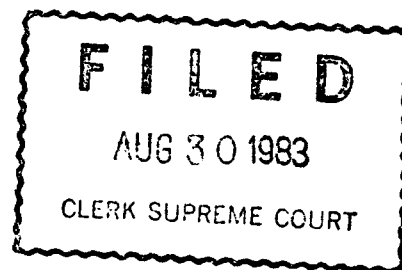


## IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA, )

Plaintiff-Appellee, )

Filed August 30, 1983

vs. )

FERMAN JONES, JR. )

 3-66  
 67392

Defendant-Appellant. )

Appeal from Dubuque District Court on change of venue from Black Hawk -  
 Carroll E. Engelkes, Judge.

Defendant appeals his conviction of murder in the second degree in violation  
 of Iowa Code §§ 707.1 and 707.3. AFFIRMED.

LuAnn White, Douglas F. Staskal, and Charles L. Harrington, Assistant  
 Appellate Defenders, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant  
 Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J.,  
 takes no part.

**DONIELSON, J.**

Defendant appeals his conviction of murder in the second degree in violation of Iowa Code § 707.1 and 707.3. He asserts: 1) there was insufficient evidence of his aiding and abetting to support the verdict; 2) the court erred in admitting certain evidence over his hearsay and relevancy objections; 3) the court erred in granting one witness' objection to expanded media coverage; and 4) the court abused its discretion in denying defendant's motion for a continuance in order to obtain testimony from the person who actually committed the murder and whose trial was not scheduled to begin until after defendant's trial. We affirm.

Defendant and Robert Elam were both charged with first-degree murder in connection with the shotgun slaying of Chris Stevens in the early morning hours of February 1, 1981. It is not disputed that Elam fired the fatal shot; his conviction for first-degree murder was affirmed by the supreme court. State v. Elam, 328 N.W.2d 314 (Iowa 1982). Defendant's conviction for second-degree murder, on the other hand, was based on our aiding and abetting statute, Iowa Code § 703.1, under which those who aid and abet the commission of a public offense "shall be charged, tried and punished as principals."

During the course of an evening a series of argumentative confrontations occurred involving the victim, Elam, and others, during the course of which threats were exchanged. *Elam fatally shot the victim after defendant obtained a shotgun from Elam's grandfather.* Defendant and Elam left an apartment together with the shotgun shortly before the shooting occurred. Defendant was present when the fatal shot was fired, left the scene with Elam, returned the shotgun to its owner, and threatened a potential witness on the morning following the shooting. For a more complete statements of the facts regarding the earlier confrontations, see Elam, 328 N.W.2d at 316. After a lengthy jury trial, defendant was found guilty of second-degree murder and was later sentenced to a term not

to exceed twenty-five years. After his motion for new trial was overruled, he brought this appeal.

I.

Defendant first claims that the evidence was insufficient to show that he aided and abetted Elam in killing Stevens. The familiar principles relevant to a determination of evidentiary sufficiency were summarized in State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981), and need not be repeated in full here. We do note, however, that we examine all of the evidence in the record in the light most favorable to the State and we will accept all legitimate inferences that may be drawn from that evidence. Id.

"Aiding and abetting" has been defined as "assent[ing] to or lend[ing] countenance of approval to a criminal act, either by active participation in it or by in some manner encouraging it." State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978). The State has the burden of proving defendant's knowledge of the act he encouraged or participated in. Id. Although a person who aids and abets in the commission of a public offense is to be tried as a principal, the guilt of such person "must be determined upon the facts which show the part he or she had in it, and does not depend upon the degree of another person's guilt." Iowa Code § 703.1. Aiding and abetting, while not proven merely by defendant's presence at the scene of the crime, need not be shown by direct proof and may instead be inferred from circumstantial evidence including presence, companionship with the person who actually committed the offense, and conduct before and after the offense is committed. Fryer v. State, 325 N.W.2d 400, 406 (Iowa 1982)(citations omitted).

Upon examination of the entire record and in light of the factors listed in Fryer, we conclude that there is sufficient circumstantial evidence of defendant aiding and abetting Elam's action in killing Stevens to generate a jury question. Defendant was aware of the confrontations between Elam and Stevens. He went

to the apartment of Sullivan George, Elam's grandfather, to obtain the latter's shotgun. He wrapped the gun in a towel and gave it to Elam who was waiting in the apartment of another acquaintance. Defendant and Elam then left the apartment with the gun and went outside where they saw Stevens. Defendant stood by while Elam shot and killed Stevens. While Elam changed clothes, defendant returned to George's apartment where he took the gun apart, cleaned it, and hid it under a mattress in the bedroom. Elam and defendant then left together in a station wagon owned by Steven's former girlfriend. A few hours later, Patricia McNamee, another resident of the apartment complex where these events occurred and who had seen defendant run past her window after the shooting, was discussing the incident with another woman. Defendant overheard their conversation and told McNamee that he knew where she lived and would be back to "get rid of" her. We believe these factual circumstances are sufficient to allow a rational jury to conclude beyond a reasonable doubt that defendant participated in or encouraged Elam's act of shooting Stevens and that defendant was aware of what Elam was planning to do. Defendant's first issue is without merit.

## II.

Defendant next raises two evidentiary issues. McNamee testified, over defendant's hearsay and relevancy objections, that, shortly before the shooting, she overheard Elam say "I'm going to kill that son of a bitch." Defendant also claims that any probative value this evidence had was outweighed by the prejudicial effect.

We find no error in the admission of this evidence. It is not barred by the hearsay rule because of the exception to that rule relating to declarations of intent to do an act. "Where one is charged with a crime, evidence of his . . . statements showing a frame of mind or plan on his part to commit such a

crime would, of course, be admissible in support of the charge." Goodale v. Murray, 227 Iowa 843, 859, 289 N.W. 450, 458 (1940). To be admissible under this exception, the statements "must be of a present existing state of mind, and must appear to have been made in a natural manner and not under circumstances of suspicion" (emphasis in original)(citation omitted). Id. at 857, 289 N.W. at 457. Elam's statement clearly related to his then-existing state of mind and intent to act. There is nothing to indicate the statement was made in an unnatural manner or under suspicious circumstances. Moreover, the evidence was relevant. Before the jury could find defendant guilty of aiding and abetting murder, it was required to find that Elam killed Stevens with malice aforethought. The statement was relevant to the determination of this latter issue. Finally, we cannot say that the probative value of this evidence was outweighed by its prejudicial effect except to the extent that any unfavorable evidence is always prejudicial to one's case. This issue presents no reversible error.

Defendant also complains about evidence received concerning an argument which occurred earlier that evening between Stevens and his former girlfriend in which Elam was injured by flying glass. Defendant claims such evidence was irrelevant. This objection was not raised below during the trial; instead, defendant unsuccessfully sought to exclude it by a pretrial motion in limine. The overruling of a motion in limine is not reversible error; defendant's failure to object to this evidence at trial leaves us nothing to review. State v. Langley, 265 N.W.2d 718, 720, 721 (Iowa 1978).

### III.

The trial court sustained over defense objection the objection to expanded media coverage made by Tanya Coleman, the sister of the woman with whom defendant lived. She alleged that she would be rendered bothered, shaky, and unable to concentrate to an extent greater than she already was by being forced

to testify on camera in front of her family against defendant, a person she regarded as a brother-in-law. Defendant claims the court's action in granting Coleman's objection to expanded coverage denied him a fair trial because she was allowed to testify under conditions different from those of the other witnesses. We disagree.

Rule 2(c) of Iowa Code of Judicial Conduct, Canon 3(A)(7) states in part: "[e]xpanded media coverage of a witness may also be refused by the judge upon objection and showing of good cause by the witness."<sup>1</sup> Rule 1 of this canon defines "good cause" for this purpose as that situation where expanded coverage "will have a substantial effect upon the objector which would be qualitatively different from the effect on members of the public in general and that such effect will be qualitatively different from coverage by other types of media."

In sustaining Coleman's objection to expanded coverage, the court made the following remarks:

I think the evidence already shows that she is an individual sixteen years of age. I understand that there is a relationship between her and the defendant. I think the most important thing now that the Court must preserve to the best of its ability is that her testimony be without any more factors than already exist. So that the jury may accurately interpret her credibility from her testimony without the additional influence of nervousness or whatever from being photographed. I think that is the one particularly valid objection that can be made to coverage in the nature of being photographed on TV. The jury has the difficult job of judging the credibility of every witness, and certainly when a witness indicates as Miss Coleman has that she is concerned about being able to testify, with that additional influence that a TV camera has or may have upon her ability to testify to the best of her ability, I think there is a valid reason why the Court must exclude coverage. For that reason I am directing that the TV camera be turned off during Miss Coleman's testimony.

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<sup>1</sup> Coleman's objection to expanded coverage was untimely filed since it was not filed at least three days before trial. See Rule 3(c) of Canon 3(A)(7). The court, however, has the discretion to extend the time for filing objections. Id. We find no abuse of that discretion in this case.

We find no error in this decision. The fact that Rule 2(c) states that a judge "may" refuse expanded media coverage upon objection and showing of good cause indicates that the matter is left largely to the sound discretion of the court. In concluding that Coleman's objection demonstrated good cause, the court did not abuse its discretion.

#### IV.

Finally, defendant asserts that the trial court abused its discretion in overruling his motion for continuance until after Elam's trial so that Elam would be able to testify at defendant's trial on his behalf. The motion did not specify the particulars of Elam's proposed testimony, stating instead only that "the evidence that Daniel Elam would testify to would be exculpatory for this defendant," and was accompanied by the following affidavit from Elam's attorney:

That I am the Attorney for Daniel Elam, who is charged with the crime of murder. This charge arose out of the same set of facts and circumstances of which Ferman Jones, Jr. has been charged with murder. I further state that I have interviewed my client at length concerning the possibility of him testifying at the Ferman Jones, Jr. trial presently scheduled to begin on June 16, 1981 in Dubuque, Iowa. In interviewing him I have determined that there is some exculpatory evidence to which Mr. Elam could testify to at Mr. Jones' trial. However, I have advised him not to testify until such time as his trial takes place since his testimony at the Ferman Jones, Jr. trial could be used to incriminate him. I also know of my own knowledge that the trial of Daniel Elam is scheduled for August 18, 1981 in Black Hawk County, Waterloo, Iowa. I make this affidavit solely for the purpose of supporting the application for continuance made by Ferman Jones, Jr.

Motions for continuance are governed by Iowa R. Civ. P. 183(b) which states in part: "[a]ll such motions based on absence of evidence must be supported by affidavit . . . and must show . . . (3) what particular facts, distinct from legal conclusions, affiant believes the witness will prove . . ." (emphasis added). The affidavit filed in this case is clearly inadequate under Rule 183(b)(3) since it contains no statement of what particular facts Elam would testify to on defendant's

behalf. Instead, it merely states the legal conclusion that Elam "could" present some "exculpatory evidence." The trial court properly overruled defendant's motion and in any event did not abuse its "very broad" discretion that it has in these matters. State v. Cowman, 212 N.W.2d 420, 423 (Iowa 1973).

Having examined all of defendant's contentions and finding no reversible error, we affirm his conviction and sentence.

AFFIRMED.