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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed April 24, 1984 325

vs.)

STEVE TYRONE GIBSON,) 4-15
83-531

Defendant-Appellant.)

Appeal from the Iowa District Court for Black Hawk County - Peter Van Metre, Judge.

Defendant appeals from his conviction for robbery in the first degree under Iowa Code section 711.2 (1981). REVERSED AND REMANDED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

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

SCHLEGEL, J.

Defendant appeals from his conviction for robbery in the first degree under Iowa Code section 711.2 (1981). He asserts: (1) the trial court erred in refusing to sever his trial from the trial of a codefendant; (2) the trial court erred in admitting evidence of the codefendant's confession when the codefendant did not testify; and (3) his trial attorney rendered ineffective assistance by failing to raise all of the relevant grounds in his motion to sever and by failing to object to the prosecutor's impeachment of the defendant by reference to his postarrest silence. Because we find issue two above to be dispositive of this appeal, we decline to address the other issues raised by defendant.[1] We reverse and remand.

Our review of criminal cases is ordinarily on assigned error. However, we make an independent evaluation of the totality of the circumstances on issues involving the violation of basic constitutional safeguards. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

During defendant's joint trial with his codefendant, Derek Johnson, a police officer was allowed to testify, over defendant's objection, as follows:

> Back at the Station shortly after we arrived Derek Johnson and myself was in the interroom, interview room together. I did not ask him any questions, and he started telling me how sorry he was it had happened. That he was driving the car. That his brother had talked him into it. And now his car was wrecked. I then inquired as to who his brother was, and he stated Quinten Miles. He proceeded into why he had done this, and he said that he was divorced, he had two children, the monthly check he received was not enough to support them. That was the essence of our conversation at that point.

Derek Johnson did not testify at trial.

Defendant, on the other hand, testified extensively in his own behalf. Defendant testified that he entered the gas station which was robbed with Johnson in order to purchase some cigarettes. Defendant and Johnson stood in line at the

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[1] See State v. Snodgrass, ___ N.W.2d ___ (Iowa 1984), for a discussion of the trial court's discretion in the allowance of joint trials pursuant to Iowa Rule of Criminal Procedure 6(4)(b).

cash register waiting for the attendant to serve them. After the attendant, who defendant knew previously, waited on them, Johnson pulled a gun from his pants and hit the attendant on the head. Defendant testified that after the attendant opened the cash register, Johnson waved the gun at defendant and told him to remove the cash from the drawer. Defendant sought to show that the robbery was instigated by Johnson without the knowledge of defendant or Johnson's brother, Quinten Miles, who was also apprehended by police in connection with the incident.

Defendant asserts that the admission of Johnson's confession into evidence over his objections was a denial of his right to confront witnesses against him. The confrontation clause of the Sixth Amendment provides, "[i] n all prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." U.S. CONST. amend. VI. In Pointer v. Texas, 380 U.S. 400, 403-04, 85 S. Ct. 1065, 1067-68, 13 L. Ed. 2d 923, 926 (1965), the Supreme Court held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment," and that the right of cross-examination is included in that right. Then, in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Court overturned the conviction of a petitioner because the confession of his nontestifying codefendant, which incriminated the petitioner as well, had been admitted at their joint trial. See State v. Waterbury, 307 N.W.2d 45, 48 (Iowa 1981). It is under this rule which defendant seeks a new trial. The State asserts, however, that the admission of Johnson's confession does not require a new trial under the Bruton rule because Johnson's confession does not implicate or inculpate the defendant. See White v. United States, 415 F. 2d 292, 294 (5th Cir. 1969), cert. denied, 397 U.S. 993, 90 S. Ct. 1128, 25 L. Ed. 2d 400 (1970).

We note that this is not a case where a "redacted" form of a codefendant's confession excluding all reference to the defendant is admitted into evidence. See United States v. Madison, 689 F.2d 1300, 1309-10 (7th Cir. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 754, ___ L. Ed. 2d ___ (1983). Instead, the codefendant's

confession, while not directly referring to the defendant, is inconsistent with the defendant's testimony and it directly challenges the defendant's credibility. Defendant and Miles were apprehended after the robbery hiding together under a building. Johnson was arrested as he walked down a sidewalk from where his car had stopped. Defendant testified before the jury that neither he nor Quinten Miles were aware of Johnson's intention to commit theft prior to the robbery and that Johnson unexpectedly pulled the gun and "forced" him to assist in the robbery. Johnson's confession, on the other hand, asserted that the robbery was preplanned, and at least contained an inference that defendant was aware of the intention to commit theft when he and Johnson entered the gas station. See Lyle v. Koehler, 720 F.2d 426, 434 (6th Cir. 1983) (the close association of defendant and the person who wrote incriminating letters, as evidenced by their simultaneous arrest after the commission of the crime, necessarily invited the jury to extend the inference of guilt to the defendant).

Under the State's theory of the case, it was required to prove as an element of robbery that the defendant had the specific intent to commit a theft or to aid and abet another with knowledge that the other possessed that specific intent. Iowa Code §§ 703.1 and 711.1 (1981). Defendant had the right to cross-examine Johnson to explore Johnson's motivation in making the confession, to test his sincerity in making the confession, and to illuminate any ambiguities in the confession which would be favorable to the defendant. We assume that the confession was admissible in the joint trial against Johnson as a "statement against interest" under Iowa Rule of Evidence 804(b)(3). However, no instructions limiting it to that purpose were given to the jury. See United States v. Rogers, 549 F.2d 490, 497-98 (8th Cir. 1976), cert. denied, 431 U.S. 918, 97 S. Ct. 2182, 53 L. Ed. 2d 229 (1977). Even if the confession was admissible under evidentiary standards, it nonetheless unconstitutionally infringed defendant's right of confrontation. Id. at 498-502. The jury had no basis with which to evaluate the

truthfulness of Johnson's confession introduced through the police officer. State v. Ege, 274 N.W.2d 350, 356 (Iowa 1979). We believe the statement was erroneously admitted.

Moreover, we are unable to say on this record that the error was harmless. The erroneous admission of a codefendant's extrajudicial confession may constitute harmless error if there is other overwhelming evidence of defendant's guilt, so that the prejudicial impact of the codefendant's statement was relatively insignificant. State v. Waterbury, 307 N.W.2d at 48. The defendant did not contest his presence at the robbery, and his seeming participation. Instead, his testimony put at issue the question of whether or not he participated in the robbery with the necessary intent. The evidence and inferences to be drawn from that evidence on the issue of the defendant's intent were conflicting. Defendant's credibility was crucial to his defense. Johnson's confession substantially contradicted the defendant's testimony. See People v. Osborn, 63 Mich. App. 719, 727-28, 234 N.W.2d 767, 772 (Mich. Ct. App. 1975). While defendant was subjected to cross-examination before the jury as to his version of the facts, Johnson was not. We find that defendant was prejudiced impermissibly when Johnson's confession was introduced and defendant had no opportunity to cross-examine Johnson because he did not take the stand.

Accordingly, this case must be reversed and remanded for a new trial.

REVERSED AND REMANDED.

Sackett, J., concurs; Hayden, J., dissents.

The majority reverses defendant's conviction on the grounds of denial of confrontation and declines to address defendant's argument concerning his motion to sever his trial from the trial of a codefendant and his allegations of ineffective assistance of counsel. Since I would affirm the conviction I will address both the confrontation and severance questions. However, the arguments concerning ineffectiveness of trial counsel are more appropriately raised by application for postconviction relief so that a full evidentiary hearing can be had, and counsel may have the opportunity to respond to defendant's charges. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

I. Admission of Codefendant's Confession. In Bruton v. United States, 391 U.S. 123, 136-37, 88 S. Ct. 1620, 1628, 20 L. Ed. 2d 476, 485 (1968), the Supreme Court held that admission of a confession of a codefendant who did not testify deprived the defendant of his rights under the sixth amendment confrontation clause when that confession implicated the defendant. See State v. Waterbury, 307 N.W.2d 45, 48 (Iowa 1981). The Bruton rule has been held to be inapplicable where the confession does not name or refer to the defendant, United States v. Belle, 593 F. 2d 487, 493-94 (3rd Cir.), cert. denied, 442 U.S. 911, 99 S. Ct. 2825, 61 L. Ed. 2d 277 (1979); White v. United States, 415 F.2d 292, 293-94 (5th Cir. 1969), cert. denied, 397 U.S. 993, 90 S. Ct. 1128, 25 L. Ed. 2d 400 (1970), or where an otherwise inculpatory statement has been redacted to eliminate references to the defendant's name or physical description. United States v. Burke, 700 F. 2d 70, 85 (2d Cir), cert. denied, ___ U.S. ___, 104 S. Ct. 72, ___ L. Ed. 2d ___ (1983). As the third circuit has noted:

> The key to Bruton was that the extrajudicial statement by the nontestifying codefendant Evans was "powerfully incriminating" of Bruton in that it named Bruton as an accomplice. It was in such a circumstance—where the challenged statement (and we emphasize, the statement only) directly implicated the complaining defendant Bruton—that the Supreme Court held that the codefendant's statement could not be admitted into evidence at a joint trial.

United States v. Belle, 593 F.2d at 493 (emphasis in original).

Other cases have held that a codefendant's statement which does not name the defendant is not clearly inculpatory even if other evidence presented at trial might lead the jury to suspect that the codefendant's confederate was the defendant. English v. United States, 620 F.2d 150, 152-53 (7th Cir.), cert. denied, 449 U.S. 859, 101 S. Ct. 160, 66 L. Ed. 2d 75 (1980); United States v. Knuckles, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986, 99 S. Ct. 581, 58 L. Ed. 2d 659 (1978). In English, three defendants were tried for bank robbery and murder. An F.B.I. agent was allowed to testify concerning the confession of codefendant Gaines. All specific references in the confession to the other participants were suppressed and they were referred to as "two other individuals." Gaines reportedly admitted that after the crime all of the participants stopped at a certain motel and one of them registered there. Immediately following this testimony the manager of the motel involved testified that a registration form was filled out about an hour after the crime under the name of defendant English. The court held that the confession was not clearly inculpatory and no Bruton violation existed because the evidence did not compel the inference that English was the individual referred to in the confession. In a similar case the Knuckles court stated:

> Smith's redacted statement did not mention Knuckles by name, nor did it contain any physical description of him. Though, when considered together with Simpson's evidence, the Smith statement might be taken to refer to Knuckles, Smith's statement standing alone did not serve to connect Knuckles with the crime. The statement was not "clearly inculpatory" with respect to Knuckles.

United States v. Knuckles, 581 F.2d at 313 (citations omitted) (emphasis in original).

In the present case, Johnson's confession directly implicates Miles in the robbery, but makes no reference to defendant Gibson. There is no question that this statement standing alone does not in any way inculpate Gibson. The majority

holds that the statement is inculpatory because it is inconsistent with Gibson's testimony at trial that neither he nor Miles was aware of Johnson's plan to rob the service station. It is true that the confession portrays Miles as the instigator, whereas defendant alleges that Johnson alone planned the crime. However, I do not believe that Bruton was intended to be extended to a case such as this where the confession is completely silent regarding defendant's guilt, and contradicts the defendant's statements regarding a third person's knowledge of the crime rather than the defendant's own knowledge of and participation in the offense. Consequently, I do not believe that the trial court erred in allowing testimony of Johnson's confession.

II. Motion to Sever. Defendant was charged with robbery along with Miles and Johnson. Miles and Johnson are brothers. Miles successfully moved to sever his trial from that of the other defendants. After learning of Miles' severance, Gibson moved to sever his trial from Johnson's. Gibson claimed that he would call both Johnson and Miles as witnesses if he were tried separately. However, if tried with Johnson, Miles would refuse to testify since his testimony would be detrimental to his brother's case. Johnson, of course, would not testify in Gibson's behalf at their joint trial. The trial court denied Gibson's motion to sever.

Iowa Rule of Criminal Procedure 6(4)(b) places the granting or denial of a motion to sever in the discretion of the trial court. If the trial court denies the motion to sever, the ruling will be reversed on appeal only if the defendant demonstrates an abuse of discretion. State v. Snodgrass, ___ N.W.2d ___ (Iowa 1984); State v. Hood, ___ N.W.2d ___ (Iowa 1984); State v. Belieu, 288 N.W.2d 895, 900 (Iowa 1980).

Since the Iowa and federal rules regarding the trial of multiple defendants are similar, the supreme court has stated that federal decisions construing the federal rule are persuasive for a similar construction of the Iowa rule. State v. Belieu, 288 N.W.2d at 897. Several recent decisions from the eighth circuit hold

that when the reason for severance is the asserted need for a codefendant's testimony, the defendant has a heavy burden of showing that the codefendant would be willing to testify if tried separately. A defendant is not entitled to rely upon his own unsupported assertion that he would call the codefendant as a witness and that the codefendant would be willing to testify on his behalf. There must be some independent support in the record bolstering defendant's assertion in order to show an abuse of the trial court's discretion. United States v. Piatt, 679 F.2d 1228, 1233 (8th Cir. 1982); United States v. Easom, 569 F.2d 457, 458 (8th Cir. 1978); United States v. Graham, 548 F.2d 1302, 1311 (8th Cir. 1977). In both Piatt and Easom the court concluded that since the defendant had made no such showing, there was no error in denying the motion to sever. Furthermore, in Graham the court held that although one defendant had shown through a deposition of a codefendant that the codefendant would be willing to testify at a separate trial, this defendant did not meet his burden since there was no evidence that the testimony of the codefendant would tend to exonerate this defendant. United States v. Graham, 548 F.2d at 1312.

Defendant in this case relies primarily upon United States v. Seifert, 648 F.2d 557 (9th Cir. 1980), and United States v. Vigil, 561 F.2d 1316 (9th Cir. 1977). In both of these cases convictions were reversed due to the prejudice resulting from the trial court's refusal to allow separate trials. However, in Seifert, defendant's counsel made an offer of proof specifically outlining the expected testimony of the codefendant that would exculpate the defendant. The offer of proof was supported by the codefendant's affidavit. United States v. Seifert, 648 F.2d at 563. In Vigil an affidavit of defense counsel was filed with the motion to sever in which he swore that he intended to call a codefendant if the trial was severed and that he had learned from the codefendant's attorney that the codefendant would be willing to testify and exonerate the defendant. United States v. Vigil, 561 F.2d at 1317. Defense counsel also attempted to make an offer of proof as to the codefendant's testimony. Id. at 1318.

In the case before us defendant made no offer of proof, filed no affidavits, and has not called our attention to any part of the record independent of his motion to sever which shows that he would call either Miles or Johnson to testify at a separate trial, that either would be willing to testify, or that their testimony would tend to exculpate defendant. Based on this record, I would hold that the trial court did not abuse its discretion in denying defendant's motion to sever.

Since I find defendant's allegations of error are unfounded, I would affirm his conviction for robbery in the first degree.