FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 18, 1985
vs.	)	415
DARYL LOUIS HOLLINS,	)	5-449 84-1300
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County - Linda K. Neuman, Judge.

Defendant appeals a conviction of first degree murder. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Marcia Mason, Assistant Attorney General; William E. Davis, Scott County Attorney; James L. Ottesen and Virginia Barchman, Assistant County Attorneys; for plaintiff-appellee.

Heard by Snell, P.J., Schlegel, and Hayden, JJ.

Defendant appeals a conviction of first degree murder and asserts that the trial court (1) abused its discretion by denying his motion for mistrial after a prosecution witness made an allegedly prejudicial statement; (2) abused its discretion by denying his motion to exclude the allegedly prejudicial and cumulative testimony of a cell-mate concerning statements made by him; (3) erred by overruling his hearsay and lack of foundation objection to out of court statements made by an alleged co-conspirator; and (4) erred by denying his requested instruction concerning corroboration of alleged confessions made by defendant to third parties. We affirm.

Daryl Hollins, the defendant in this action, was charged by grand jury indictment with the August 18, 1983, murder of Carol Stinger.

At trial, the State presented evidence that the defendant and one B.C. Pendleton had made plans to rob the St. Louis House, a bar in Davenport, Iowa. It was during this robbery that the murder allegedly took place. In support of this theory, the State presented several witnesses who testified about certain admissions made by Hollins which would tend to implicate him.

The defendant, whose hearing is impaired, testified through the use of a signing interpreter. He claimed that he was not in the bar at the time of the robbery and murder.

At the conclusion of the trial, defendant requested an instruction on corroboration of the testimony concerning his "confessions." This request was denied and Hollins was ultimately convicted of the crime charged.

I.

During direct examination, State's witness Shari Perkins testified about a conversation she had with the defendant:

Q. Where did this conversation take place?

> A. He [defendant] came into Mr. Dog's Pool Hall and I was sitting at a video games and he stood up over me glaring at me, you know, with evil eyes, like he had something really on his mind. And so he finally looked at me -he had just gotten out of jail himself. [Emphasis added.]

Defense counsel's objection to this nonresponsive answer was sustained, and the trial court admonished the jury to disregard the reference to defendant's prior incarceration. Defense counsel's subsequent motion for a mistrial was overruled by the court.

On appeal, Hollins complains that the trial court abused its discretion in denying him a new trial. We do not agree.

A trial court has considerable discretion in determining whether or not to grant a mistrial. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983); State v. Mattingly, 220 N.W.2d 865, 870 (Iowa 1974). As a general rule, improper testimony is not considered unduly prejudicial if the court admonishes the jury to disregard it. State v. Williams, 315 N.W.2d 45, 55-56 (Iowa 1982). Only in those exceptional cases in which the prejudicial effect of such a comment cannot be eliminated will an admonition of the court be found insufficient. Id. at 56.

In the present case, we conclude the trial court's admonition sufficiently guarded against any potential prejudice. The testimony referring to defendant's incarceration was not so highly inflammatory that it would lead us to believe the jury would disregard the subsequent admonition. On the record before us, we find no abuse of discretion.

II.

Hollins also argues that the trial court erred in failing to exclude testimony of State's witness, Gary Dickinson. Dickinson, a former cellmate of defendants, testified that Hollins had admitted that he shot and killed Carol Stinger in August, 1983. It is defendant's contention that this testimony was unreliable and therefore should not have been admitted at trial.

Apparently, the basis for defendant's complaint stems from his hearing impairment and his resulting difficulty in effectively communicating with others. Hollins complains that Dickinson was unable to understand and relate to the words and gestures used by defendant and, as such, was incompetent to testify.

We need not and do not reach the merits of this challenge. Assuming, without deciding, that the testimony was admitted in error, there was no prejudice. As conceded by defendant, Dickinson's testimony was cumulative evidence; four other witnesses testified about admissions made by defendant. Thus, the error, if any, would be harmless. See State v. Smith, 309 N.W.2d 454, 456 (Iowa 1981); State v. Johnson, 272 N.W.2d 480, 482 (Iowa 1978).

III.

The third assignment of error concerns the alleged admission of hearsay evidence. At trial, the State introduced B.C. Pendleton's out-of-court statements through the testimony of his girlfriend, Tawana Harris. Defendant claims the trial court erred in admitting these statements under the co-conspirator rule.

The co-conspirator rule, now set forth in Iowa Rule of Evidence 801(d)(2)(E), provides for the admissibility of statements by a co-conspirator "during the course of and in furtherance of the conspiracy." The statements are considered nonhearsay admissions. In State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976). The Iowa Supreme Court set forth two conditions that must be met for the rule to be applicable: 1) the statement must have been made during the pendency of the conspiracy, and 2) it must have been in promotion of the object or design of the conspiracy. Our analysis of the record convinces us that these factors have been met.

There is substantial independent evidence of a conspiracy between Hollins and Pendleton, even though none was charged. Furthermore, it is apparent that Pendleton made the incriminating statements to his girlfriend prior to

the termination of the conspiracy. Tawana's testimony indicates that Pendleton told her about the robbery and murder when he returned home in the early morning hours of August 18, 1983. At the time, he had a gun, a bank bag containing money, and appeared very nervous. He explained to Tawana where he had been and told her what to say if anyone questioned her about it. Such evidence is sufficient to support a finding that the statements were made during the concealment stage of the conspiracy, thereby satisfying the first condition of the rule. See State v. Waterbury, 307 N.W.2d 45, 50 (Iowa 1981).

We also conclude that the statements were made in furtherance of the conspiracy. As a general rule, declarations which are "merely" narrative are excluded from the rule since they are likely to be unreliable and self-serving. Kidd, 239 N.W.2d at 865. Yet the supreme court has indicated that some narrative declarations can be in furtherance of the conspiracy:

> It is not the purpose of the rule to exclude statements relating to the conspiracy uttered during the active life of the conspiracy under circumstances indicating reliability. The furtherance requirement is construed broadly with this in mind. United States v. Overshon, 494 F.2d 894, 899 (8 Cir. 1974), cert. denied, 419 U.S. 853, 95 S. Ct. 96, 42 L. Ed. 2d 85. A narrative declaration is in furtherance of the conspiracy if it has some connection with what is being done in promotion of the common design.

Id.

In the present case, the statements were made during the active life of the conspiracy and under circumstances which would indicate reliability. The declarations were spontaneous, not the type of premeditated self-serving statements the "narrative exclusion" was designed to protect against. In light of the broad construction of the "furtherance requirement," we conclude the statements were properly admitted.

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Hollins' final allegation is that the trial court erred in refusing to submit an instruction on corroboration of confession testimony. He relies on Iowa Rule of Criminal Procedure 20(4) which provides:

> The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense.

Upon consideration of the record, we conclude that such reliance was misplaced. Defendant's statements to State witnesses are more appropriately characterized as admissions rather than confessions. The distinctions between the two were discussed in State v. Olson, 260 Iowa 311, 318, 149 N.W.2d 132, 136 (1967):

> A confession is an acknowledgment in express terms, by a party in a criminal case, of his guilt of the crime charged. An admission is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt. An admission is something less than a confession and but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only to establish the ultimate fact of guilt.

Essentially, in order to be characterized as a confession, that statement must, in and of itself, suffice to support a guilty verdict. See State v. Schomaker, 303 N.W.2d 129, 130 (Iowa 1981); State v. Dunn, 199 N.W.2d 104, 108 (Iowa 1972).

In the case before this court, the declarations in question were made to five persons. Our review of their testimony reveals that none of the statements contained sufficient information to support a guilty verdict for felony murder. Michelle Perkins testified that the defendant said he was in trouble for something he had done with B.C. Pendleton and that he felt sorry for what had happened to the woman at the St. Louis House. Tawana Harris testified that defendant told her that he was glad that the bartender was dead. Neither statement can

be said to contain all the elements of the crime charged. In other statements, defendant did admit to shooting someone. Perhaps the most incriminating testimony in this respect was given by one Shari Perkins. According to Perkins, Hollins said he had used a gun to shoot a woman during a robbery. When asked where, defendant named the street where the St. Louis House is located. Even so, there was no mention of a specific location or whether Hollins actually participated in the robbery. More importantly, nothing would indicate malice aforethought, a necessary element of felony murder. Certainly the statements were damaging in nature and would tend to establish the ultimate fact of guilt. However, we cannot say that they rise to the level of a confession.

We conclude that defendant's statements to third parties concerning the robbery and murder were admissions. Thus, an instruction on corroborating evidence was unnecessary.

Finding no reversible error, the conviction is affirmed.

AFFIRMED.