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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

384

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
SIMON CURTIS TUNSTALL,	)	8-415 87-501
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Woodbury County (No. 42226), Dewie J. Gaul, Judge.

Defendant appeals from the judgment entered following his convictions for first-degree murder and first-degree burglary after a jury trial. **AFFIRMED.**

Gary E. Wenell of Baron, Sar, Wenell, Lohr & Jarman, Sioux City, for defendant-appellant.

Thomas J. Miller, Attorney General, and Richard J. Bennett and Charles N. Thoman, Assistant Attorneys General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J. 385

Defendant appeals from the judgment entered following his convictions for murder in the first degree, in violation of Iowa Code sections 707.1 and 707.2(2), and burglary in the first degree, in violation of sections 713.1 and 713.3, after a jury trial. Defendant claims the trial court erred in: 1) overruling his objections to hearsay evidence; 2) refusing to allow a defendant to testify about his knowledge of prior acts of violence by the victim; 3) limiting the cross-examination of a witness; 4) allowing the State to cross-examine a codefendant from suppressed testimony; 5) its instructions to the jury; 6) admitting exhibit 22, a knife, into evidence; and 7) failing to grant his motion in arrest of judgment or, in the alternative, for a new trial.

Defendant Simon Curtis Tunstall was convicted of first-degree murder and first-degree burglary for his involvement in the shooting of Jeffrey Jones. Tunstall was a friend or acquaintance of Steven Frasier and James Simpson. Frasier and Jones were both pimps and had known each other for many years. Christine Buddi was a prostitute for Jones, and Kaylene Hopkins was a prostitute for Frasier. On August 31, 1986, Frasier, Buddi, and Hopkins went to a motel where they used cocaine and had sex. That afternoon Buddi returned to the apartment she shared with Jones. Tunstall attended church that morning

and then went to dinner. Later he gave a ride to Frasier and Simpson. They stopped at a hotel, then went to Buddi's apartment to check on her. There Frasier, Tunstall, and Jones became involved in an altercation, and Jones received fatal gunshot wounds. Tunstall claims that he was present only during the fight and that he never touched Jones. Tunstall, Frasier, and Simpson were charged and tried together.

I. The defendant contends the trial court erred in overruling the defendants' objections to hearsay evidence. Officer Smith was allowed to testify regarding his conversation with Mr. Jackson. The officer had gone to the Bel-Aire Motel in response to a radio dispatch. Jackson immediately said he had been threatened with a gun by men looking for Jones. The court allowed the testimony as an excited utterance.

It is within the trial court's discretion to determine the admissibility of the evidence. We will reverse a decision only if the trial court abused that discretion. State v. Russell, 261 N.W.2d 490, 495-96 (Iowa 1978). Hearsay is admissible as an excited utterance if the statement relates to a startling event or condition and was made while the declarant was under the stress of excitement created by the event or condition. State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981).

The trial court has discretion to determine whether a statement is an excited utterance. Id. Excited utterances "must meet a requirement of spontaneity in order to possess a circumstantial guarantee of trustworthiness for admissiblity." Bratton v. Bond, 408 N.W.2d 39, 45 (Iowa 1987) quoting with approval, State v. Stevens, 289 N.W.2d 592, 596 (Iowa 1980). The rationale behind this exception to the hearsay rule is that the declarant's statement is trustworthy because it is not the result of reflection and design; spontaneity indicates the statement is reactive to the situation and not carefully thought out. Bratton, 408 N.W.2d at 45.

To determine if a statement is spontaneous, the trial court must consider the circumstances under which the statements were made. Relevant factors include the nature of the startling event, whether the use of questions led to statements which otherwise would not have been made, the age and condition of the declarant, the subject matter of the statements used, and the lapse of time. State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986). No one factor is conclusive on whether a statements is admissible. Id.

Defense counsel's objection was based on the length of the statement being admitted, urging that entire conversations are not excited utterances. However, we find that the length of the statement is not determinative. As long as the statement is spontaneous and not reflective,

nor designed by declarant, it may still possess the circumstantial guarantee of trustworthiness necessary for admission of the evidence.

The officer testified that Jackson looked excited and upset when he arrived on the scene. Jackson had been threatened with a gun by three or four black males who were looking for the victim in this case. Jackson's statements related to this startling event and were made while under the stress of the event.

Only a short interval of time had elapsed between the threat and Jackson's statement. In Rhiner v. City of Clive, 373 N.W.2d 466, 476 (Iowa 1985), the court found shooting victim's statements admissible in part because of the short interval of time which elapsed. The injured declarant was found approximately fifteen minutes after the shooting. Statements made to the officer at that time and in the ambulance on the way to the hospital were properly admitted as excited utterances where ample evidence showed declarant to be in pain, only a short interval elapsed, and declarant testified to being scared and struggling for his life. Id.

What amount of time constitutes a short interval is dependent upon the circumstances of each case. The approximate lapse of two hours in this case is no greater than what has been upheld in previous decisions. Mateer, 383 N.W.2d at 535 (one hour); State v. Galvan, 297 N.W.2d

344, 346 (Iowa 1980) (two days); Stevens, 289 N.W.2d at 593 (about an hour); State v. Paulsen, 265 N.W.2d 581, 586 (Iowa 1978) (two hours); State v. Stafford, 237 Iowa 780, 785-87, 23 N.W.2d 832, 835-36 (1946) (fourteen hours). Certainly under the circumstances of this case, only a short interval of time expired before Jackson made his statement to the police.

The fact that some of Jackson's statements were made in response to questions by the officer is a factor which tends to negate spontaneity, but this is not conclusive either. State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981) (statements properly admitted as excited utterances even though made one-half hour after a sexual assault and in response to officer's questions). The officer testified that Jackson remained excited during the entire conversation. Jackson spoke faster and less calmly than he did at a subsequent meeting with Officer Smith. Jackson's answers were not the result of reflection, but were spontaneous reactions. The questioning did not affect the trustworthiness of his statements.

In conclusion, we find it was a reasonable exercise of discretion to find that an individual making a statement to the police within approximately two hours of being threatened with a gun by people who were out looking for someone was eliciting a spontaneous statement. The statements related to this startling event and were made

while Jackson was under the stress of the event. Therefore, we find no abuse by the trial court in admitting the officer's testimony under the excited utterance exception to the hearsay rule.

II. The defendant claims the trial court erred in its refusal to allow a codefendant, Frasier, to testify about his knowledge of prior acts of violence and aggression by the victim. The State contends that regardless of whether this evidence would have been admissible when offered, no prejudicial error has been demonstrated. We agree with the State.

Defendant argues that this testimony was necessary to Frasier's claim of self-defense. And because defendant was charged with joint criminal conduct and felony murder, it is asserted that Tunstall's case depends on Frasier's case. Therefore, defendant claims this was reversible error.

The testimony in question was about the victim's prior involvement in a shooting which resulted in the victim having shot someone and the victim himself being shot. Defendant claims this is relevant to Frasier's claim of self-defense. Whether it is or not, this testimony would have been cumulative as other evidence had been introduced on the theory of self-defense and concerning this particular shooting incident. Defendant acknowledges that the victim's mother testified that her son had spent two

years in the penitentiary as a result of the shooting. Other evidence admitted related to: prior threats of violence by the victim against Frasier and others; the victim's reputation for violence; and his beating of a prostitute and breaking of windows at Frasier's house on the night before the murder. The trial court properly exercised its discretion by excluding this evidence. Iowa R. of Evid. 403. The additional testimony would not add anything to the case. Therefore, there was no prejudice to defendant Tunstall for the exclusion of this testimony.

III. Defendant next contends the trial court erred in limiting the cross-examination of Christine Buddi which resulted in the denial of his constitutional rights of cross-examination and confrontation. Because defendant was given a sufficient opportunity to confront and cross-examine Buddi, the State argues that no reversible error is present. We agree.

When confronted with an alleged constitutional violation, we resolve the issue by making our own independent evaluation of the totality of the circumstances. State v. Johnson, 395 N.W.2d 661, 663 (Iowa App. 1986); State v. Conger, 375 N.W.2d 278, 279 (Iowa App. 1985). Our review is de novo. State v. Harlan, 301 N.W.2d 717, 718 (Iowa 1981).

The right of confrontation secures the right of effective cross-examination. State v. Davis, 269 N.W.2d

434, 438 (Iowa 1978). The test to determine whether the right of confrontation has been violated is whether under the circumstances, the fact finder has been deprived of a satisfactory basis for evaluating the truthfulness of the witness's testimony. State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981). We are convinced that the trial court was provided with a satisfactory basis for evaluating the credibility of Christine Buddi.

Defendant was allowed on cross-examination to reveal that Buddi had lied on her 1986 welfare application. This fact was used in closing argument. It also came out on the stand that she had refused to answer questions at her deposition about filing her tax returns. The court allowed inquiry as to the types of questions refused and that refusals came after consulting with her attorney. The only evidence excluded was that the refusals were based upon her privilege against self-incrimination.

Exclusion of this testimony did not prevent defense counsel from arguing that there must have been some sort of agreement between the State and the witness which allowed her to testify at trial. The witness admitted drug usage and prostitution on the stand. She admitted her refusal to answer fifty questions at the deposition. The witness was not an accomplice. Thus, the trial court could properly limit this testimony. A sufficient basis was developed for evaluation of this witness's testimony.

Therefore, based on the totality of the circumstances, we find that defendant has been afforded his constitutional right of confrontation.

IV. Defendant complains that the trial court erred by allowing the State to cross-examine codefendant Simpson from suppressed testimony. The State claims this did not deprive Tunstall of a fair trial.

The extent of cross-examination is largely discretionary with the trial court. State v. Jackson, 259 N.W.2d 796, 800 (Iowa 1977). We will review this discretion for abuse resulting in substantial harm to the complaining party. Id.

Codefendant Simpson gave an oral statement before trial pursuant to a negotiated plea agreement. The plea bargain was not accepted by the trial court and the court ordered the statement suppressed, ruling it inadmissible for any purpose in the criminal proceeding. According to the defendant, the prosecutor used this statement during cross-examination to formulate questions and by means of insinuation and innuendo, suggested the truth of the matter contrary to Simpson's negative responses.

Defendant has not shown that substantial harm resulted from this questioning. It is speculative to claim that the jury put undue weight on a few questions from a trial that lasted over two weeks. The prosecution did not draw the jury's attention to some inference it should make from

these questions. The jury was instructed not to consider as evidence any statement made by counsel and they were not to speculate that any insinuation suggested by a question is true. Generally, a jury is presumed to follow its instructions. State v. Frank, 298 N.W.2d 324, 327 (Iowa 1980). Cautionary instructions are usually sufficient to remove any danger of prejudice. See State v. Williams, 315 N.W.2d 45, 55-56 (Iowa 1982). Therefore, no prejudicial error has occurred.

V. Defendant asserts that he was deprived of a fair trial and due process of law when the trial court erred in its instructions to the jury. The State's theory of prosecution, as submitted to the jury, was that defendants were guilty of felony-murder because the victim was killed while the defendants were participating in the forcible felony of first-degree burglary. Defendant claims that the trial court failed to make clear that defendant Tunstall had to be found guilty of burglary in the first degree based upon the acts that he alone committed. In particular, he contends the court failed to clearly instruct the jury that joint criminal conduct only applied to the murder charge, resulting in the unlawful conviction of Tunstall and denial of due process of law.

The jury was instructed regarding joint criminal conduct as follows:

INSTRUCTION NO. 9

> The law provides that when two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and his guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.

(See Iowa Code § 703.2 (1987)).

The jury was also instructed on the definition of participating in a public offense as follows:

INSTRUCTION NO. 10

> The law provides that a person is participating in a public offense, during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has eluded pursuers, if any there be.

See (Iowa Code § 702.13 (1987)).

We believe the trial court correctly instructed the jury with regard to joint criminal conduct and that defendant was not deprived of due process of law. Section 703.2 makes Tunstall vicariously liable for additional other crimes committed by his accomplices without Tunstall's personal participation in them. See State v. Irvin, 334 N.W.2d 312, 315 (Iowa App. 1983). Tunstall's participation involved unlawfully entering the apartment. There is no evidence that he participated in the injury which resulted in the victim's death. However, there is sufficient evidence to find that Tunstall unlawfully

entered the apartment with the intent to commit an assault. Where alone Tunstall could have been found guilty of second-degree burglary, the theory of joint criminal conduct makes him vicariously liable for burglary in the first degree which was committed when the accomplice injured the victim and for felony murder which resulted when the victim died.

This result is consistent with State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981), in which it was proper to instruct the jury on the theory of joint criminal conduct in a homicide prosecution where the defendant participated in acts which culminated in the victim's death. The defendant in Kern prepared the lines used to tie up two people and brought the contract killer to town. These were preliminary "acts" which resulted in the victim's death. Therefore, the theory of joint criminal conduct was properly submitted to the jury.

Tunstall participated by going to the apartment to find the victim. He did not participate in the act of injuring the victim. Therefore, the theory of joint criminal conduct was properly submitted to the jury.

The defendant argues that this result deprives Tunstall of due process because the "State is attempting to use the felony murder rule to make all killings occurring during the perpetration of a felony first-degree murders . . . ." citing State v. Galloway, 275 N.W.2d 736 (Iowa 1979). The

felony murder statute was changed after the incident which led to the Galloway decision. However, the courts continue to require malice aforethought for felony murder, State v. Oliver, 341 N.W.2d 744, 747 (Iowa 1983). The jury in this case was instructed on malice aforethought. Defendant has not been denied due process through use of the felony murder statute. See Oliver, 341 N.W.2d at 747; State v. Nowlin, 244 N.W.2d 596 (Iowa 1976).

VI. An error has been alleged as a result of the trial court's admission of exhibit 22, a knife, into evidence. Defendant objected at trial to this admission based on grounds of relevancy and, even if relevant, it was more prejudicial than probative. Defendant complains that it was not sufficiently shown to be the knife defendant allegedly carried when he entered the apartment.

A weapon is properly admitted where it is shown there is a reasonable likelihood it was used in the crime. State v. Hansen, 225 N.W.2d 343, 349 (Iowa 1975). A positive identification connecting the weapon with the crime is not needed. Id. It is only necessary that it be found under circumstances affording a basis for a reasonable inference on a point in issue. State v. Johnson, 162 N.W.2d 453, 456 (Iowa 1968).

The knife was found at the murder scene by a police officer. It was unsuccessfully processed for fingerprints. A photograph of the knife was identified by

a witness who said Tunstall entered the apartment with a knife. This witness, however, thought the knife Tunstall had when he entered the apartment was larger than the actual knife, exhibit 22. This witness also said this knife was not one kept in her kitchen, even though it was found there.

A reasonable likelihood the knife was used in the crime has been shown. The trial court did not abuse its discretion in admitting this exhibit as relevant to the case.

Furthermore, it cannot be said that its admission was more prejudicial than probative because there was testimony about Tunstall carrying a knife. Tunstall denied having the knife. Defendant Frasier identified the knife as the one the victim drew and used to attack him with in the kitchen. It is the function of the jury to decide which testimony to believe and to determine what weight it is entitled to receive. State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984). Admission of this knife itself did not result in prejudice to the defendant. Therefore, no error is found.

VII. Finally, the defendant contends the trial court erred by failing to grant the defendant's motion in arrest of judgment, or, in the alternative, a new trial. This claim is based on the court's involvement in the plea bargaining process, other evidentiary errors coupled with

the overall tactical decisions used by the prosecution, and the failure to grant the motion for judgment of acquittal at the close of the State's case. For all of these reasons, defendant argues he has been denied due process of law.

First, defendant has no constitutional or statutory right to have his plea accepted. Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427, 433 (1971). A court may reject a plea in exercise of sound judicial discretion. Id. Second, we have already addressed the alleged evidentiary errors and have found no abuse by the trial court. Finally, we find no error occurred when the trial court refused to grant the motion for judgment of acquittal at the close of the State's case.

Defendant claims his success or failure was dependent upon codefendant Frasier. He asserts that if the court had granted his motion for acquittal with regard to the premeditation theory, there is a "substantial chance" defendant Tunstall would not have taken the stand nor had any witnesses testify about his activities earlier that day. The result, according to defense counsel, was critical weight being added to the prosecution's case.

Defendant's speculation does not show prejudice to his case. He has not indicated how his strategy would have been different, only that there was a chance defendant and some witnesses would not have testified. Even if this

could be shown as a certainty, he has not demonstrated how this change would have led to a different result. Therefore, if any error occurred, it was harmless.

Trial courts, which are closer to the actual trial than the appellate court, have discretion in granting or denying post trial motions based on fair trial considerations. See State v. LaDouceur, 366 N.W.2d 174, 178 (Iowa 1985). We will reverse a ruling only on a showing of an abuse of discretion. State v. Pletka, 310 N.W.2d 525, 529 (Iowa 1981). We find no abuse of discretion in the trial court's denial of the defendant's motion in arrest of judgment, or in the alternative, a new trial.

AFFIRMED.