IN THE COURT OF APPEALS OF IOWA

No. 8-008 / 96-2296
Filed August 28, 1998

STATE OF IOWA,
Appellee,

vs.

JOHN LEE HARRIS,
Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Defendant appeals from his conviction for first-degree murder in violation of Iowa Code sections 707.1, 707.2(1), (2) (1995). **AFFIRMED.**

Michael J. Burdette of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John Sarcone, County Attorney, and Jeffrey Noble and Jamie Bowers, Assistant County Attorneys, for appellee.

Considered en banc.

STREIT, J.

John Lee Harris appeals his conviction of first-degree murder for killing Monte Williams contending the trial court erred in refusing to instruct the jury the State's witnesses were accomplices, refusing to submit special interrogatories, admitting statements obtained by police without the presence of his parents, and admitting a dated photograph of Harris with a pistol similar to the murder weapon. Because we find the trial court did not err in these rulings and the conviction is supported by substantial evidence, we affirm.

I. Background Facts & Proceedings.

Defendant, John Harris, and his comrades, Demarco Walker, Samuel Palmer, Eric McCuller, and Kenneth Hayes planned to confront Tony Williams on July 24, 1996. In preparation, the group went to McCuller's and Palmer's houses and obtained guns. Kenneth Hayes drove Harris, Walker, Palmer, and possibly McCuller, in search of Tony Williams.

The group spied Monte Williams, Tony's cousin. They approached Monte and asked him where Tony was. After speaking with Monte, the group drove away. Harris told Hayes to "turn [the car] around because I am going to shoot him." Hayes turned the vehicle around and drove back to Monte. Harris called out to Monte. Harris, gun in hand, got out of the car and blasted at Monte three times. Monte Williams died of a gunshot wound to his pelvis.

Harris was charged with first-degree murder. Pursuant to a plea agreement, Hayes pled guilty to going armed with intent. At the defendant's trial, Hayes, Walker, and Palmer all testified Harris killed Williams. The State conceded Hayes was an accomplice, but disputed that Walker and Palmer were. The defendant was convicted as charged.

II. Trial Court's Refusal to Instruct the Jury the State's Witnesses Were Accomplices.

Harris claims the trial court erred in failing to determine, as a matter of law, Walker and Palmer were accomplices. The State admitted Hayes was an accomplice and the trial court instructed the jury of this.

Iowa Rule of Criminal Procedure 20(3) provides:

> 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.

Iowa R. Crim. P. § 20(3) (1997).

Harris requested the court instruct the jury Palmer and Walker were accomplices as a matter of law, instead of leaving that question for jury determination. The trial court refused. Rather, the court instructed the jury as follows:

Instruction No. 15.

> An "accomplice" is a person who knowingly and voluntarily cooperates or aids in the commission of a crime.
>
> A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime.
>
> The State admits Kenny Hayes is an accomplice.
>
> The testimony of one accomplice is not sufficient to corroborate the testimony of any other accomplices. If you find Kenny Hayes, Samuel "Scooter" Palmer and Demarco Walker all are accomplices, the defendant cannot be convicted by their testimony alone. There must be other evidence tending to connect the defendant with the commission of the crime. Such other evidence, if any, is not enough if it just shows a crime was committed. It must be evidence tending to single out the defendant as one of the persons who committed it.

An accomplice is a person who willfully unites in, or is in some way concerned in the commission of a crime. *State v. Berney*, 378 N.W.2d 915, 918 (Iowa 1985). 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. *Id.*

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. *Id.* It must be established by a preponderance of the evidence that a witness was in fact an accomplice. *Id.*

The question of whether a particular witness is an accomplice is a question of law where the facts are not disputed or susceptible to different inferences; however,

where the facts are susceptible to different inferences the question is one of fact for the jury. *Id.* (citing *State v. Doss*, 355 N.W.2d 847, 879 (Iowa 1984)).

There is conflicting testimony in the record as to whether Walker and Palmer were accomplices. The jury could have drawn different inferences from the evidence on this issue. When the facts are susceptible to different inferences, the question becomes one of fact for the jury. *State v. Powell*, 400 N.W.2d 562, 564 (Iowa 1987); *State v. Doss*, 355 N.W.2d 874, 879 (Iowa 1984). While the testimony of Hayes, Palmer, and Walker supports the conclusion Palmer and Walker would have been accomplices if Tony Williams had been shot, the evidence raises a question of their consent to participate in the shooting of Monte Williams. Because the evidence was conflicting and different inferences could be drawn, the trial court did not err in refusing to instruct the jury Walker and Palmer were accomplices as a matter of law. *Powell*, 400 N.W.2d at 564.

III. Refusal to Submit Special Interrogatories Requiring Jury to Find Whether the Witnesses Were Accomplices.

Harris contends the trial court erred in refusing to submit special interrogatories to the jury asking them if Walker and Palmer were accomplices of Harris and whether their testimony was corroborated. A trial court's decision on instructions will not be disturbed absent an abuse of discretion. *State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990).

Harris contends Iowa Rule of Criminal Procedure 21(2) required the court to submit the interrogatories he requested.

Iowa Rule of Criminal Procedure 21(2) provides:

> [The jury] must also return with the general verdict answers to special interrogatories submitted by the court upon its own motion, or at the request of the defendant in prosecutions where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required.

The trial court denied the request, reasoning "[I]n the event of a guilty verdict, whatever the answer to that interrogatory would be would inhere in the verdict."

Contrary to Harris's contention, the trial court's discretion in choosing whether to submit special interrogatories to the jury is not altered by rule 21(2). In *State v. Gilroy*, the supreme court noted the "limited mandate of rule 21(2)." *State v. Gilroy*, 313 N.W.2d 513, 520 (Iowa 1981). The limited mandate is one imposing a duty on the *jury* to answer interrogatories, not for the court to issue the questions to the jury. The limited mandate comes into play *after* the trial court has determined, in its discretion, to allow special interrogatories to go to the jury. Iowa R. Crim. P. 21(2).

After special interrogatories have been submitted to the jury there are limited scenarios under which the jury is mandated to return the verdict with an answer to the interrogatories that have been submitted. *Id.* There are four scenarios under which the mandate will apply. First, the jury must return an answer to special interrogatories with the verdict when the court, upon it own motion, has submitted the special

interrogatories. *Id.* Second, the jury must return answers to special interrogatories with the verdict where the defendant asserts an affirmative defense[1] *and* the defendant requests the interrogatories be answered. *Id.* Third, the jury must return an answer to special interrogatories with the verdict where it is claimed a witness is an accomplice *and* the defendant requests the interrogatories be answered. *Id.* Fourth, the jury must return an answer to special interrogatories with the verdict where there has been a failure to corroborate where corroboration is required *and* the defendant requests the interrogatories be answered. *Id.* As is evident from construction of the rule, the trial court is not required to submit special interrogatories of any type to the jury upon the request of the defense. The trial court retains its discretion to determine what interrogatories will fairly submit the law and issues to the jury.

Because the trial court was not mandated to submit defendant's proposed interrogatories, it did not err in refusing to do so. Further, the trial court did not abuse its discretion in refusing to submit the instruction. It is for the trial court to decide if an answer to an interrogatory would benefit the jury or court in reaching its decision. *See, i.e., Coleman v. Brower Const. Co.*, 119 N.W.2d 256, 259 (Iowa 1963). The trial court herein properly exercised its discretion and adequately presented the issues of accomplice testimony and corroboration to this jury.

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[1] Such as self defense, defense of others, defense of property, aiding another in defense of property, resisting forcible felony, diminished responsibility, intoxication, mistake of law or fact, entrapment, and the alibi defense.

Instruction 15 clearly stated there must be *other evidence* than accomplice testimony to convict defendant. If the jury found Walker and Palmer were accomplices of Harris, the jury could not convict Harris based on their testimony without corroborating evidence.

The existence of corroborative evidence is a question of law for the court, but its sufficiency is ordinarily a question of fact for the jury. *State v. Ware*, 338 N.W.2d 717, 718 (Iowa 1983). Corroborative evidence need not be strong as long as it can fairly be said to connect the defendant with the commission of the crime in some material fact. *State v. Dickerson*, 313 N.W.2d 526, 529 (Iowa 1981). We presume the jury followed the instructions concerning the need for other evidence, if they found Walker and Palmer were accomplices. *See State v. Simpson*, 438 N.W.2d 20, 21 (Iowa App. 1989) (generally a jury is presumed to follow its instructions). If the jury did not find Walker and Palmer accomplices, there was no need for evidence corroborating their statements.

Under some circumstances the better practice may be for the trial court to give the interrogatories requested. The court herein, in determining the interrogatories would not aid the jury or the court, did not abuse its discretion in refusing the submission. We find no reversible error and find defendant's conviction supported by corroborated substantial evidence.

IV. Admission of Photograph of Defendant With Guns.

Harris argues the trial court abused its discretion in admitting a photograph in which he was holding a gun. The court also allowed testimony about the photograph. Review of the district court's evidentiary ruling is for an abuse of discretion. *See State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997); *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992); *State v. Gordon*, 354 N.W.2d 783, 784 (Iowa 1984); *State v. Kane*, 492 N.W.2d 209, 210 (Iowa App. 1992).

Harris objected to the admission of testimony based on a photograph taken six months before the murder showing him with a gun in each hand and two in his waistband. He argued it was irrelevant. The State argued the proffered evidence was relevant to show Harris had access to and knowledge of a .22 caliber semiautomatic pistol before July 1996. The trial court admitted the photograph but gave the jury this admonishing instruction:

> [E]vidence that you are about to hear goes only to whether or not the defendant had access to and knowledge regarding a .22 caliber semi-automatic handgun prior to June 4, 1996, by his being pictured with said gun. This evidence is not to be considered, nor are you allowed to infer that the gun in the photograph was used in the murder. This photograph, Exhibit 13, will be admitted into evidence and will be a part of the record, but the exhibit contains other evidence the Court has ruled inadmissible. Therefore, Exhibit 13 will not be published to the jury and will not go back to the jury room with you during deliberations.

The court also permitted expert witness Robert Harvey to testify it was his opinion the gun in the defendant's left hand shown in the photograph was a Smith & Wesson model 422 pistol. Harvey also testified the bullet fragment found in Williams' body could have been fired by a Smith & Wesson model 422 pistol. Again, the trial admonished the jury by stating: "The testimony of [the defense expert] is not to be considered nor are you allowed to infer that the gun in the photograph was used in the murder." Jurors are presumed to have obeyed a court's admonition absent evidence to the contrary. *State v. McMullin*, 421 N.W.2d 517, 520 (Iowa 1988).

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. The test of relevancy is whether the evidence offered would render the desired inference more probable than it would be without such evidence. *State v. Knox*, 536 N.W.2d 735, 738 (Iowa 1995). Evidence that Harris had access to a .22 caliber semiautomatic pistol in January 1996, is relevant to Harris having access to a similar pistol in July 1996.

Once the trial court establishes the evidence is relevant to an issue, however, it must balance the probative value of evidence against its potential prejudice. *State v. Kern*, 392 N.W.2d 134, 136 (Iowa 1986). This balancing is required by Iowa Rule of Evidence 403, which states in relevant part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .

Iowa R. Evid. 403.

Harris argues the photograph was unfairly prejudicial because it depicted him as being a bad character who was likely to have killed Williams. The key to admissibility is "whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit a wrongful act." *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997). It was not an abuse of discretion for the trial court to allow the photograph of Harris into evidence after weighing this claimed prejudice against its probative value. *State v. Zeliadt* 541 N.W.2d 558, 562 (Iowa App. 1995).

An error in the admission of evidence is not prejudicial where the evidence appears elsewhere in the record. *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992). The record here is replete with testimony that Harris obtained, possessed, and used a .22 caliber semiautomatic pistol at the time Monte Williams was slain. Evidence which is merely cumulative is not prejudicial. *Barker v. State*, 479 N.W.2d 275, 280 (Iowa 1991). Thus, even if the court did err in admitting the photograph and accompanying testimony, the error was harmless in that it did not prejudice the defendant.

V. Sufficiency of Evidence to Support Conviction.

Harris challenges the sufficiency of the evidence to support his conviction. The appellate scope of review for sufficiency of evidence to support a conviction is well established:

> [R]eview of a substantial evidence claim is on error. [An appellate court is] bound by the jury verdict unless the verdict is not supported by substantial evidence. In making this determination, [the court will] consider all the evidence in the light most favorable to the State. We accept all legitimate inferences that may fairly and reasonably be deducted from the evidence. Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Direct and circumstantial evidence are equally probative. Evidence, whether direct or circumstantial, must however do more than create speculation, suspicion or conjecture.

State v. Sanborn, 564 N.W.2d 813, 815-16 (Iowa 1997)(quoting *State v.Bayles*, 551 N.W.2d 600, 608 (Iowa 1996)). As set forth in the above discussion, numerous witnesses testified Harris shot Monte Williams. The evidence of Harris's guilt was overwhelming. We affirm on this issue.

VI. Statements by Defendant to Police.

Harris claims the court erred in admitting evidence of a statement he made to a police officer because the officer failed to make a good faith effort to contact his parents prior to his waiver of counsel. Iowa Code § 232.11(2) (1995). We review for the correction of errors of law. Iowa R. App. P. 4.

Statements obtained from juveniles arrested on suspicion of a crime without valid waiver of counsel are per se inadmissible. *State v. Nelson*, 435 N.W.2d 344, 347 (Iowa 1989). A child's right to counsel during questioning by police officials, however, can be waived. If the child is at least sixteen years of age, a waiver is valid without parental consent as long as police make a good faith effort to notify the parent, guardian, or custodian that the child has been taken into custody, of the alleged delinquent act, the location of the child, and the right of the parent, guardian, or custodian to visit and confer with the child. *Id.*

The statute does not grant an absolute right to parents of children at least sixteen years of age to receive this information. *State v. Means*, 547 N.W.2d 615, 620 (Iowa App. 1996). Rather, it requires police to make a good faith effort to contact parents before obtaining a waiver from their sixteen or seventeen-year-old child. *Id.* The good faith relates not only to the efforts to initiate contact with the parent or caretaker, but extends to the content of the contact as well. *Walker*, 352 N.W.2d at 243.

The facts of this case demonstrate a good faith effort on the part of the police to contact Harris's parents. At approximately 8:45 p.m. on July 24, 1996, Detective Bjornson asked Harris how his mother could be contacted. Harris lived away from his parents and did not know where his mother lived. Harris gave Bjornson his mother's telephone number. Bjornson called the number, reached an answering

machine, and left a message identifying himself as a police officer, stating Harris was in custody at the police station, and Harris's mother needed to call as soon as she got the message. Bjornson also called Harris's father's pager and left his number.

After he was unable to contact Harris's parents, Detective Bjornson called an assistant county attorney who worked in the youth division and asked her how he should proceed. Bjornson was told to wait thirty minutes to give Harris's parents a chance to call back. After waiting thirty minutes and receiving no response, Bjornson informed Harris of his rights. This effort was sufficient under Iowa Code 232.11(2) to obtain a waiver from Harris. Harris signed the waiver. Bjornson asked Harris where he was the night of the crime. He told Bjornson he was at his girlfriend's apartment and had not seen Hayes for a week. Under the circumstances, the trial court did not err in admitting the statements at trial.

Last, Harris claims he was denied effective assistance of counsel on numerous grounds. The State agrees the claims of ineffective assistance should be preserved for postconviction proceedings. These claims are preserved for postconviction proceedings.

AFFIRMED.

All judges concur except Sackett, J., who partially dissents.

SACKETT, J. (concurring in part; dissenting in part)

I concur in part and dissent in part. Defendant John Lee Harris should have a new trial.

Defendant was convicted of murdering Monte Williams. The State's principal evidence came from the testimony of Kenneth Hayes, Demarco Walker, and Samuel Palmer. The men testified they were with defendant when Monte Williams was shot. Hayes was found to be an accomplice. Walker and Palmer claimed they were not accomplices. They admitted they were in the car with defendant and accomplices to executing a plan to shoot Tony Williams, but defendant shot Monte Williams.

Though Walker's and Palmer's reasoning why they were not accomplices is a bit far-fetched, I agree with the majority there was conflicting evidence on the issue and the question was one for the jury. I do not, however, agree with the majority that the trial court was not bound by Iowa Rule of Criminal Procedure 21(2) to submit defendant's request for an interrogatory requiring the jury to determine and answer whether the men were accomplices and evidence was corroborated. The majority has held Iowa Rule of Criminal Procedure 21(2) requires the jurors to answer such an interrogatory, but does not require submission of such an interrogatory because there is no language used directing the trial court shall give the instruction. I have difficulty accepting this reasoning. In *State v. Gilroy*, 313 N.W.2d 513 (Iowa 1981), the court,

in discussing rule 21(2), refers to the limited mandate of the rule.[2] *Id.* at 520. The interrogatory, when requested by defendant, should have been given. I find the failure to submit the interrogatory was error.

I also disagree with the majority's decision on the admission of a picture of a gun. The majority says, "Evidence that Harris had access to a .22 caliber semiautomatic pistol in January 1996 is relevant to Harris having access to a similar pistol in July 1996." I must depart also from the majority holding the picture was relevant. The pictured gun was not identified as the gun used in the murder. The State advances the gun in the picture was not just a gun, but a gun that could have committed the murder -- though not necessarily the gun that did -- and, therefore, this renders the evidence admissible. The State's argument convinces me the admission of the picture was highly prejudicial because there is a strong possibility of the jury inferring the gun defendant had six months prior to the crime was the murder weapon.

In applying case law, I also fail to find the picture relevant. The acceptable test of relevancy is to ask the question, Does the evidence offered render the desired inference more probable than it would be without the evidence? *State v. Goff*, 315 N.W.2d 768, 769-70 (Iowa 1982). Or, stated another way, does the evidence have a tendency to make the existence of any fact that is of consequence to the determination

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[2] The supreme court in *State v. Gilroy*, 313 N.W.2d 513, 520 (Iowa 1981), found a special interrogatory requested need not be given because the request was of interrogatories not provided for by the rule.

of the action more probable or less probable than it would be without the evidence? *Id.* at 770; *State v. Ivory*, 247 N.W.2d 198, 204 (Iowa 1976); *State v. Delaney*, 526 N.W.2d 170, 175 (Iowa App. 1994). The gun in the picture had no connection with the crime with which defendant was charged. *See State v. Roghair*, 353 N.W.2d 433, 434-35 (Iowa App. 1984), where this fact was considered in determining relevance.[3] *See also Shawhan v. Polk Co.*, 420 N.W.2d 808, 810 (Iowa 1988), where the court found plaintiff's prior drug use not shown to have any relevance to the car accident which was the basis of her suit.

I look also to *Goff*, 315 N.W.2d at 769. There, the court addressed the relevance of cross-examination of a defendant who claimed, contrary to the State's claim, he had no knife at the time he committed the crime he was charged with. The State's challenged cross-examination brought out that defendant had been convicted of going armed with intent. *Id.* The supreme court found that conviction not relevant to the issue of whether defendant had a knife when he committed the crime, and further found the trial court erred in admitting it. *Id.* at 770.

Also, in *Roth*, 403 N.W.2d at 766, the supreme court affirmed the trial court's denial of evidence of a murder conviction to impeach a witness's testimony that she had never used a firearm of any kind. In that case, defendant sought to show the

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[3] *State v. Roghair*, 353 N.W.2d 433 (Iowa App. 1984), was distinguished from the situation in *State v. Kane*, 492 N.W.2d 209 (Iowa App. 1992), where challenged evidence showed motive. *Id.* at 211.

witness, not he, committed the crime for which he was being tried. In *Roth*, one murder was committed with a .22 caliber revolver and another with a .22 caliber tube-loading automatic rifle. The court held the defendant, in seeking to admit the evidence, did not establish a relevancy link between the witness's prior conviction and her ability to load and operate the weapon used in the murder. *Id.* The supreme court further found there was other evidence of the witness's familiarity with firearms. *Id.*

The relevancy of the fact defendant had a gun on a prior occasion does not show defendant had a gun at the time of the murder. It is not relevant. *See Goff*, 315 N.W.2d at 769. It was highly prejudicial. Furthermore, I fail to find, as did the majority, the evidence supporting defendant's conviction is overwhelming.

Because I would remand for a new trial, I would therefore not find it necessary to address the questions of the competency of trial counsel. I would agree with the majority on the balance of the issues.