

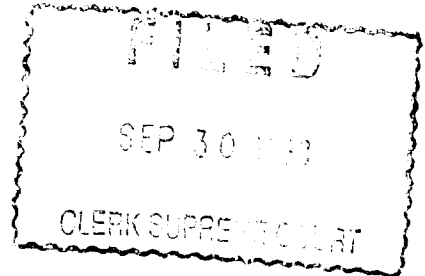
IN THE COURT OF APPEALS OF IOWA

No. 8-321 / 97-266

STATE OF IOWA,
Appellee,

vs.

RODNEY L. BORUSHASKI,
Appellant.



Appeal from the Iowa District Court for Polk County, Richard G. Blane, Judge.

On appeal from two convictions for first-degree murder, the defendant, Rodney L. Borushaski, argues the district court erred in (1) finding substantial evidence supported the submission of a felony murder instruction, and (2) refusing to permit a defense witness to testify about a co-defendant's statements. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, John Sarcone, County Attorney, and Frank Severino and Melodee Hanes, Assistant County Attorneys, for appellee.

Heard by Cady, C.J., and Streit and Vogel, JJ.

VOGEL, J.

Rodney Borushaski appeals two convictions for first-degree murder, contending the district court erred in submitting a felony murder instruction and in refusing to permit a defense witness to testify about a co-defendant's statements. We find that substantial evidence supported the submission of a felony murder instruction, and that Rodney suffered no prejudice from the exclusion of the statements. We therefore affirm.

Background facts. Bob and Marilyn Blewer, Missouri residents, owned a funnel cake stand which they operated at various fairs and festivals in several states. Their children, Jamie, Beau and Jada, also worked in the family business during the summers. Jamie, the eldest Blewer child, married Rodney Borushaski in 1991. The couple lived with their two children in a mobile home on the Blewer property. During the course of their marriage, the Blewers helped the Borushaskis financially and also provided child care. Despite this assistance, the Borushaskis continued to have financial troubles and eventually filed for bankruptcy in 1995.

In August of 1996, Bob, Marilyn, Beau and Jada arrived in Des Moines to set up their stand at the Iowa State Fair. Rodney was expected to arrive sometime before August 12 to help run the stand after Beau and Jada returned to Missouri for the start of the school year. However, on August 9, 1996, Jeremy Sneed showed up at the Fair and told the Blewers that Rodney had sent him in his stead. Sneed had been

introduced to the family through Rodney and had previously worked at the Blewers' stand at a Davenport fair.

On the morning of August 12, Beau and Jada opened the stand. When their parents did not arrive to relieve them as expected, Beau and Jada attempted to reach them several times by radio without success. Beau eventually left the stand to check the bus in which the family lived during the Fair. When he reached the bus, Beau observed that the door was slightly ajar and a packet of money was lying on the steps to the bus. Upon entering, Beau found his parents lying in the aisle. When he discovered they were unresponsive, Beau ran for help.

Investigators found that Bob and Marilyn Blewer had been bound with clothes line and duct tape and each shot in the head. Investigators also discovered a twenty-two-caliber handgun on a chair and a packet of money near the chair. It was quickly noted that Jerimy Sneed was missing, along with Beau's pickup truck. The truck was later found abandoned at a gas station in southeast Des Moines.

In the late afternoon of August 12, Sneed arrived by taxi at the home of Bill Cox, a mutual acquaintance of Sneed and Rodney. Cox lived on ten acres in a rural area approximately ten miles from Odessa, Missouri. At trial, Cox testified that the first thing Sneed did upon arrival was to ask him if Rodney had called. Sneed then asked Cox to hold a packet of money for him and told him it was from another mutual friend, Tim Headen. Cox counted four thousand dollars in the packet and put it in a file cabinet. Sneed stayed with the Cox family that night.

Rodney arrived in Des Moines on the evening of the 12th, where he was informed of the Blewer's deaths and interviewed by DCI investigators for information about Sneed. Rodney told investigators that he thought Jerimy's last name was Sneed, but did not know his whereabouts. Later that evening, after receiving a message from Jamie, Rodney called the Cox residence and spoke to Sneed.

The next morning Rodney left the Fair to return home. However, Rodney first drove to Odessa, Missouri, where he stopped and called Bill Cox. He asked Cox to meet him at the McDonald's in Odessa, where he informed Cox of the Blewers' murder. Cox told Rodney that Sneed was still at his home, and the two proceeded to the home. Upon arrival, Rodney spoke to Sneed. Rodney then asked Cox if there was a bus station nearby and if he could borrow Cox's car. Rodney got into the car with Sneed and later returned to Cox's alone. Although Rodney testified that Sneed had threatened him with a gun and forced him to drive him away from the Cox's, Rodney made no mention of this to Bill Cox. Before leaving for home, Rodney gave Cox \$200 for his trouble. When later asked why it took him so long to drive from Des Moines to his home in Missouri, Rodney told investigators that he had taken a wrong turn and gotten lost in Kansas City.

Rodney was interviewed by the police several times during which he made numerous statements, adding new details, corrections and explanations on each occasion. On August 22, 1996, Rodney was arrested. The State filed a trial information charging both Rodney and Sneed with two counts of murder in the first

degree in the deaths of Bob and Marilyn Blewer. After a jury trial in January of 1997, Rodney was convicted and sentenced to life without parole. Rodney appeals.

Substantial evidence for felony murder instruction. The jury was instructed that they could find Rodney guilty of murder by either of two ways; (1) that Rodney acted with Sneed to intentionally kill the Blewers, or (2) that he acted with Sneed in robbing the Blewers and the murders were incident to the robbery. Rodney contends that there was not substantial evidence to support the submission of the latter, the felony murder instructions, as an alternate means of committing murder in the first degree.

We review substantial evidence claims on error. Iowa R. App. P. 4; *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). Instructions can be submitted to the jury only when substantial evidence from some source appears in the record. *See State v. Lucas*, 368 N.W.2d 124, 127 (Iowa 1985). Where a defendant challenges an instruction on the grounds that it included alternative methods for the commission of an offense which were unsupported by the evidence, the evidence must be viewed in a light most favorable to the State. *See State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996).

At the conclusion of trial, the jury was instructed with regard to first degree murder as follows:¹

¹ The jury was similarly instructed with regard to the murder of Marilyn Blewer.

The State must prove all of the following elements of Murder in the First Degree of Bob Blewer as alleged in Count I of the Trial Information:

1. On or about the 12th day of August, 1996, Jerimy Sneed shot Bob Blewer.
2. Bob Blewer died as a result of being shot.
3. Jerimy Sneed acted with malice aforethought.
- 4a. Jerimy Sneed acted willfully, deliberately, premeditatedly, and with specific intent to kill Bob Blewer; or
- 4b. Jerimy Sneed killed Bob Blewer while participating in a robbery.
- 5a. *The defendant, Rodney L. Borushaski, knew that he aided and abetted Jerimy Sneed in willfully, deliberately, and with specific intent killing Bob Blewer; or*
- 5b. *The defendant, Rodney L. Borushaski, knew that he aided and abetted Jerimy Sneed in the participation of a robbery during which Bob Blewer was killed.*

(emphasis added).

Rodney argues that even when the evidence is viewed in a light most favorable to the State, there is insubstantial evidence to show that the murders were committed in the course of a robbery. We disagree.

We begin by defining both felony murder and aiding and abetting, as both were part of the jury instruction. A murder is committed during the perpetration of a felony under Iowa Code section 690.2 “if it results as an incident to the felony and is associated with the felony as one of its hazards.” *State v. Aldape*, 307 N.W.2d 32, 40 (Iowa 1981) (quoting *State v. Conner*, 241 N.W.2d 447, 464 (Iowa 1976)). In this case, the robbery is the underlying felony. In order to support a conviction based on the theory of aiding and abetting, “the record must contain substantial evidence to show that the accused assented to or lent countenance and approval to the criminal act

either by active participation in it or in some manner encouraging it prior to or at the time of its commission.” *State v. Lockheart*, 410 N.W.2d 688, 693 (Iowa App. 1987) (quoting *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984)).

Rodney argues he did not aid and abet Sneed in the robbery. At trial, several witnesses testified that Rodney expected Jamie to inherit the bulk of her parents’ estate upon their death and that he was eager to come into this inheritance. The evidence presented further established that Rodney needed money immediately. At the time of the murders, the Borushaskis had no money in their checking account and were behind on their bills. Due to his past experience, Rodney knew that it was customary for the Blewers to keep tens of thousands of dollars in cash on their bus during the fair. In addition, evidence was presented which supported that Rodney suddenly had large amounts of money immediately following the murders. When Rodney called Cox to arrange a meeting in Odessa the day after the murders, he told him to “bring the package.” When Cox arrived, Rodney asked him if he had brought “the package.” When asked at trial what “package” he thought Rodney was referring to, Cox surmised that Rodney was talking about the packet of money that Sneed had given him. Cox did not bring the packet to the meeting and later returned the packet of money to Sneed. When Rodney returned from dropping off Sneed, he gave Cox \$200. Among Rodney’s explanations as to how he suddenly came into so much cash was that Sneed had left the packet of money behind in the car when Rodney dropped him off.

Additional evidence that Rodney suddenly had a large amount of cash following the murders came from Cindy Bacon, Rodney's girlfriend. Bacon testified that a few days after the murders, Rodney gave her a teddy bear to hold for him with \$4,000 stuffed inside. Rodney provided several explanations to investigators as to how he suddenly came into so much cash; however, the evidence presented at trial supported that Rodney received some money from the robbery. *Cf. State v. Gates*, 246 Iowa 344, 352, 67 N.W.2d 579, 584 (1954) (Unexplained possession of goods which a jury could fairly and reasonably find were stolen raises an inference of defendant's guilt of crime charged).

In addition, the State presented testimony from Ronnie Rigsby, a prisoner who had been transported with Rodney after his arrest. Rigsby testified that Rodney had confided that he had sent Sneed to kill the Blewers and was upset that Sneed had run off with all the money rather than sharing the proceeds from the robbery as planned. The record supports that Rodney aided and abetted Sneed in the murder and robbery of the Blewers not only for a long-term financial gain from the expected inheritance, but also for the immediate financial gain from the robbery.

Rodney further appears to argue that the alternatives of premeditated murder and felony murder are mutually exclusive and that the felony murder rule requires that the State prove the attempt or intent to commit a robbery preceded *unplanned* murders. However, previous cases have held that such alternative methods are not repugnant or inconsistent with each other where, as here, there is evidence supporting

both the premeditated murder and underlying felony. *See State v. Wright*, 378 N.W.2d 727, 733-34 (Iowa App. 1985); *see also Aldape*, 307 N.W.2d at 40. Viewing the evidence in a light most favorable to the State, we find substantial evidence of Rodney Borushaski's aiding and abetting Sneed in the robbery and murder of the Blewers to support the court's instruction on felony murder.

Prior statements made by Sneed. At trial, the defense called Cynthia Rinehart to testify. Rinehart stated that on August 10, 1996, while attending the Iowa State Fair, she had observed and overheard an argument between a man matching the description of Jerimy Sneed and an older woman believed to be Marilyn Blewer. The State objected to Rinehart's testimony on grounds of hearsay. Defense counsel argued that the statements were not offered to prove the truth of the matter asserted and made an offer of proof by examining the witness as to the content of the proffered statements outside the presence of the jury. Rinehart stated that she had heard the male individual begging for money at first, then the conversation became more heated as the older female kept refusing, and finally the male stated: "I'll get it one way or another."²

² Defense counsel's examination of Rinehart proceeded in part as follows:

COUNSEL: What specifically was the conversation that occurred after it [the conversation] became heated?

RINEHART: His statement to her was why can't you just give me some more, and her statement to him was I'll not give you another red cent, no.

* * *

He started cussing her and saying what's the big deal, what the F is the big

Rodney argued that the statements were not hearsay as they were not offered to prove the truth of the matter asserted. Instead, he asserted the statements were offered to show that Sneed had an independent motive to rob and kill the Blewers. Rodney argued that the statements supported his defense that Sneed acted alone. The trial court, however, sustained the State's objection, ruling that the statements were inadmissible hearsay.

We review the trial court's rulings on admissibility of evidence for abuse of discretion. *See State v. Kone*, 562 N.W.2d 637, 638 (Iowa App. 1997). In order to show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976); *see also State v. Summage*, 532 N.W.2d 485, 487 (Iowa App. 1995). However, even when the ruling is erroneous, reversal is not required when no prejudice results. *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982).

On appeal, Rodney reasserts his contention that the statements were not offered to prove the truth of the matter asserted and therefore do not come within the definition of hearsay. We agree. Hearsay is a statement, other than one made by the

deal, and she told him that's all you're getting, I'm not giving you any more. And it just kept -- that exchange kept going back and forth. She kept saying that like two more times, and he kept saying what's the big deal. And then following that the last two statements I heard was her saying you've got all you're going to get, and he replied you know I'll get it one way or another. And then the last thing I heard her say was get the hell--get your ass out here now, and he told her F-you, and that's when he saw me.

declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 801(c). Here, the statements were not offered to prove that the Blewers owed Sneed money; instead, they were offered as evidence of the strained relationship between Sneed and the Blewers and to show Sneed's motive to commit the murders and robbery.

Having found that the statements were erroneously excluded at trial, we examine the record to determine whether Rodney was prejudiced by the omission. In addition to the evidence discussed above, including Rodney's confession to Ronnie Rigsby, the State presented four witnesses who testified to Rodney's desire to have the Blewers killed and to his planning of the murders. Tim Headen, a friend of Rodney's, testified that prior to ever having met Sneed, Rodney told him that he wanted the Blewers murdered. He specifically told Headen that he wanted them bound, gagged, and shot. Headen testified that he refused to participate in the scheme, and Rodney later told him that Sneed was going to execute the murders. Following the Davenport fair, at which Sneed first worked in the Blewers' stand, Headen overheard Rodney telling Sneed that he was angry that Sneed hadn't committed the murders in Davenport as planned.

Deanna Roberts, Headen's girlfriend, testified that on one occasion, Rodney had made comments about how easy it would be to kill the Blewers, take the money from their bus safe, and also receive "settlement money." Another acquaintance of Rodney's, Curtis Garrison, testified that prior to the murders, Rodney had told him

that the Blewers “needed to be destroyed, they were going to die, it was just a matter of time.” Garrison further testified that Rodney told him that he couldn’t wait for the Blewers to be dead and asked him if he would be interested in “doing the job” or if he knew someone who would. Garrison’s wife, Tracy, also testified that she had heard Rodney state on an estimated ten occasions that he wished the Blewers were dead and would be glad when they were gone.

Cindy Bacon testified that she and Rodney had an affair in the summer of 1993 and had resumed seeing each other just prior to the murders. Bacon testified that although she had spoken to Rodney twice after the murders, he did not inform her of the murders until he met with her and gave her the teddy bear stuffed with money. He also told her on this occasion that had they stayed together “there would be two less people dead and one less baby born.”³ Finally, there was substantial testimony with regard to the strained relationship between Rodney and the Blewers, and evidence that Rodney resented the Blewers because he felt they favored Beau and Jada over Jamie, and was jealous of the substantial gifts, including vehicles, that Jada and Beau received from their parents. Several witnesses testified that Borushaski spoke often about how well off he and his family would be if the Blewers were dead and he and Jamie would inherit the bulk of the Blewers’ estate. One witness at trial testified that Rodney was under the impression that the Blewers’ estate was worth several million dollars.

³ Bacon explained that after her relationship ended with Borushaski, he continued his relationship with Jamie and fathered another child.

There was overwhelming evidence presented at trial to support that Rodney planned the Blewers' murder and robbery. In light of this and other evidence presented at trial, we do not find that Rodney suffered prejudice from the omission of Rinehart's testimony. We therefore affirm the conviction and sentence of Rodney Borushaski.

AFFIRMED.