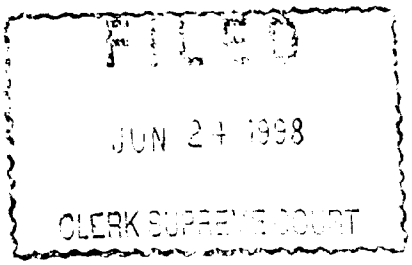
IN THE COURT OF APPEALS OF IOWA

No. 8-219 / 97-1352

STATE OF IOWA,
Appellee,

vs.

JESSE JOHN GUSMAN, SR.,
Appellant.



Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Jesse John Gusman, Sr. appeals from his conviction, following a jury trial, for first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (Iowa 1995).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Richard Crowl, County Attorney, for appellee.

Heard by Cady, C.J., and Vogel and Mahan, JJ.

CADY, C.J.

Jesse Gusman, Sr. appeals the judgment and sentence following his conviction of first-degree murder. He claims the district court erred by instructing the jury to consider aiding and abetting as an alternative means of committing the offense. He also claims he received ineffective assistance of counsel. We affirm the district court and preserve the claim for ineffective assistance of counsel for postconviction relief.

The facts giving rise to this case began when Gusman and his girlfriend, Lorrie Ryan, went to the Omaha airport to meet Larry Magnuson. Magnuson had been in California where he purchased approximately $14,000 worth of methamphetamine. The packaged drugs were attached to his ankles with masking tape and covered by his boots.

Gusman, Ryan, and Magnuson drove to Magnuson's residence in Iowa. Gusman and Magnuson engaged in a fight after their arrival. The fight soon escalated from shoving to more intense violence. Ryan testified she observed Gusman hit Magnuson on the head with a rock. Gusman later told police he hit him with a pipe wrench and a brick.

Magnuson was later found dead in the hallway of his home. His boots had been removed, along with his cell phone and an airplane ticket. These items were discarded into a dumpster.

The autopsy revealed Magnuson received numerous stab wounds to the neck, face, and chest, more than fifteen blows with a blunt object to the head, and numerous defensive wounds to his hands. Gusman testified he hit Magnuson with a brick in

self-defense. He denied using a knife. He also claimed diminished capacity due to intoxication.

The instructions submitted to the jury provided three alternatives for first-degree murder: (1) Gusman acted willfully, deliberately, premeditatedly, and with a specific intent to kill Magnuson; or (2) Gusman was participating in the offense of willful injury; or (3) Gusman was participating in the offense of robbery in the first degree. Aiding and abetting instructions were also submitted to the jury. The jury found Gusman guilty of first-degree murder and the district court sentenced him to life imprisonment.

On appeal, Gusman claims the district court erred by instructing the jury to consider aiding and abetting as an alternative means of committing the offense. He also asserts he received ineffective assistance of counsel.

I. Jury Instructions

Our review of the submission of a jury instruction is for corrections of errors of law. Iowa R. App. P. 4; *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Instructions submitted to the jury must be supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). Substantial evidence means evidence exists in the record which could convince a reasonable jury the defendant is guilty beyond a reasonable doubt. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). Even if the trial court did err in submitting an instruction, we will reverse only when the error has caused prejudice. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 148 (Iowa 1992).

We must assess whether substantial evidence supporting the instruction existed. A person cannot aid and abet himself in the commission of a crime. *State v. Mays*, 204 N.W.2d 862, 864 (Iowa 1973). To convict a person on an aiding and abetting theory, the State must produce substantial evidence the individual "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa App. 1995).[1] Knowledge of the criminal act at or before its commission is essential. *Id.* Knowledge can be inferred. *Id.* Knowledge of the crime and proximity to the scene, circumstantial evidence such as companionship, combined with conduct before and after the crime is committed, are sufficient to infer a defendant's participation. *Id.*

Gusman claims all the evidence introduced by the State at trial portrayed him as the killer. He points out the evidence supports Ryan's presence during the crime,

---

[1] The trial court submitted the following instruction to the jury:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.
>
> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the Defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.
>
> If you find the State has proved the Defendant directly committed the crime, or knowingly "aided and abetted" another person in the commission of the crime, then the Defendant is guilty of the crime charged.

but does not support a finding she committed the murder or aided and abetted the murder. Consequently, he asserts the instruction permitting the jury to consider his guilt as an aider and abettor was improper in the absence of evidence of another's involvement.

Although there was little direct evidence of Ryan's role in the crime, considerable circumstantial evidence exists. It was reasonable to infer Ryan knew Magnuson was bringing drugs back from California. She took Gusman with her to pick him up at the airport. Additionally, when initially interviewed by police, Gusman stated "they" had taken Magnuson's boots off his feet. Later, he said "he" had taken them off. Finally, Gusman told police "she" had taken off Magnuson's boots. Ryan's testimony was also inconsistent with the forensic evidence showing Magnuson was stabbed numerous times. Although Ryan was present during the fight, she claims she did not see a knife. The jury could have reasonably inferred from this testimony she wanted to protect Gusman or herself.

Further, evidence exists Ryan assisted Gusman in destroying evidence on the way home after the crime, and later after they learned Magnuson had died. Sufficient evidence exists to support an aiding and abetting scheme to rob Magnuson of drugs or willfully injure him during the course of the robbery. We therefore conclude substantial evidence exists in the record to support the aiding and abetting instruction.

II. Ineffective Assistance of Counsel

Gusman's ineffective assistance of counsel claim involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Cook*, 565 N.W.2d

611, 613 (Iowa 1997).

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

Gusman maintains he received ineffective assistance of counsel by defense counsel's failure to request the employment of a forensic pathologist before trial. The record indicates defense counsel did not request an expert to challenge the autopsy testimony until after the verdict had been entered. Dr. Bennett, the State Medical Examiner, testified Magnuson died approximately ten hours after the fight. He also testified Magnuson died within fifteen to twenty minutes of his injuries. Gusman contends the time of death testimony, if sufficiently challenged by a forensic pathologist, would have potentially provided reasonable doubt.

The record is insufficient for us to address Gusman's ineffective assistance of counsel claim on appeal. The record does not indicate whether defense counsel attempted to obtain an expert prior to trial or why counsel decided against obtaining an expert. In order to allow Gusman's counsel to explain the decision, we preserve his ineffective assistance of counsel claim for postconviction relief. This will also allow Gusman an opportunity to develop his claim of prejudice.

We have considered all of Gusman's claims and affirm the district court.

AFFIRMED.