**IN THE COURT OF APPEALS OF IOWA**

No. 1-014 / 00-0212
Filed February 28, 2001

**STATE OF IOWA,**
Plaintiff-Appellee,

vs.

**JOSHUA SAMUEL GILPIN,**
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Washington County, E. Richard Meadows, Jr., Judge.

The defendant appeals his conviction and sentence, following a jury trial, for first-degree robbery. **AFFIRMED.**

John E. Wunder, Muscatine, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Barbara A. Edmondson, County Attorney, and Eric Goers, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

**MAHAN, J.**

The defendant appeals his conviction and sentence, following a jury trial, for first-degree robbery. Defendant contends the district court erred in refusing to allow into evidence an accomplice's statement, and its exclusion prejudiced him. We affirm.

**Background Facts and Proceedings.** During the early evening hours of June 12, 1999, Gilpin retrieved his 9mm Beretta pistol from its hiding place in a roadside ditch and gave it to his friend and roommate Armando Lemos. Later that evening, Gilpin, Lemos, and three of their friends—Anjelica Ruiz, Luisa Castro, and Jamaica Sosa—ended up in a car driven by Sosa. At some point, Gilpin and his friends decided to do a "beer run," which Gilpin described at trial as going into a store, taking beer, cigarettes, and anything else one could grab, and running out without paying.

At approximately 2:15 a.m. on June 13, 1999, Sosa drove up to a gas pump at the Moco One store in Washington, and waited in the car while Gilpin pumped gas. Lemos, Ruiz, and Castro went into the store. The Moco One clerk testified Lemos remained in the vicinity of the cash register, while the two women used the restroom and then headed toward the store's cooler. Gilpin entered the store after pumping gas and joined the two women near the cooler. Lemos pointed Gilpin's gun at the clerk's face and said, "Give me all your money." The clerk heard the cooler doors open and close, and saw the others exit the store with several eighteen-packs of beer. The clerk opened the cash register, and Lemos took all the money from the cash drawer. The clerk heard the others

enter the store for a second time, open and close the cooler doors, and leave carrying something, although he could not see what they took. When the clerk was unable to eject the security tape from the VCR unit mounted underneath the counter, Lemos took the entire unit and left the store with it. According to the clerk, the others never said anything to Lemos about the gun during the incident.

The State filed its amended trial information on October 11, 1999, charging Gilpin with first-degree robbery, in violation of Iowa Code sections 711.1, 711.2, 702.7, and 703.2 (1999). At trial, Gilpin contended he only intended to commit a theft. He denied planning a robbery and testified he was shocked and surprised to see the gun in Lemos's hand as he (Gilpin) walked out of the store the first time.

The district court instructed the jury it could find Gilpin committed first-degree robbery directly, as an aider and abettor, or as a knowing participant in joint criminal conduct. The jury found Gilpin guilty as charged, but did not specify under which theory. The court sentenced Gilpin to an indeterminate twenty-five year prison term. Gilpin appeals.

**Standard of Review.** Our review of hearsay rulings is for correction of errors at law. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

**Hearsay Evidence.** At trial, Gilpin sought to introduce a statement made by Lemos to the police: "It was happening so I had to do something, so I grabbed the gun. I pointed the gun at the clerk and started yelling." Gilpin urged the district court to admit the statement under Iowa Rule of Evidence 804(b)(3), as the statement of an unavailable declarant (Lemos), which tended to inculpate

Lemos and exculpate Gilpin. Gilpin contended the statement demonstrated the theft was in progress *before* Lemos pulled the gun, thereby supporting Gilpin's theory he did not know Lemos planned to use a gun during the "beer run." The district court ruled the statement inadmissible.

Iowa Rule of Evidence 804(b)(3) provides:

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. *A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*

Iowa R. Evid. 804(b)(3) (emphasis added). Rule 804(b)(3) requires: (1) proof the declarant was unavailable as a witness, and (2) corroborating circumstances which clearly indicate the trustworthiness of the statement. *State v. Traywick*, 468 N.W.2d 452, 454 (Iowa 1991).

*Unavailable Declarant.* Gilpin contends Lemos was unavailable for trial because he had "previously advised all concerned that he would assert his Fifth Amendment Rights." *See* Iowa R. Evid. 804(a)(1). The State disputes this contention, arguing Gilpin does not claim any court ever ruled on Lemos's assertion of his Fifth Amendment privilege, as required by Iowa Rule of Evidence 804(a)(1). Because we can affirm the district court's hearsay ruling on other grounds, we assume, without deciding, Lemos was unavailable for trial.

*Corroborating Circumstances.* Rule 804(b)(3) requires corroborating circumstances to make the declaration admissible. *State v. DeWitt*, 597 N.W.2d 809, 812 (Iowa 1999). As the *DeWitt* court explained:

> The corroboration requirement of 804(b)(3) is a preliminary question as to the admissibility of evidence, not an ultimate determination as to the weight to be given such evidence. The district judge does not need to be completely convinced that exculpatory statements are true prior to their admission. Such a high burden was not intended by the corroboration requirement of 804(b)(3). The district court must find only that sufficient corroborating circumstances exist and then permit the jury to make the ultimate determination concerning the truth of the statements.

*Id.* (quoting *United States v. Garcia*, 986 F.2d 1135, 1141 (7th Cir. 1993) (footnote omitted)).

The district court found Gilpin's actions in taking the beer from the store and returning at least once while Lemos held the clerk at gunpoint "suggest that he wasn't surprised by the robbery," and "don't offer a lot of corroboration for [Lemos's] statement." We agree. Gilpin did not object or express surprise after he saw Lemos with the gun in his hand. He did not disassociate himself from the robbery Lemos was committing. Rather, Gilpin left the store with several packs of beer and returned to steal cigarettes from the store. Gilpin received a share of the beer and cigarettes he stole, and a share of the money stolen by Lemos.

Other circumstances fail to indicate the trustworthiness of the statement. Gilpin retrieved the gun from its hiding place in a roadside ditch and gave it to Lemos before the incident. Lemos returned the gun to Gilpin afterwards. The clerk testified he turned away from Lemos to light a cigarette or take a drink. When the clerk turned back around, Lemos had the gun pointed at his face. The

clerk initially thought "it was a joke," until further inspection of the gun led him to conclude "[the gun] was real." Lemos said, "This ain't no joke, give me all your money." Moreover, the clerk testified he heard the cooler door open and close *after* the gun had been pulled. Lemos's actions, as explained by the clerk, do not suggest he panicked and pulled the gun once the others began taking merchandise from the store.

Lemos's statement lacked trustworthiness insofar as it might have tended to exculpate Gilpin. The district court did not err in excluding the hearsay statement.[1]

*Prejudice.* Even if the district court erred in excluding the hearsay statement, any error did not prejudice Gilpin. When an alleged error is not of constitutional magnitude, the test of prejudice for harmless error purposes is whether it sufficiently appears the rights of the complaining party have been injuriously affected or the party has suffered a miscarriage of justice. *Traywick*, 468 N.W.2d at 454-55 (quoting *State v. Massey*, 275 N.W.2d 436, 439 (Iowa 1979)).

Gilpin saw Lemos standing near the cash register with the gun in his hand before he left the store with several eighteen-packs of beer. Gilpin took the beer to the car, returned to the store, and stole several cartons of cigarettes. Gilpin

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[1] In addition, we question whether Lemos' statement was inculpatory. As the district court stated:

> [I]t seems to me that Lemos thinks it will help him. In other words...it's akin to "he started it" or "they started it.". . . [H]e's in custody, he's making the statements to the officers, the officers already know he's the gunman, and he's, it seems to me, trying to make himself look better. He's trying to shift blame to other people, he's trying to curry favor with the officers as opposed to inculpating himself.

said nothing to Lemos about the gun during the incident. Prior to the incident, Gilpin retrieved the gun from a roadside ditch and gave it to Lemos. Given the overwhelming evidence appearing in the record, we conclude the jury could have found Gilpin guilty under a theory of aiding and abetting, joint criminal conduct, or the substantive charge itself. The district court's exclusion of Lemos's hearsay statement did not prejudice Gilpin.

**AFFIRMED.**