

IN THE COURT OF APPEALS OF IOWA

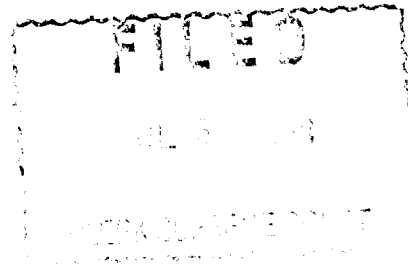
No. 8-190 / 97-0334

Filed July 31, 1998

STATE OF IOWA,
Appellee,

vs.

JESSE J. JACKSON,
Appellant.



Appeal from the Iowa District Court for Keokuk County, James P. Rielly,
Judge.

Jesse Jackson appeals his judgment and sentence entered for first-degree
murder. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John E. Schroeder, County Attorney, and Robert J. Glaser, Assistant County
Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

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STREIT, J.

Jackson appeals his sentence and conviction for first-degree murder. He argues the trial court erred in giving a joint criminal conduct instruction and denying his motion for mistrial based on prosecutorial misconduct. Because Jackson was not prejudiced by the joint criminal conduct instruction or the alleged misconduct, we affirm the trial court.

I. Background Facts & Proceedings.

Jesse Jackson was hired by Maria Allar to kill her ex-boyfriend, Larry Grove, for \$700. On February 14, 1996, Allar, driving her automobile, picked up Jackson from his apartment, and they began stalking their prey. The duo encountered Grove as he drove from his home to school or work. As Jackson crouched in the automobile's back seat, Allar got Grove to stop his vehicle by blinking her headlights. Grove pulled over and talked to Allar through the car windows.

At that point, Allar told Jackson: "If you are going to do it, do it now." Jackson popped up and shot Grove five times. Grove's vehicle rolled into a field and stopped. Jackson got out of Allar's vehicle to see if Grove was alive. Jackson came back to Allar and said Grove was barely alive and he would beat him to death. Grove was killed.

Both Allar and Jackson were charged with first-degree murder, in violation of Iowa Code section 707.2(1) (1995). Allar pled guilty to second-degree murder in exchange for her testimony against Jackson.

Before trial, defense counsel attempted to discover the notes of Allar's attorney. The court determined, after in camera review, the notes were privileged and denied the defense attorney access to the notes. Another issue that arose before trial was the admissibility of statements Jackson made to police. The parties stipulated no reference would be made to these statements during trial. However, during trial, the prosecutor asked a witness about a statement Jackson made to police. Over defense counsel's objection, the court submitted a joint criminal conduct instruction to the jury. The jury returned a guilty verdict and the court sentenced Jackson to life in prison. Jackson's motion for new trial was denied.

II. Standard of Review.

Generally, the standard of review for the trial court's denial of a motion for new trial is for abuse of discretion. *State v. Weaver*, 554 N.W.2d 240, 244 (Iowa 1996). When the determining factor in granting or denying a new trial involves a question of law, however, the abuse of discretion standard does not apply. *State v. Irvin*, 334 N.W.2d 312, 315 (Iowa App. 1983). In regard to the trial court's determinations concerning jury instructions, our review is for errors at law. *State v. Lawler*, 571 N.W.2d 486, 489 (Iowa 1997). In regard to the trial court's refusal to grant a new trial due to alleged prosecutorial misconduct and denial of defendant's discovery motion, we review for an abuse of discretion. *See State v. Weaver*, 554 N.W.2d at 244.

III. Joint Criminal Conduct Jury Instruction.

Jackson argues the trial court erred in submitting a jury instruction on joint criminal liability as set out in Iowa Code section 703.2. The court's instruction read:

When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. The defendant's guilt is the same as the other person's unless the act could not reasonably be expected to be done in aiding the commission of the crime.

Jackson does not challenge the form of the instruction, but argues the theory was not applicable under the evidence. Any error in jury instructions must be prejudicial to warrant reversal. *State v. Webb*, 516 N.W.2d 824, 831 (Iowa 1994).

Joint criminal conduct is a theory of criminal liability which arises when a defendant has agreed with accomplices to commit a crime and, during the commission of the underlying crime, the defendant's accomplices commit additional or other crimes without defendant's personal participation and without joint planning of the crimes. *State v. Irvin*, 334 N.W.2d 312, 314 (Iowa App.1983). This theory is distinct from the theory of aiding and abetting.¹ There are four essential elements of joint criminal conduct: (1) defendant must be acting in concert with another; (2) defendant must knowingly be participating in a public offense; (3) A "different crime" must be committed by another participant in furtherance of defendant's offense; and (4) The

¹ Aiding and abetting as set out in section 703.1 of the Iowa Code is a theory used to impose liability upon a defendant who has jointly planned and participated to some degree in a crime. *State v. Irvin*, 334 N.W.2d 312, 314 (Iowa App.1983).

commission of the different crime must be reasonably foreseen. *State v. Hohle*, 510 N.W.2d 847, 848 (Iowa 1994).

For section 703.2 to apply, a crime other than the charged offense must have been committed by a defendant's confederate. *State v. Irvin*, 334 N.W.2d 315. When a crime other than the charged offense has not occurred, the joint criminal conduct theory does not apply. *Id.*; see also *State v. Satern*, 516 N.W.2d 839, 843 (Iowa 1994); *State v. Pearson*, 547 N.W.2d 236, 242 (Iowa App. 1996); *State v. Hershberger*, 534 N.W.2d 464 (Iowa App. 1995) (instruction on joint criminal conduct for lack of evidence of another crime having been committed was error). In *Irvin*, the crime charged was burglary. *Id.* No other crime was committed in furtherance of the offense. *Id.* The court held this set of facts showed aiding and abetting rather than joint criminal conduct and, if the defendant was guilty, it must be as an aider and abettor under section 703.1. *Id.* The court held the trial court erred in applying the joint criminal conduct theory to the case. *Id.* at 314-15.

In the case at hand, one crime was committed: the murder of Larry Grove. The State's theory was Jesse Jackson shot Grove and then beat him to death. Jackson's theory was Maria Allar shot and killed Grove. Under either theory, there was only one crime committed. Jackson could be found liable either as a principal of murder or as an aider and abettor of murder. Because no crime other than murder occurred, the theory of joint criminal conduct does not apply. *Irvin*, 334 N.W.2d at 315. It was

error for the trial court to submit a joint criminal conduct instruction to the jury. *See id.*

To warrant reversal, the trial court's error must have prejudiced Jackson. *State v. Webb*, 516 N.W.2d at 831. If the error altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome, it was harmless error does not require reversal. *State v. Milam*, 447 N.W.2d 415, 418 (Iowa App. 1989).

Jackson argues he was prejudiced because it is impossible to distinguish whether the jury found the defendant guilty as a principal or under a joint criminal conduct theory. *See State v. Means*, 211 N.W.2d 283, 285 (Iowa 1973). However, overwhelming evidence proved Jackson's conviction for murder as a principal beyond a reasonable doubt. The defendant was hired by Maria Allar to kill Larry Grove. Days before the murder he came into a sum of money, although he was unemployed, and after the murder he had additional money. The murder weapon was owned by Jackson's roommate. Jackson had knowledge of the weapon and access to it. Grove's blood was found on Jackson's clothing and a pair of white gloves with Grove's blood on them were found behind Jackson's apartment. A jury is presumed to rely on the alternative means of committing an offense which is properly supported by evidence. *State v. Griffin*, 502 U.S. 46, 49-51, 59-60 (1991).

The erroneously given jury instruction on joint criminal conduct, in practice, had no effect on the outcome of this case. *State v. Milam*, 447 N.W.2d at 418. Under any of the court's instructions, the defendant could not have been found guilty unless

he was found to have committed the murder himself or acted together with Maria Allar to knowingly commit the murder for which he was charged. *See State v. Thompson*, 397 N.W.2d 679, 686 (Iowa 1986). Submission of the case on these theories was strongly supported by the evidence. There is no reversible error in the instructions. The district court is affirmed.

IV. Prosecutorial Misconduct.

Prosecutorial misconduct warrants a new trial when it is “so prejudicial as to deprive the defendant of a fair trial.” *State v. Escobedo*, 573 N.W.2d 271, 279 (Iowa App. 1997)(citation omitted). To establish the claim, a defendant must show both misconduct and prejudice. *State v. Farmer*, 492 N.W.2d 239, 242 (Iowa App.1992). Prejudice ordinarily results from persistent efforts to inject prejudicial matter before the jury. *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976). It is also important to consider the strength of the evidence of guilt. *Id.* If the evidence is strong, an inappropriate comment by a prosecutor is unlikely to contribute to a conviction. *See id.*

Trial courts have broad discretion to determine whether prejudice resulted from misconduct. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). As a firsthand observer to both the claimed misconduct and any reaction by the jury, the trial court is better equipped than an appellate court to determine the presence of prejudice. *Id.* at 34. For this reason, an appellate court will reverse a trial court’s ruling only upon

an abuse of discretion. *Id.* An abuse of discretion occurs when it is “exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *Id.*

Jackson claims the State agreed it would not make reference to any statements Jackson made to police. During the cross examination of a D.C.I. agent, the State asked “Do you know when the defendant was interviewed and a statement acquired from him on that date?” Jackson objected. The State replied the defense had opened the door because it had elicited testimony from one of the State’s witnesses and defendant had talked to police. In fact, it was the prosecutor who had elicited the testimony.

The prosecutor’s mistaken recall as to who elicited testimony regarding Jackson talking to police does not constitute misconduct. The prosecutor did not make persistent efforts to inject prejudicial matter before the jury. *State v. Webb*, 244 N.W.2d 332 at 333. The isolated question was never answered by the witness and the jury was admonished that questions were not evidence. Any prejudicial effect of misconduct can ordinarily be eliminated with an admonition by the trial court. *State v. Escobedo*, 573 N.W.2d at 277. It is also unlikely the prosecutor’s alleged misconduct had any effect on the verdict finding Jackson guilty of murder. The evidence against him was overwhelming. Because Jackson cannot successfully show misconduct or prejudice, his claim fails. *See State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). The trial court’s denial of Jackson’s request for a new trial on this ground is affirmed.

V. Denial of Defendant's Discovery Motion.

Jackson contends the trial court erred in refusing to turn over notes of Maria Allar's attorney which he subsequently turned over to the D.C.I. After in camera review of the notes, the trial court determined the notes were privileged communication and, because Allar had not given her consent, refused the defendant's request to discover the notes. Whether information is privileged is within the sound discretion of the trial court. *State v. Burkett*, 357 N.W.2d 632, 637 (Iowa 1984). After reviewing the notes taken by Allar's attorney, we agree with the trial court that the notes were privileged and the court did not abuse its discretion in denying the defendant's motion to discover them.

AFFIRMED.