

IN THE COURT OF APPEALS OF IOWA

No. 8-459 / 97-1100
Filed January 27, 1999

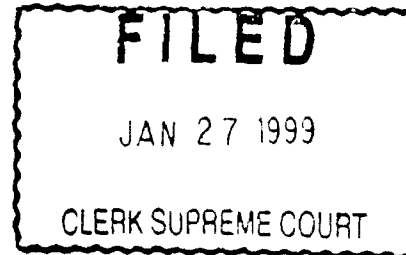
STATE OF IOWA,

Plaintiff-Appellee,

vs.

COREY DEWITT,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

Corey Dewitt appeals from his convictions, following a jury trial, for
first-degree murder and first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher A. Cooklin,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, John P. Sarcone, County Attorney, and Daniel Voogt and Jeffrey Noble,
Assistant County Attorneys, for appellee.

Heard by Streit, P.J., Mahan, J., and Habhab, S.J., but decided by Sackett, C.J.,
and Huitink, Streit, Vogel, Mahan, and Zimmer, JJ.

MAHAN, J.

Defendant Corey Dewitt appeals from his convictions, following a jury trial, for first-degree murder and first-degree robbery. Dewitt contends the district court erred in failing to admit into evidence a statement against interest exculpating him. We affirm.

Michael Brown began buying crack cocaine in the Oakridge area of Des Moines in October of 1996. In the early afternoon of December 20, 1996, Michael drove to the area to purchase some crack. Upon arrival, he was observed by teenagers Dimayne Pickens and Duriel Browne, who were sitting in Browne's car in the parking lot. Pickens got out of the car and approached Michael. Michael stated he wanted "a hundred." Pickens then proceeded to sell him \$100 worth of gank.¹ Pickens then returned to Browne's car.

Michael drove a short distance, stopped, and returned to Browne's car. Pickens got out and ran away. Michael told Browne, "Man, that dude in your car just ganked me for a hundred bucks." Michael then noticed several people standing in the parking lot. He announced loudly to everyone, "Somebody replace it because I've got \$50 whoever got some real stuff." The two cars were then approached by Corey Dewitt and Deangelo Coleman. Dewitt stood near the driver's door and Coleman stood toward the rear of Michael's vehicle. Dewitt chatted briefly with Browne, who then drove off. That left only Dewitt and Coleman in the vicinity of Michael's car.

¹ Gank is fake crack cocaine.

A short time later, Michael was observed by independent witnesses driving erratically toward the emergency room of Methodist Hospital. It appeared he was trying to close the front passenger door. Michael arrived at the hospital with a bullet wound to his right arm and right lung.² During treatment, a nurse testified Michael stated, "I opened the door" and "he" or "they shot me." Michael was pronounced dead shortly thereafter. The specific cause of death was loss of blood from a gunshot wound to the right lung.

Shortly after the shooting, Pickens went to an apartment where he observed both Dewitt and Coleman. Pickens testified to the events which then took place:

Q. What happened at Ursula's place when you were there? A. Told him what he did.

Q. Who did? A. Corey Dewitt.

Q. What did he tell you? A. He said that he shot -- that he shot him and I said --

Q. He told you what? A. He shot that dude.

Q. And tell us to the best of your ability what it was that he said to you exactly. A. He said -- he said that -- I think he said he shot him for me and I said -- I said, "You didn't shoot him for me because I already ran."

Q. Okay. He said he shot him for you? A. Yeah.

Q. Meaning he shot him for you? A. Yeah.

Q. And you said what? A. I said, "You didn't shoot him for me because I was already gone." I already ran.

Q. And what else did you say, or what else did he say? A. I can't remember.

Q. Did he tell you why he shot the man? A. He said that he shot him for me.

Q. Other than shooting him for you, did he say anything about what had happened at the car or why he shot him? A. He tried to rob him.

² The record indicates the bullet went through his right arm before entering his lung.

Dewitt then showed Pickens a chrome semi-automatic .22 caliber pistol and stated it was the gun he had used.³ Pickens later advised police Dewitt was the shooter.

The next day several people once again congregated at the apartment. Rosalind Scoggins asked, "Who knows who shot that dude?" Dewitt responded, "White people⁴ got B.J. incarcerated,⁵ so it was white people that got to go."

Approximately two weeks later, on January 2, 1997, Coleman was shot and injured. Police found a .22 caliber revolver in his pocket. Ballistic tests on the bullets recovered from Michael established this gun had fired the fatal shots. Pickens testified Dewitt stated to him, "I think it's the one I shot the dude with."

I. STANDARD OF REVIEW. Review of the admissibility of evidence is for abuse of discretion. *State v. Brewer*, 247 N.W.2d 205, 214 (Iowa 1977); *State v. Miller*, 359 N.W.2d 508, 511 (Iowa App. 1984). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestian*, 515 N.W.2d 356, 358 (Iowa App. 1994).

II. DISTRICT COURT REFUSAL TO ADMIT HEARSAY STATEMENT. Duriel Browne testified that sometime after the shooting on

³ The chrome pistol was not the murder weapon.

⁴ Michael Brown was Caucasian.

⁵ Dewitt's friend, B.J. Harris, was convicted of first-degree murder prior to Michael Brown's shooting.

December 20, 1996, he was with Coleman when a police car drove down the street.⁶

Coleman took off running. The defense made an offer of proof outside the presence of the jury to explain Coleman's actions.⁷ Browne testified:

He just told me; we was all standing around in Oakridge one day and the police rolled down the street and he ran. I like, why you running for, man, like that and he was like, because *I don't want to be up here carrying this revolver that I got a body on.* (Emphasis added.)

Browne further testified the statement meant only that somebody has "been killed with that gun." Browne emphasized Coleman never told him he had shot the victim and at some point flatly denied it when asked.

The defense argued the statement was admissible as an exception to the hearsay rule as a statement against penal interest. Iowa Rule of Evidence 804(b)(3) provides:

Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

.....
Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

⁶ This alleged incident occurred before January 2, 1997, when Coleman was shot.

⁷ This offer of proof was made before any objection by the State.

Iowa R. Evid. 804(b)(3). The district court ruled Coleman was "unavailable for purposes of rule 804." However, the district court went on to rule the statement was ambiguous and did not have "sufficient reliability to be admissible." Dewitt argues the district court erred in not allowing the statement. We agree.

We accept the meaning of the statement as argued by the State, i.e., "Somebody's been killed with that gun." Having done so, we do not agree with the State the hearsay statement is far too ambiguous to qualify as a statement against interest under the rule. *United States v. Thomas*, 571 F.2d 285, 288-89 (5th Cir. 1978). We also find sufficient corroborating circumstances to meet the trustworthiness requirement.⁸ We conclude the district court should have admitted the statement into evidence and let the jury decide the weight to be given it:

[T]he corroboration requirement of 804(b)(3) is a preliminary question as to the admissibility of evidence, not an ultimate determination as to the weight to be given such evidence. The district judge does not need to be completely convinced that exculpatory statements are true prior to their admission. Such a high burden was not intended by the corroboration requirement of 804(b)(3). The district judge must find only that sufficient corroborating circumstances exist and then permit the jury to make the ultimate determination concerning the truth of the statements.

United States v. Garcia, 986 F.2d 1135, 1141 (7th Cir. 1993).

⁸ (1) Dewitt and Coleman were the last persons seen with the victim.
(2) The gun belonged to Coleman.
(3) Ballistic tests established the victim was killed with this revolver.

III. HARMLESS ERROR.

When an alleged error is not of constitutional magnitude, [T]he test of prejudice [for harmless error purposes] is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice.

When the error is of constitutional dimensions, however, the State must show beyond a reasonable doubt that the error did not result in prejudice. *See 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. Traywick, 468 N.W.2d 452, 454-55 (Iowa 1991).

An erroneous ruling must go to the heart of the case to invoke the more stringent review. *Chambers v. Mississippi*, 410 U.S. 284, 296-98, 93 S. Ct. 1038, 1046-47, 35 L. Ed. 2d 297, 309-10 (1973). The "integrity of the fact-finding process" must be called into question. *Id.* We conclude the ruling in the instant case to be of constitutional dimension requiring the more stringent review.

Dewitt argues, but the record does not support, his "theory of defense" was that Coleman was the shooter. In addition, the State tried Dewitt as either a principal *or an aider and abettor to Coleman*.⁹ Aiding and abetting was the subject of thirteen separate instructions, not including Instruction No. 30 on joint criminal conduct. Instruction No. 31 defined aiding and abetting as follows:

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- ⁹ (1) Both Dewitt and Coleman were at the car.
 - (2) Both were the last persons seen with the victim before he was shot.
 - (3) Both were seen at the apartment after the shooting.
 - (4) Dewitt made several incriminating statements.
 - (5) They were close friends and "partners" who loaned guns back and forth.

INSTRUCTION NO. 31

All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated the same way. "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."

The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.

If you find the State has proved the defendant directly committed the crime, or knowingly "aided and abetted" another person, DeAngelo Coleman, in the commission of the crime, then the defendant is guilty of the crime charged.

The crime charged requires a specific intent. Therefore, before you can find the defendant "aided and abetted" the commission of the crime, the State must prove the defendant either has such specific intent or "aided and abetted" with the knowledge the others who directly committed the crime had such specific intent. If the defendant did not have the specific intent, or knowledge the others had such specific intent, he is not guilty.

There is overwhelming evidence of aiding and abetting in this case. As in *Traywick*, the excluded statement is a "two-edged sword." *Traywick*, 468 N.W.2d at 455. Tying Coleman to the possession of the gun used in the shooting necessarily implicates Dewitt. We have previously concluded the district court should have admitted the hearsay statement. We further conclude any error on the part of the district court was harmless beyond a reasonable doubt.

AFFIRMED.

All judges concur, except Streit and Vogel, JJ., who dissent.

STREIT, J. (dissenting)

The majority holds the trial court's exclusion of Browne's testimony Coleman stated "*I don't want to be up here carrying this revolver that I got a body on*" was harmless error.¹ I respectfully dissent.

The trial court instructed the jury it could find Dewitt guilty as either a principal of the crime of first-degree murder or guilty as an aider and abettor. There is no way to know on which theory the jury relied in convicting Dewitt. If the jury relied on the principal theory, Browne's testimony indicating Coleman's statements were potentially exculpatory, and may have impacted the jury's finding of guilt. If such were the case, the trial court's error was grounds for a new trial. *See State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984)(error regarding hearsay evidence presumed prejudicial error unless the contrary is affirmatively established by showing the evidence had no impact on the jury). The fact two theories of guilt were presented, the defendant as a principal or he aided and abetted the principal, and one theory was supported by overwhelming evidence does not cure the fact that prejudicial error existed regarding the other theory of guilt. It could be argued that since the entire jury *could* have found DeWitt aided and abetted the primary shooter, it doesn't matter there was error involved in the other presentation of evidence of guilt — that DeWitt was the shooter. This ignores the well-founded principle that allows the individual

¹ Coleman's statement, although hearsay, is admissible as a statement against penal interest. Iowa R. Evid. 804(b)(3).

jurors to find guilt on any of the theories of guilt, that they have to be unanimous only on one thing — the defendant's guilt. We do not know how this jury found DeWitt guilty. If one juror voted for the guilty verdict because she thought the defendant was the shooter, the verdict has been reached without the jury considering the allowable relevant evidence. It was prejudicial error to not allow this evidence.

I would grant DeWitt's request for a new trial on the ground that the exclusion of Browne's testimony deprived DeWitt of his right to a fair trial.

Vogel, J., joins this dissent.