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IN THE COURT OF APPEALS OF IOWA

|                      |   |                        |
|----------------------|---|------------------------|
| STATE OF IOWA,       | ) |                        |
| Appellee,            | ) | Filed January 31, 1978 |
| vs.                  | ) |                        |
| RICHARD LEON HUDSON, | ) | $\frac{339}{59775}$    |
| Appellant.           | ) |                        |

Appeal from Muscatine District Court - R. K. Stohr, Judge.

Defendant appeals his jury conviction of conspiring to obtain money by false pretenses, claiming denial of his right to confrontation and admission of hearsay evidence regarding statements made by a coconspirator. - Affirmed.

John Lyng, Hannibal, Missouri and Meardon, Sueppel, Downer & Hayes, Iowa City, for Appellant.

Richard C. Turner, Attorney General of Iowa, and David W. Newell, Muscatine County Attorney, for Appellee.

Heard by Albee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

## PER CURIAM

The defendant, Richard Leon Hudson, appeals his jury conviction of conspiracy to obtain money by false pretenses in violation of § 719.1, The Code 1975. We affirm.

Hudson claims the trial court erroneously allowed the complaining witness, Ernest Brei, to testify to his conversation with "the other guy" which set the stage for a bilking scheme in which the elderly Brei was to pay \$8500 in advance for replacement of the outdoor wiring at his home. Hudson was apprehended in an alley adjacent to a supermarket in the act of accepting the "payment" from Brei.

In support of his claim of denial of confrontation rights secured by the 6th Amendment of the federal constitution, Hudson claims the *Dutton v. Evans*, 400 U.S. 74 (1970) "indicia of reliability" test renders Brei's testimony regarding statements of "the other guy" inadmissible. He claims this testimony is self-serving, confused, and, therefore, unreliable. In support of his reading of *Dutton* he cites *United States v. Kelley*, 526 F.2d 615, 620 (8th Cir. 1975). We agree the "indicia of reliability" test of *Dutton* is to be applied to the statement of the "other guy". With the "other guy" not present before the jury, *Dutton* requires that there be sufficient indicia of reliability of the statement in order to avoid Hudson's 6th amendment confrontation clause challenge.

The record establishes Hudson himself indicated the general terms of the negotiations between Brei and "the other guy" in accordance with those of the statement: 1) the repairs were to be made, 2) the price to be paid was set, 3) the money was to be paid in advance at the grocery store. The heart of Hudson's objection to the statement regarding negotiations coming into the record is their revelation that the elderly Brei was to pay \$8500 for the replacement of his outside wiring. He claims without the \$8500 figure before the jury there is no solid indication of a bilking. He overlooks the direct indicia of reliability we find in Brei's subsequent conduct. Brei went immediately to his bank for the money, the banker's suspicions were aroused to the point he refused to allow the withdrawal and insisted the police be alerted. The totality of circumstances suggested criminal activity. As in *Kelley*, supra, we find the course of subsequent events

indicates that the "other guy's" statement was made and indicates reliably the substance of this statement. The jury was afforded a satisfactory basis for evaluating the truth of the out of court statement as required by **Dutton** and *California v. Green*, 399 U.S. 149 (1970).

Hudson claims also the prosecution failed to exert a "good faith effort" to obtain the "other guy" as a witness at trial. Such a requirement does not apply to a coconspirator. Cases cited by the defendant refer to the admission of testimony of a witness at a previous judicial proceeding received into evidence in lieu of his appearance at trial.

On Hudson's hearsay claim, we find the requisite substantial evidence of a conspiracy to invoke the coconspirator exception to the hearsay rule. Hudson was aware by his own account that he and the "other guy" had arrived at Brei's home unsolicited; he was in the basement alone at the time the "coating" occurred and he appeared at the grocery store as prearranged to collect for the work in advance. He motioned Brei, age 75, into the alley before he moved to receive payment. This scenario is so at variance with ordinary work practices, especially in view of the ultimate payment at Hudson's direction to occur in an alley, as to strongly suggest criminal activity. We find this record establishes an agreement between the "other guy" and Hudson "... to do or accomplish a criminal or unlawful act or to do a lawful act in an unlawful manner." *State v. Jennings*, 195 N.W.2d 351, 356 (Iowa 1972). The statements of the "other guy" made to Brei in furtherance of such activity were properly deemed to have been said on behalf of Hudson as well. *State v. Kidd*, 239 N.W.2d 860, 864 (Iowa 1976).

Hudson's motion for a directed verdict was denied. He claims that there was no evidence that he was other than an innocent employee throughout the entire encounter with Brei. As we have indicated we think the jury could find Hudson's conduct occurred within the active core of the criminal enterprise itself. It was he who directed the elderly Brei into the alley. As in *State v. Blyth*, 226 N.W.2d 250, 268 (Iowa 1975) although the evidence against Hudson may not compel a finding that as a matter of law he conspired, certainly it generates a jury issue as to the culpability of that conduct. Further, we note under **Jennings** evidence offered to

substantiate the claim Hudson was an accomplice need not be "entirely inconsistent with innocence." We find the whole record establishes something more than mere knowledge on Hudson's part that a crime was contemplated and something more than mere personal presence at the time and place where the bilking was to occur. Jennings, 195 N.W.2d at 357.

AFFIRMED.