

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 4 1986

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed June 4, 1986

vs.

)

398

FREDERICK L. SOWDER,

)

6-77
85-723

Defendant-Appellant.

)

Appeal from the Iowa District Court for Des Moines County (No. CRF 3462-1184) - William S. Cahill, Judge.

Defendant appeals the judgment and sentence entered on a jury verdict finding him guilty of robbery in the first degree in violation of Iowa Code section 711.2, asserting that the trial court erred in admitting a witness's testimony because it constituted double hearsay. **REVERSED AND REMANDED FOR NEW TRIAL.**

John G. Linn, Chief Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and William L. Dowell, County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Sackett, JJ., but considered en banc.

SNELL, J.

On October 29, 1984, the Swift Shop in Burlington, Iowa, was robbed by a person wearing a red ski mask and carrying a knife. In November of 1984, Frederick L. Sowder was arrested for this crime and charged with robbery in the first degree. The case was submitted to the jury and a guilty verdict was returned. Sowder's motion for a new trial was overruled, and Sowder was sentenced to a term not exceeding twenty-five years.

On appeal, Sowder contends that the trial court erred in allowing into evidence the rebuttal testimony of witness Jean Buchholz because it constituted double hearsay. Sowder also argues that the court erred in denying his motion for directed verdict or judgment of acquittal by failing to observe the provisions of Iowa R. Crim. Pro. 20(3) regarding the corroboration of accomplice testimony.

Impeachment. During the course of the trial, Alan Leffler, a friend of Sowder's, testified primarily regarding his relationship with Sowder. On cross-examination, the following colloquy occurred:

Q. Would you and Fred ever frequent the Sportsman tavern? A. Yes, we went there with my girlfriend and Barb and —

Q. When did that take place? A. Around Halloween.

* * *

Q. And who all was there? A. My girlfriend.

Q. Who is that? A. Jean Buchholz.

* * *

Q. And this was sometime around Halloween that you and Fred and Jean and Barb were in the Sportsman? A. Yes.

* * *

Q. Have you visited with Fred at all since his arrest? A. Yesterday I went up and seen him?

Q. What was that visit about? A. Just went up to see him.

Q. Did he ever talk to you about his involvement in the robbery? A. Not really.

Q. During that meeting in October at the Sportsman lounge, did he talk to you about his involvement in the robbery? A. No.

Q. Never said a word about it? A. Huh-uh.

Sowder also testified, and on cross-examination denied ever telling Leffler or anyone else that he committed the robbery:

Q. Mr. Sowder, have you ever told anyone that you committed the robbery? A. No, Sir, I did not.

* * *

Q. And I would take it that you didn't tell Mr. Leffler anything about your involvement in the robbery of the Swift Shop? A. No, I did not.

Q. Alan wouldn't have any reason to lie to help you, would he? A. Not that I know of, no.

Q. Would — I think you said Barb would have a reason to lie to hurt you. Would Jean Buchholz have a reason to lie to hurt you? A. Not that I know of.

Q. You know of no reason why she has any hatred or ill will towards you? A. None that I can know of.

Q. And you still state on Wednesday of Halloween you did not have a wad of money? A. I had, like I said, approximately \$175 or something like that.

Q. Didn't represent that you had around a Thousand Dollars? A. No.

Q. And you never had a conversation with Bimbo Leffler about your involvement in the robbery? A. No, I did not.

The State offered Jean Buchholz, Alan Leffler's girlfriend, as a rebuttal witness. She testified as follows:

Q. Jean, I would like to direct your attention to you having been at the Sportsman tavern sometime in October with Fred Sowder and Alan Leffler. Do you recall those events? A. Yes.

* * *

Q. And did you also become aware that Fred and Mr. Leffler had a conversation that evening? A. Yes.

* * *

Q. (By Mr. Dowell) How did you learn that Fred and Alan had a conversation? A. Alan told me.

Q. And did Alan tell you what the conversation was he had with Fred? A. Yes.

Q. And what was that conversation?

MR. LINN: Your Honor, I would object on hearsay grounds, possibly double hearsay, if this is a statement that Fred purportedly made and Alan is now making a statement to the witness.

Outside the presence of the jury, an offer of proof was made and counsel argued to the court concerning the issue of admissibility. During the proceeding in chambers, Jean Buchholz made the statement that Sowder was not present

when the conversation occurred between her and Leffler. The court eventually overruled defense counsel's hearsay objection and questioning before the jury resumed:

THE COURT: Now, the objection is overruled. You may answer that question. Do you understand the question?

THE WITNESS: Yes.

THE COURT: You may answer. A. First I said to Alan — I said, "Did you know that Fred got that money from holding up that convenience store?" And he said, "Yes, Fred told me in the bathroom."

And then the one thing I remember Alan saying, because I thought it was kind of ironic, is when Fred hold the knife up to his throat — the girl —

THE COURT: Mr. Dowell, could you ask another question, please.

Q. (By Mr. Dowell) Jean, could you confine yourself in answering the questions what Alan told you when he first came back from the bathroom. A. He said that Fred had held up that convenience store and that's how he got if [sic] money.

Q. And did he state how he had done that? A. Yes. He held a knife up to her throat is what Alan said.

After Jean Buchholz testified about this conversation, the court gave the following cautionary instruction to the jury:

THE COURT: Now, Ladies and Gentlemen, this testimony that you just heard in response to these two questions is being permitted into the record for you to consider whether these statements were made. They are not submitted to you upon the issue of whether the statements are offered to establish or prove the truth of any fact asserted in the statements.

Defense counsel then moved for a mistrial which was denied by the trial court.

The court reiterated the limiting instruction in its charge to the jury.

Sowder contends that the admission of Jean Buchholz's testimony constituted multiple hearsay and went far beyond proper impeachment of defense witnesses.

There is no question that the State was unable, in its case-in-chief, to put Buchholz on the stand to testify that her boyfriend, Leffler, had told her

that Sowder told Leffler that Sowder had committed the Swift Shop robbery, because such testimony would have been inadmissible hearsay within hearsay.

Iowa R. Evid. 802 provides that "hearsay is not admissible except as provided by the Constitution of the State of Iowa, by statute, by these rules, or by other rules of the Iowa Supreme Court." Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Furthermore, Iowa R. Evid. 805 provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

When the witness reports on the stand, that one declarant stated to him that another declarant made a given statement, this may be termed "double hearsay," if both statements are offered to prove the facts asserted. "Multiple hearsay" would include double hearsay and instances where the chain of repeated statements is longer still, as where the witness reports that A told him that B said that C had stated a given fact. Multiple hearsay is, of course, even more vulnerable to all the objections which attach to simple hearsay, and it seems that if it is to come in at all, each of the out-of-court statements must satisfy the requirements of some exception to the hearsay rule.

State v. Evans, 169 N.W.2d 200, 205 (Iowa 1969) (quoting McCormick, Law of Evidence, § 226 at 461). Buchholz's testimony would constitute double hearsay or hearsay within hearsay because she testified about what Leffler told her that Sowder had said to Leffler. Therefore, both Sowder's statement to Leffler and Leffler's repetition of the statement to Jean must be independently admissible.

A hearsay exception would exist for the statement made by Sowder to Leffler. If Leffler testified regarding Sowder's statement, it would constitute an admission by Sowder and under Iowa R. Evid. 801(d)(2) would not constitute

hearsay. However, no exception exists to cover Buchholz's relation of what Leffler told her out-of-court.

An oral admission of a party can be shown only by the testimony of a person who heard it; a witness who did not hear the admission cannot testify as to what a person who did hear it told him about it.

Evans, 169 N.W.2d at 206 (quoting 31A C.J.S. Evidence § 193(i), § 370 at 546).

There is no dispute, then, that Buchholz's testimony could not have been admitted for a substantive purpose.

However, the State argues that both Sowder's statement to Leffler and Leffler's repetition of Sowder's statement to Jean were admissible solely for impeachment purposes as prior inconsistent statements. The State is correct in asserting that a prior, inconsistent, out-of-court statement offered for impeachment purposes, does not come within the definition of hearsay. See State v. Hill, 243 N.W.2d 567, 570 (Iowa 1976).

The prior statement is not primarily hearsay, because it is not offered assertively, i.e., not testimonially. The hearsay rule . . . simply forbids the use of extrajudicial utterances as credible testimonial assertions; the prior contradiction is not offered as a testimonial assertion to be relied upon. It follows, therefore, that the use of prior self-contradictions to discredit is not obnoxious to the hearsay rule.

Id. at 570 (quoting 3A Wigmore, Evidence § 1018 at 996 (Chadbourn Rev. 1970)).

It is well-settled, however, that the right to impeach by a prior inconsistent statement is not without limit. Id. at 571.

The Eighth Circuit Court of Appeals has established four requirements "founded in fundamental fairness" for the use of prior inconsistent statements for impeachment. United States v. Rogers, 549 F.2d 490, 495 (8th Cir. 1976), cert. den., 431 U.S. 918, 97 S. Ct. 2182, 53 L. Ed. 2d 229 (1977). These requirements are: (1) inconsistency such as raises a doubt as to the truthfulness of both statements, (2) sufficient relevancy that the prosecution's case will be

adversely affected if the inconsistent testimony is allowed to stand, (3) compliance with Fed. R. Evid. 613, and (4) limiting jury instructions. Id. at 495-97.

We find that Sowder's statement to Leffler would arguably be admissible as evidence of a prior inconsistent statement offered to impeach Sowder. However, Leffler's repetition of Sowder's statement to Jean would only be admissible if Leffler could be properly impeached thereby. Because the State did not comply with Iowa R. Evid. 613(b) and requirements two and four of Rogers, such impeachment is improper.

Iowa R. Evid. 613(b) is identical to Fed. R. Evid. 613(b). It provides as follows:

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2), Iowa Rules of Evidence.

The conditions, then, set by Rule 613(b) are essentially two: the witness being attacked must have a chance to explain or deny the prior statement, and the opposite party must have an opportunity to question the witness about it. The rule makes it plain that both requirements must be met.

A notion of fairness, both to the witness and to the opponent of the impeaching party, underlies the conditions set by Rule 613(b). If the credibility of the witness is to be called into question, he should have some chance to defend himself; and if the direct testimony of a witness is to be undermined, the calling party should have an opportunity to show that any vacillation by the witness has an innocent explanation or does not truly raise doubts as to the evidence which the witness has given.

D. Louisell & C. Mueller, Federal Evidence § 358 at 561 (1979).

In the case at bar, Leffler was given no opportunity to explain or deny the prior inconsistent statement. In fact, there was no mention of any conversa-

tion between Leffler and Buchholz during his cross-examination. While Leffler denied having a conversation with Sowder about the Swift Shop robbery, he did not deny having a conversation with Buchholz regarding such.

Additionally, the content of the impeaching testimony was highly prejudicial to Sowder's defense and without any degree of reliability. Buchholz in effect told the jury that Sowder admitted committing the robbery. Yet she had no personal knowledge that Sowder ever made such an admission. She merely related what her boyfriend told her about what Sowder said. Under these circumstances, we cannot allow otherwise inadmissible hearsay to be placed before the jury under the guise of impeachment. See Carter v. Wiese Corp., 360 N.W.2d 122, 134-35 (Iowa Ct. App. 1984) (witness's testimony regarding what her daughter-in-law told witness about what plaintiff told the daughter-in-law was properly excluded because witness was without personal knowledge of plaintiff's statement and so reliability was too speculative); Rogers, 549 F.2d at 497 ("courts must be watchful that impeachment is not used as a subterfuge to place otherwise inadmissible hearsay before the jury"). Compliance with Iowa Rule of Evidence 613(b) is absent.

We note that a limiting instruction was given which stated that the statements by Jean Buchholz were submitted to the jury only to consider whether they were made and not to prove the truth of the facts asserted. Despite this, it is obvious that the testimony plainly stated that defendant admitted the robbery. No instruction could effectively direct a jury to think otherwise. See State v. Maniccia, 355 N.W.2d 256, 261 (Iowa Ct. App. 1984). Therefore, the fourth requirement of Rogers was not met.

Additionally, the second requirement of Rogers was not satisfied. Impeaching Leffler is not of sufficient relevancy that the prosecutor's case would be adversely affected if the inconsistent testimony is allowed to stand. Moreover,

Sowder pled not guilty. The jury would not have been surprised or unshakably impressed by his denial of a conversation containing admissions. See State v. Gage, 302 N.W.2d 793, 799 (S.D. 1980).

In view of the fact that the requirements for the use of prior inconsistent statements for impeachment purposes were not satisfied, we hold that under the facts of this case reversible error occurred.

Accomplice Corroboration. At trial the chief witness against Sowder was Barbara Saben. Saben testified that she had lived with Sowder during the later part of 1984. She claimed that she knew criminal conduct was going to occur prior to the time that Sowder left their trailer on October 29, 1984. On that date, Saben supplied Sowder and a friend, Danny Petty, with ski masks and pinned Sowder's hair up with hair pins. Saben claimed she was also present when Sowder and Petty divided up the money from the robbery and related how the crime was accomplished. Sowder contends that Saben was an accomplice and that her testimony required corroboration under Iowa R. Crim. Pro. 20(3), which states:

3. Corroboration of accomplice or person solicited.
A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Before Iowa R. Crim. Pro. 20(3) has application, it must be determined whether or not the testifying witness is in fact an accomplice. The defendant has the burden to prove by a preponderance of the evidence that the witness is an accomplice. State v. Houston, 206 N.W.2d 687, 689 (Iowa 1973). The Iowa Supreme Court has defined an accomplice as follows:

An accomplice is a person who willfully unites in, or is in some way concerned in the commission of a crime. The general rule for determining whether a witness is

an accomplice is if he could be charged with and convicted of the specific offense for which an accused is on trial.

But something more than mere knowledge that a crime is contemplated, or mere personal presence at the time and place where committed, must be shown in order to make one an accomplice. And it must be established by a preponderance of the evidence that a witness was in fact an accomplice.

State v. Johnson, 318 N.W.2d 417, 440 (Iowa 1982), cert. den. 459 U.S. 848, 103 S. Ct. 106, 74 L. Ed. 2d 95 (1982) (quoting State v. Jennings, 195 N.W.2d 351, 356-57 (Iowa 1972)). "The question whether a particular witness is an accomplice is a matter of law for the court when the facts are not disputed or susceptible to different inferences; when the facts are disputed, the question is one of fact for the jury." State v. Doss, 355 N.W.2d 874, 879 (Iowa 1984).

In the case at bar, the issue of whether the witness Barbara Saben was an accomplice was submitted to the jury. The jury was instructed regarding "accomplice" and the need for corroboration of accomplice testimony:

INSTRUCTION NO. 11

The term "accomplice" refers to and includes all persons who knowingly and voluntarily cooperate or aid and abet in the commission of the offense with which the defendant is charged.

Under the law of this State, a defendant cannot be convicted of a public offense upon the testimony of accomplices, unless his, or their testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense or its circumstances. The corroboration may be either direct or circumstantial evidence.

If you find that any witness offered by the State is an accomplice, as that term is herein defined, the defendant cannot be convicted of the offenses charged against him upon the testimony of such accomplice alone unless there is other evidence tending to connect the defendant with the commission of the offense charged; and such other evidence, if any, is not sufficient if it merely shows that the offense was committed or the circumstances

thereof, but it must be such as tends to point and single out the defendant as one of the persons who committed it.

We find that the trial court properly submitted this issue to the jury. While Saben supplied Sowder and Petty with ski masks on October 29, 1984, she had no knowledge that a robbery of the Swift Shop was planned. Sowder and Petty discussed robbing Saben's ex-employer's home. She remained in the trailer when Sowder and Petty left that evening and was unaware of the commission of the robbery until Sowder returned home with the stolen cash. The record also indicates that Saben watched Sowder and Petty divide up the cash and helped Sowder hide some of the money (\$100) from Petty.

Under these facts, we cannot say that Saben was an accomplice as a matter of law. See Doss, 355 N.W.2d at 879 (where evidence showed witness was a member of a gang, knew of the planned murder and was at the crime scene, question of "accomplice" was properly submitted to the jury). Because the facts were susceptible to different inferences, Saben's status as an accomplice was properly submitted to the jury. In the absence of any showing to the contrary, we must assume that the jury's finding on the accomplice issue was consistent with its general verdict and otherwise proper. See State v. Bestmann, 317 N.W.2d 847, 852 (Iowa Ct. App. 1982).

REVERSED AND REMANDED FOR NEW TRIAL.

All judges concur, except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. Even though I am not convinced that elements two and four of the Rogers test (regarding relevancy of the testimony and a limiting instruction to the jury, respectively) are lacking in this case, element three (regarding Fed. R. Evid. 613) is not satisfied. However, I think Buchholz's testimony was not admitted to prove the truth of the matter asserted, but to impeach the defendant's chief witness's testimony.

Notwithstanding these views on the alleged hearsay testimony, I find the error, if any, was harmless. The majority believes Buchholz's testimony, if believed by the jury, would have been highly prejudicial because defendant basically admitted he committed the robbery.

Witness Saben convincingly testified as to defendant's activities prior to the robbery in which she supplied defendant with a ski mask.

The clerk who was working at the Swift Shop when it was robbed identified the perpetrator as wearing a red ski mask with blue trim, red plaid shirt, and a blue jacket, and described the buck knife used to commit the crime, and finally testified the defendant's physical characteristics, particularly his mustache which showed through the ski mask, matched those of the perpetrator's. Evidence admitted at trial included a ski mask, shirt, and knife which matched the clerk's description. Testimony also indicated defendant had a large amount of cash in the Sportsman Lounge after the robbery occurred. This evidence, which so overwhelmingly links defendant to the robbery, easily nullified any prejudicial effect Buchholz's improperly-admitted testimony may have had on the jury. Such testimony, in the face of the persuasive evidence that defendant was the perpetrator of the robbery, constituted harmless error.

This court does not know the importance the jury attached to Buchholz's testimony. After reviewing the record, I find overwhelming evidence, aside

from Buchholz's testimony, which connected the defendant to the robbery committed at the Swift Shop on October 29. Buchholz's alleged hearsay testimony was not likely given undue importance by the jury after considering the other evidence in the record.

I would affirm the trial court.