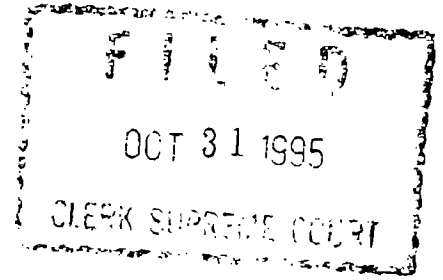


IN THE COURT OF APPEALS OF IOWA

No. 5-482 / 94-1617



STATE OF IOWA,

Appellee,

vs.

BRENDA L. WALLER,

Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Waller appeals her conviction, following a jury trial, of first-degree burglary

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, William E. Davis, County Attorney, and Kelly Raines, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

Brenda Waller appeals her conviction for the crime of burglary in the first degree, in violation of Iowa Code section 713.3 (1993). We affirm

On May 10, 1994, Kenneth Tye was approached by Brenda Waller, who asked him if he wanted a date. Tye agreed to pay Waller thirty dollars for sexual intercourse. Tye told Waller they would have to take a cab to his motel room because he did not have a car. Waller stated her brother could give them a ride. The "brother" was actually Waller's boyfriend, Timmy Tucker. Tucker drove Waller and Tye to the Riverview Inn.

When they arrived at the motel, Tucker waited in the car. Waller and Tye went to Tye's room, where they had some type of sexual contact. Tye took his wallet out of his pants' pocket and paid Waller thirty dollars. He then placed his wallet back in his pocket. After Waller left, he placed his wallet on the night stand. He went to sleep dressed only in his underwear.

Tye woke up when someone hit him in the head with a tire iron. He later identified his assailant as Tucker. Tye testified Tucker hit him several times about the head with the tire iron. Tucker then left, taking Tye's pants with him. Tye called the front desk and stated he had been beaten and robbed.

Brinadine Zimpleman, who was the desk clerk at the Riverview Inn, testified she saw Tye and Waller enter the hotel and go to the second floor, where Tye had a room. She stated Waller later left and then returned with Tucker, and they took the elevator

to the second floor. She stated she received a call from Tye's room, and while she was on the telephone talking to him, Waller and Tye got off the elevator and ran out the front door of the motel. Myrna Arrington, who was checking into the motel, also saw Waller and Tye running out of the motel. Arrington recognized Waller as an acquaintance.

Police officers stopped Waller and Tucker in their vehicle later in the evening. Tucker had blood on his hands and clothing. This blood was determined to be consistent with Tye's blood type. A tire iron was found in the car. Also, in the car were a belt and knife which had belonged to Tye.

Waller was charged with the crimes of burglary in the first degree, assault causing bodily injury, robbery in the second degree, and prostitution. At trial, Waller admitted to the crime of prostitution. A jury found her guilty of burglary in the first degree. She was acquitted of the other charges. She was sentenced to a term of imprisonment not to exceed twenty-five years on the burglary charge. Waller appeals.

I. Defendant contends the district court abused its discretion in failing to obtain clarification concerning a question sent by the jury to the district court during deliberations. The jury sent the court the following question:

If a person is guilty buy [sic] aid and abet of a first crime in a chain of events -- are they then guilty of aid & abet of all subsequent events?

The court discussed the question with counsel:

WALLER'S COUNSEL: I'm actually having difficulty trying to figure out what they are asking.

THE COURT: That's the problem. That's the other problem which is why referring them back to Instructions is the more appropriate course

PROSECUTOR: Could we ask a clarification --

THE COURT: No, we do not ask clarification questions of questions. If they have a question, they have to present it to us and I answer the question. Either I can't answer the question or the answer is -- and the answer is reread Instructions 4 and 12.

WALLER'S COUNSEL: That seems to me the only possible way under what's been presented to us. I would certainly like to be able to answer the question they want to ask if I knew what it was.

The court's answer to the jury's question was, "Members of the Jury: Please re-read Instructions 4 and 12." Defendant claims the court abused its discretion by failing to seek a clarification of the jury's question or give a meaningful answer to the question.

We believe defendant failed to preserve error on this issue. Defendant did not ask for clarification of the question. Only the State specifically asked about clarification. Defendant did not object when the court stated it would not seek a clarification but would tell the jurors to reread the instructions.

Furthermore, we do not believe the district court abused its discretion by telling the jurors to reread Instructions 4 and 12. Instruction 4 provided:

The defendants have been jointly charged. You may not consider the joint charge or joint trial as any evidence of guilt. The guilt or innocence of each defendant must be determined solely upon individual participation in the offense charged.

If you cannot reach a verdict as to each defendant, you shall reach a verdict only as to the defendant upon whom you can unanimously agree.

Instruction 12 provided:

The defendants, Timmy Joe Tucker and Brenda L. Waller have been charged with three counts. This is just a method for bringing each

of the charges to trial. If you find the defendant, Timmy Joe Tucker, innocent or guilty on any one of the three counts, you may not conclude guilt or innocence on the others. If you find the defendant, Brenda L. Waller, innocent or guilty on any one of the three counts, you may not conclude guilt or innocence on the others. The defendant's innocence or guilt must be determined separately on each count.

We believe these instructions adequately answered the jury's question of whether a finding a person had aided and abetted in one crime should be used to find a person had aided and abetted in another crime. These instructions correctly informed the jurors each crime should be considered separately

II. Defendant claims the State failed to prove beyond a reasonable doubt she committed the crime of burglary in the first degree. She believes there is insufficient evidence to show she aided and abetted Tucker in the burglary.

When a criminal defendant challenges the sufficiency of evidence to support a conviction, we review all the evidence in the record in a light most favorable to the State. *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We must uphold the conviction if there is substantial evidence in the record to support it. *State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980).

One cannot be convicted of a crime upon a theory of aiding and abetting unless there is substantial evidence to show he or she 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. Lott*, 255 N.W.2d 105,

107 (Iowa 1977). Neither knowledge nor proximity to the scene alone is enough to prove aiding and abetting. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). However, these factors in combination with circumstantial evidence, such as presence, companionship, and conduct before and after the offense is committed, may be enough from which to infer a defendant's participation in the crime. *Id.*

We determine there was sufficient evidence in the record to show Waller aided and abetted Tucker in the crime of burglary. Waller came back to the Riverside Inn with Tucker, who had a tire iron with him, and went with him to the second floor. Waller knew Tye's room number. When Waller had been in Tye's room previously, Tye had placed his wallet in his pants pocket. Thus, it is significant Tucker took Tye's pants when he left the room. These factors raise the inference Waller informed Tucker of Tye's room number and the location of his wallet. Waller and Tucker ran from the scene of the crime together. We conclude there is sufficient evidence to support defendant's conviction.

We affirm defendant's conviction for the crime of burglary in the first degree. Costs of this appeal are assessed to defendant.

AFFIRMED.