is a mere clarification when it changes the standard from one transaction or occurrence to two transactions or occurrences with the added dimension that these are parts of a common scheme or plan. These are substantive statutory changes that directly affect a defendant's right to a fair trial.

In this case there is no evidence of a common scheme or plan.

It is not enough that the defendant committed other crimes of the same nature unless in some way each has a bearing on the other. * * *

Nowhere is there any suggestion that one crime was dependant upon or connected with any of the others. * * *

Common scheme or plan means more than the commission of two similar crimes by the same person.

State v. Wright, 191 N.W.2d 638, 641 (Iowa 1971).

Moreover, there is no evidence of a legislative intent that the new rule be applied retrospectively.

The general rule is that a statute will be given prospective application only, unless it appears the legislature clearly intended it to be applied retrospectively. An exception exists, however: when a statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively. But if the statute relates to a substantive right, it is usually only applied prospectively.

State ex rel. Leas in Interest of O'Neal, 303 N.W.2d 414, 419 (Iowa 1981). The purpose of the severance rule is to protect the defendant's right to a fair trial.

See State v. Turnbow, 67 N.M. 241, 244, 354 P.2d 533, 535-36 (1960). This right is a substantive right. The new rule should be given only a prospective effect and would not be applicable in this case.

The result of the majority's analysis is to retroactively apply a new criminal rule to defendant's case which changed the standards by which defendant was tried and convicted without any indication from the legislature that such was desired or even contemplated. Defendants Kruse and Bair, who were tried together, were

denied their right to a fair trial regarding this issue and should be granted a new trial.

Schlegel, J., joins this dissent.