

IN THE COURT OF APPEALS OF IOWA

No. 0-156 / 89-945

FILED

MAY 24 1990

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JOEY ALAN SCURLOCK,

Appellant.

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Appeal from the Iowa District Court for Polk County,
Harry Perkins, Judge.

The defendant appeals from his conviction, following a jury trial, for second-degree robbery. He challenges an evidentiary ruling and a ruling on instructions. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and Patricia R. Lapointe, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; James Smith, County Attorney; and James Ward, Assistant County Attorney; for the appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Joey Alan Scurlock and a companion were accused of robbing Matthew Merk, a pedestrian. Scurlock admitted he assaulted Merk by tackling him and kicking him in the head. However, Scurlock maintained he never intended to commit a theft and was unaware his companion planned to steal the victim's wallet and checkbook.

At Scurlock's trial for second-degree robbery, Darin McCormick testified about a conversation he had with Scurlock and Robert Emery on the night of the robbery. The two men told McCormick about the robbery. Although McCormick testified to the substance of the conversation, he could not remember who said what. Scurlock's attorney objected to his testimony as inadmissible hearsay. The district court overruled these objections without specifying its reasons for finding the testimony admissible.

A jury found Scurlock guilty of second-degree robbery. Scurlock has appealed from the conviction.

Scurlock contends the district court erred by admitting the testimony of Darin McCormick, arguing it was inadmissible hearsay. The State responds the testimony was admissible under Iowa Rule of Evidence 801(d)(2)(B) because Scurlock, the party against whom the statement was offered, had "manifested his adoption or belief in [the statement's] truth" by agreeing with his codefendant's recitation, by

joining in that recitation, and by displaying the property stolen from the victim.

Scurlock also challenges the district court's instruction on the specific intent to commit a theft, which is an element of robbery. Scurlock contends the jury should have been instructed it could find Scurlock guilty on a theory of aiding and abetting only upon a finding he possessed specific intent to commit a theft or knew his codefendant possessed such a specific intent.

We affirm the conviction.

Our scope of review is for errors assigned. Iowa R. App. P. 4.

During the trial, outside the presence of the jury, McCormick was questioned by Scurlock's attorney. He testified about a conversation between himself, the defendant, and Emery, in which the two men told him about the incident. McCormick admitted he could not remember exactly who said what. The defense attorney's hearsay objection was overruled.

The jury was brought in and McCormick testified, again, over Scurlock's objection.

Scurlock argues this testimony does not fall within the Iowa Rule of Evidence 801(d)(B) or (E) definitions of nonhearsay, and therefore, was erroneously admitted. We disagree.

Iowa Rule of Evidence 801(d)(2)(B) defines as nonhearsay a statement offered against a party which is also a statement in which he has manifested his adoption or belief in its truth.

According to McCormick, the conversation began when Scurlock pulled the victim's driver's license from his pocket and showed it to McCormick. Then Scurlock and Emery proceeded to tell McCormick about the robbery. Although the witness could not specifically remember who said what. McCormick testified as follows:

They saw a guy walk by and Joe and Rob, they were, you know, wrestling back and forth and Rob told Joe that he couldn't whip anybody's butt, and he said, "Oh, yeah? Well, you watch. The next guy that walks by I'm going to beat him up."

According to McCormick there was no disagreement between the two men as they talked. "They were both just telling the story."

The Iowa Supreme Court in State v. Kelsey, 201 N.W.2d 921, 927 (Iowa 1972), established that silence alone is not sufficient to constitute an admission by an accused in a criminal prosecution. That is, the admission must be adopted, rather than merely tacitly agreed to. Admissions by adoption or acquiescence can only be established by the totality of circumstances viewed in terms of probable human behavior. The term adoptive admission is applied to evidence of the conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person. It must be shown a person clearly and unambiguously assented to the statements of another before an adoptive admission comes into being.

State v. Beckett, 383 N.W.2d 66, 69 (Iowa App. 1985)
(citations omitted.)

In this case, the defendant was not merely a passive listener. Scurlock initiated the conversation by showing McCormick the stolen driver's license. Scurlock participated in the recounting of the assault and robbery and made some of the incriminating statements himself.

Failure to respond to a statement made in the presence of a party may constitute a manifestation of the belief in the truth of the statement if the silence occurs in circumstances where there is no other explanation equally consistent with the inference of adoption of the statement's truth by the silent listener.

J. Adams and K. Kincaid, Iowa Practice 7, Evidence § 801.13 (1988).

We conclude, under the totality of the circumstances, Scurlock's conduct manifests circumstantially his assent to the truth of those statements made by Emery. Therefore, the testimony falls within the purview of nonhearsay as defined in 801(d)(2)(B).

"If the hearsay rule can be found inapplicable under any theory, the trial court's ruling of admissibility of evidence will be upheld." State v. Beckett, 383 N.W.2d at 67, quoting State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976). We affirm the trial court's ruling on the admissibility of McCormick's testimony.

Scurlock argues the district court erred in refusing to give the following jury instruction:

You are further instructed that the offense charged requires a specific intent as that has been defined for you in Instruction Number 15. In this regard before you find the defendant aided and abetted the commission of the offense charged,

you must not only find that the defendant aided and abetted as has been explained but it must also be proved by the state by evidence beyond a reasonable doubt that the Defendant either possessed such specific intent himself or aided and abetted with the knowledge that the principal had possessed such specific intent or have knowledge that the principal had such specific intent for the offense charged, or he is not guilty.

The trial court submitted the following marshaling instruction to the jury:

The State must prove all of the following elements of robbery in the second degree:

1. On or about the 30th day of October, 1988 the defendant had the specific intent to commit a theft.

2. In carrying out his intention or to assist him in escaping from the scene with or without the stolen property the defendant:

a. Committed or aided and abetted in the commission of an assault on Matthew Merk. If the State has proved all of the above elements then the defendant is guilty of Robbery in the Second Degree. If the State has failed to prove any one of the elements then the defendant is not guilty of Robbery in the Second Degree and you will then consider the charge of Assault Causing Bodily Injury.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). However, the trial court's ruling regarding this decision will not be disturbed absent an abuse of the trial court's discretion. State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982). We will not find an abuse of discretion unless "such discretion was

exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id. The defendant has the burden of proving abuse of discretion. Id.

There is no abuse of discretion here. The trial court submitted an instruction to the jury which required proof beyond a reasonable doubt the defendant had a specific intent to commit a theft and the defendant committed, or aided and abetted in the commission of, the assault upon the victim to carry out his intention or to assist him in escaping with the stolen property.

The jury was given the more narrow instruction of determining the defendant's specific intent to commit the theft. Defendant has failed to carry his burden of proving the trial court's refusal to submit the requested instruction was clearly unreasonable.

AFFIRMED.