

IN THE COURT OF APPEALS OF IOWA

No. 0-946 / 10-0294
Filed April 13, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSICA K. HILL,
Defendant-Appellant.

Appeal from the Iowa District Court for Boone County, David R. Danilson (pretrial motions) and Dale E. Ruigh (trial), Judges.

Jessica Hill appeals her second-degree murder conviction. **REVERSED AND REMANDED.**

Angela L. Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Scott Brown, Assistant Attorneys General, Jim Robbins, County Attorney, and Adria Kester, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ., but decided by Sackett, C.J., Potterfield, J., and Mahan, S.J.* Danilson and Tabor, JJ., take no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

POTTERFIELD, J.**I. Background Facts and Proceedings**

Jessica began dating Shane Hill when she was sixteen years old. They married in 2002, and two children were born to the marriage. Daniel Blair lived with the Hills and helped raise the children. However, in 2005, Shane discovered Blair and Jessica were involved in an affair, and Blair moved out of the Hills' home. Jessica left Shane, and she and her two children moved in with Blair. After about three months, Jessica and the children returned to live with Shane. Shane and Blair tried to repair their friendship but were unsuccessful. As a result, there was tension between the two men who, according to a friend, "always . . . said they were going to beat each other up."

Shane worked on a sheep farm and often carried a pistol while he did chores. On May 28, 2007, at approximately 11:10 a.m. and again at 11:16 a.m., Shane called 911 to report that he had accidentally shot himself. He died shortly thereafter. An ensuing investigation revealed that Shane had in fact been gunned down.

Jason Christensen, special agent with the Iowa Division of Criminal Investigation (DCI), and another officer spoke with Jessica for roughly twenty minutes at the Boone County Sheriff's Office on the date of Shane's death. Jessica informed the officers she did not know of anyone who had a conflict with Shane. Jessica then volunteered she had an affair with Blair in 2005 but stated that she and Shane were back together and at the strongest point in their relationship. She told the officers she did not think Blair was involved in

Shane's death. Jessica informed the officers she had last seen Blair four months earlier when she saw him walking as she drove through Boone.

On May 30, 2007, two officers spoke with Jessica and with Shane's parents at the Boone County Sheriff's Office. Terrance Cowman, special agent in charge with DCI, testified that he brought the family in to have them listen to the tapes of Shane calling 911. Cowman stated Jessica was "stoic" while she listened to the tapes and showed no emotion. After the 911 calls were played, Jessica informed the officers that she did not want any more ballistic testing done on Shane's body.

On May 31, 2007, Cowman spoke with Shane's mother, who informed him that the content of messages on a computer used by Jessica suggested she was involved in an ongoing relationship with Blair. After receiving this information, Cowman contacted Jessica and asked her to come to the sheriff's office a third time.

Brett Braafhart, an agent with DCI, along with Special Agent Matt Sauer interviewed Jessica at the Boone County Sheriff's Office. This interview was recorded, and the first approximate eighty minutes of the interview were played for the jury.

During the interview, Jessica initially stated that she and Blair talked periodically after their affair for roughly two years. She also stated that after she saw Blair walking by the side of the road roughly four months earlier, she contacted Blair and they got together once. She stated this was roughly two to three months earlier and was the only time she had been with Blair since the

affair in 2005. She admitted she still talked with Blair periodically on the phone but said she had not seen him since Shane's death.

Officers informed Jessica they were interested in her relationship with Blair because they believed it was more than what she was telling them. Jessica then stated that she and Blair "did talk all the time." She admitted to meeting Blair after work at his place. She also stated that Blair came to Shane's mother's home on the night of Shane's death. She admitted to having sexual contact with Blair within the last two weeks. She stated that Blair loved her and knew she was not happy with Shane, but he also knew she would never leave Shane for him. She admitted to telling Blair and others on many occasions that she wished Shane would disappear, but described these statements as "things that you don't really mean but you say." She expressed sadness over the fact that her relationship with Blair was no longer hidden.

Jessica informed officers that she and Blair had messaged back and forth on the morning of Shane's death. She messaged Blair and told him Shane had finally left for work. She stated this was a regular occurrence. She stated that at one point, Blair asked what Shane was driving, and she provided that information. She also expressed again to Blair that she wished Shane would never come home. When asked, Jessica stated she did not suspect that Blair harmed Shane. She said that on previous occasions, she had told Blair she would never want him to be the one that shot Shane. Jessica stated that she did not tell anyone to kill Shane, did not pay anyone to kill him, did not know anything about his murder, and did not want it to happen.

Other evidence implicated Blair and Blair's roommate, Aron Moss, in Shane's murder. In May 2007, Blair and Moss obtained a 30-06 rifle. On May 17, 2007, Blair, along with an unidentified man, bought two boxes of 30-06 ammunition. Around the time of Shane's calls to 911, a passenger in a car saw a man, whom he later identified as Moss, walking across the farmyard carrying a rifle. DNA matching Moss's DNA was found on the sling of a rifle from which a bullet recovered from Shane's body had been fired. Fingerprints made by Blair and Moss were found on a box of 30-06 ammunition.

Blair spoke with a friend, Lisa Lewis, the weekend before Shane's death and requested that she provide an alibi to him. He requested that if anyone asked anything about him, she say that she was with him all day on Memorial Day (May 28, 2007). When Lewis saw Blair on the evening of May 28, he informed her "that they had made somebody disappear." Blair texted Lewis later that night to inquire whether she had said anything about their conversation and to ask that she not discuss their conversation with anyone. Lewis talked to Blair several days after Shane's death, and Blair told her "that they had shot somebody." Lewis testified Blair said they did this because "they did not like the way he was treating his wife and they would be together no matter what." Blair further informed Lewis that "Aron pulled the trigger." Lewis testified that when Blair told her they shot somebody, she assumed he meant himself and Moss. Lewis had been friends with Moss and Blair for several months and did not know Jessica.

On June 8, 2007, Jessica was charged with first-degree murder and conspiracy to commit murder. On October 8, 2009, the State filed a substituted

trial information including only the first-degree murder charge. Jessica filed pretrial motions, which will be discussed in more detail as necessary below. At the close of the evidence, the court instructed the jury that the state was required to prove Jessica aided and abetted the commission of Shane's murder. A jury returned a verdict of guilty of the lesser-included offense of aiding and abetting second-degree murder. Blair and Moss were both charged in connection with Shane's death and had been convicted by the time of Jessica's trial. A ruling on a motion in limine prevented the jury from knowing about Blair's and Moss's convictions.

Jessica appeals her conviction, arguing: (1) the district court erred in admitting the recorded interrogation, which she asserts was obtained in violation of the Fifth Amendment; (2) her counsel was ineffective in failing to support her motion to suppress statements made in the interrogation on the grounds that the interrogation violated Jessica's rights under the Iowa Constitution and that Jessica's statements were involuntary; (3) there was insufficient evidence to support her conviction; (4) the district court erred in admitting statements made by her accomplice, which she argues were inadmissible hearsay; and (5) she was denied effective counsel because her counsel had a conflict of interest.

II. Sufficiency of the Evidence

Jessica argues the evidence was insufficient to prove she was guilty of second-degree murder.

We review challenges to the sufficiency of the evidence for errors at law. *State v. Atkinson*, 620 N.W.2d 1, 3 (Iowa 2000). The State bears the burden of proving every element of the crime with which Jessica is charged. See *State v.*

Cashen, 666 N.W.2d 566, 569 (Iowa 2003). We uphold a finding of guilt if substantial evidence supports the verdict. *Id.* Substantial evidence is evidence upon which a rational fact finder could find a defendant guilty beyond a reasonable doubt. *Id.* We review the facts in the light most favorable to the State, including legitimate inferences and presumptions that may reasonably be deduced from the evidence in the record. *Id.* “Although direct and circumstantial evidence are equally probative, the inferences to be drawn from the proof in a criminal case must raise a fair inference of guilt as to each essential element of the crime.” *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001) (citations and internal quotation omitted). “Evidence is not substantial if it raises only suspicion, speculation, or conjecture.” *Id.* In determining whether the evidence was sufficient, we consider all the evidence admitted during trial, including erroneously admitted evidence. *State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003).

The instructions permitted jurors to convict Jessica only if they found her guilty of aiding and abetting. An aider and abettor is charged, tried, and punished as a principal. See Iowa Code § 703.1 (2007).

To sustain a conviction on the theory of aiding and abetting, the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act either by active participation or by some manner encouraging it prior to or at the time of its commission.

State v. Spates, 779 N.W.2d 770, 780 (Iowa 2010). “[T]he State must prove the accused knew of the crime at or before its commission,” but the proof “may be either direct or circumstantial.” *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). This evidence may include companionship and conduct before and after the

offense is committed. See *State v. Hustead*, 538 N.W.2d 867, 870 (Iowa Ct. App. 1995). The State need not prove that Jessica possessed the intent to commit the crime, but only that she had knowledge that the perpetrator possessed the intent. See *id.* “Any participation in a general felonious plan will normally support a conviction as a principal.” *Id.*

We conclude that when the evidence is considered as a whole in the light most favorable to the State including all reasonable inferences, substantial evidence supports the jury’s verdict.

First, the State established that Jessica had a motive to participate in Shane’s murder. She was involved in an ongoing affair and wanted to be with Blair. During her third police interview, Jessica stated that Blair had told her if she wanted to be with him, she would have to leave Shane for Blair again. She told Blair she could not do that because of the stress it would put on her and her children. She explained, “[Shane] was psychotic when I left him before. I wouldn’t let [Blair] go anywhere by himself because I was always afraid that Shane was gonna sniper rifle him off the top of the house.”

Second, on numerous occasions she had stated to Blair that she wished Shane would disappear. Jessica had even gone so far as to discuss with Blair how Shane could disappear. When asked whether she had had a specific conversation with Blair about shooting Shane, Jessica responded, “I don’t think so,” but continued to explain that she had told Blair, “If [Shane] was ever to be shot . . . I wouldn’t want you to kill him because if you’re killing him, then that’s defeating any purpose of anything because then I’m losing a really awesome

friend” Further, the morning of Shane’s death, Jessica had messaged Blair saying she wished Shane would never come home.

Third, Jessica was in frequent contact with Blair on the morning of Shane’s murder. Though this contact between Jessica and Blair was not unusual, the timing of the text messages as well as the known content of the messages support the jury’s verdict. Officer Cowman testified that from approximately twenty-five minutes before to six minutes after Shane first called and reported being shot, twenty-six messages were sent from Jessica’s identifiers to Blair’s phone, and twenty-eight messages were sent from Blair to Jessica. Jessica messaged Blair shortly after Shane left for work and informed Blair that Shane had left. In addition, Jessica told officers that Blair sent her a message asking what Shane was driving, and Jessica told him.

Fourth, the jury could have found that Jessica’s behavior after the crime was not consistent with innocence. When police first questioned Jessica regarding Shane’s death, Jessica stated that she did not know of anyone who had a conflict with Shane. Jessica informed officers of her affair with Blair in 2005 but stated that she and Shane had worked out their differences and were at the strongest point in their relationship. She was also untruthful with officers about the details of her affair with Blair. Jessica initially led officers to believe the affair had ended in 2005 and the last time she had seen Blair was four months earlier when she saw him walking as she drove through Boone. Jessica did not initially inform officers she still communicated with Blair. In addition, when Jessica spoke with officers two days after Shane’s death, she informed them that she would not like any more ballistic testing done on Shane’s body. When

viewing this evidence in the light most favorable to the State, one could infer that Jessica was attempting to steer the investigation away from evidence pointing to her and Blair's involvement in Shane's death.

Although we believe this is a very close case, we conclude that when considered as a whole in the light most favorable to the State, substantial evidence supports a finding that Jessica knew of and either participated in or encouraged the plan to murder Shane.

III. Hearsay

Lisa Lewis testified at trial regarding statements allegedly made to her by Blair. The district court overruled Jessica's objections to Lewis's testimony regarding Blair's statements the weekend of the shooting, finding the statements were admissible as admissions of a coconspirator, Blair. We review the admission of claimed hearsay evidence for errors at law. *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009).

The Iowa Rules of Evidence define hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). Generally, hearsay is not admissible unless it fits within one of several recognized hearsay exceptions. Iowa R. Evid. 5.802. Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established. *State v. Long*, 628 N.W.2d 440, 447 (Iowa 2001).

We agree with the State that Lewis's testimony that Blair told her after the shooting that "they had made somebody disappear," "they had shot somebody," "they did not like the way he was treating his wife and they would be together no

matter what,” and “Aron pulled the trigger” constitutes hearsay and is not admissible as statements made by Blair in furtherance of a conspiracy. See *State v. Kidd*, 239 N.W.2d 860, 865 (Iowa 1976). We also agree with the State that these statements are not admissible under Iowa Rule of Evidence 5.804(b)(3) as statements against interest. No court entered a ruling exempting Blair from testifying in Jessica’s trial; thus, Blair was not an unavailable declarant pursuant to Iowa Rule of Evidence 5.804(a), and the statements against interest exception did not apply.

We reject the State’s alternate argument that Lewis’s testimony about Blair’s statements to her was admissible under the residual exception to the hearsay rule. Iowa Rule of Evidence 5.807 provides:

A statement not specifically covered by any of the exceptions in rules 5.803 or 5.804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

The statements were, as the State argues, material to prove Blair’s guilt and to prove the presence of Blair and Moss at the farm where Shane was shot. Blair’s statements to Lewis were probative on those points, but not more probative than evidence of the ammunition and firearms, and not more probative than other statements Blair made that were admitted as admissions of a

coconspirator. More importantly, Lewis's testimony was offered to prove Jessica's guilt as an aider and abettor of Blair, and the statements are not probative on that issue. The purposes of the hearsay rules are not served by the admission into evidence of a coconspirator's statement about his own guilt without specific reference to the defendant.

As the jury was instructed, Jessica's guilt as an aider and abettor was to be determined "only on the facts which show the part she has in it, and does not depend upon the degree of another person's guilt." None of these four hearsay statements were probative on the issue of Jessica's participation in the crime. None explicitly stated that she participated in, encouraged, or knew of the crime. See *Spates*, 779 N.W.2d at 780 (stating the record must contain substantial evidence the accused actively participated in or by some manner encouraged the criminal act prior to or at the time of its commission). The statements were hearsay and were not admissible under the residual hearsay exception.

Prejudice is presumed if hearsay is erroneously admitted unless the contrary is affirmatively established by the State. *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986). We conclude Jessica was prejudiced by the admission of Blair's statements. Though Lewis testified she believed Blair was referring to himself and Moss when he said "they" shot somebody, the State argued that Blair's statements included Jessica. Blair's statement that "they did not like the way he was treating his wife and they would be together no matter what" connected Jessica to Blair and suggested she was the motivation for the crime. In this case where the evidence of guilt was barely sufficient, the State failed to

establish that Blair's statements were not prejudicial. We therefore reverse the judgment of the district court and remand this case for a new trial.

IV. Admission of Videotaped Interrogation

Because the following issue is likely to arise upon retrial, we address it now.

On May 31, 2007, DCI special agents Brett Braafhart and Matt Sauer interviewed Jessica at the Boone County Sheriff's Office. Jessica filed a motion to suppress statements made during that interview, arguing she had been subjected to custodial interrogation without *Miranda* warnings. The district court granted Jessica's motion in part but denied the motion as it pertained to the first roughly eighty minutes of the interview. The State appealed from the district court's ruling granting the motion to suppress in part, and this court affirmed the portion of the district court's ruling suppressing the latter part of this interview. See *State v. Hill*, No. 08-0657 (Iowa Ct. App. Mar. 11 2009). Jessica asserts the court erred in admitting any of the recorded interrogation, which she alleges was obtained in violation of the Fifth Amendment.

Because Jessica's claim implicates her constitutional rights, we review the record de novo. *State v. Bogan*, 774 N.W.2d 676, 679 (Iowa 2009). We review the totality of the circumstances and consider both the evidence from the suppression hearing and the evidence introduced at trial. *Id.* at 679–80.

Miranda warnings are not required unless there is both custody and interrogation. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). The State concedes that Hill was interrogated and was not given her *Miranda*

warnings. Thus, the admissibility of her statements turns on the question of whether she was in custody.

“The custody determination depends on the objective circumstances of the interrogation, not on subjective views harbored either by the officer or the person being questioned.” *Id.* In applying this objective analysis, we “ask whether a reasonable person in the defendant’s position would have understood his situation to be one of custody.” *Bogan*, 774 N.W.2d at 680. In making such a determination, we consider the following four factors: (1) the language used to summon the individual; (2) the purpose, place, and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of her guilt; and (4) whether the defendant is free to leave the place of questioning. *Id.* We will consider these factors in order.

A. Language Used to Summon Defendant

Cowman called Jessica and told her the police had phone numbers she had requested from Shane’s phone. He indicated it would be better if she arrived soon to obtain the information. Cowman did not inform Jessica he intended to interview her regarding her relationship with Blair because he “didn’t want her to not come in.” Hill never received phone numbers from Shane’s phone.

The use of deceptive stratagems during questioning is an indicium of custody. *State v. Mortley*, 532 N.W.2d 498, 501 (Iowa Ct. App. 1995). Presumably, the use of deceptive strategies in summoning Hill to the station would indicate custody as well and would negate a finding that Jessica voluntarily approached officers. See *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002) (stating that a defendant can only voluntarily approach officers if the

defendant understands that questioning will ensue); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa 1996) (finding defendant's involuntary presence is indicative of custody). However, the fact that Jessica drove herself to the station and would not have to rely on authorities for transportation weighs in favor of a finding that she was not in custody. See *United States v. LeBrun*, 363 F.3d 715, 723 (8th Cir. 0204).

B. Purpose, Place and Manner of Interrogation

The purpose of the interrogation was to question Jessica about her relationship with Blair. At the beginning of the interrogation, the officers informed her they wanted to clarify a few things and find out what she knew about Shane's death. Approximately one-half hour into the interrogation, the officers informed Jessica they were talking to her about her relationship with Blair because they believed it was more than she was telling them.

The interrogation took place at the Boone County Sheriff's Office in a small interview room, approximately six feet by eight feet. The officers were not in uniform, though they both wore side-arms during the interview. Jessica did not have to pass through any locked doors on her way to the interview room. Jessica had previously been interviewed at this office on two occasions, and she believed one of the interviews had been in the same room used on May 31. She returned home after both of the previous interviews.

The interrogation was informal and conversational. Jessica sat several feet away from the two officers, who were not blocking her access to the door. The officers' questions were primarily of an investigatory nature and for the most part were not aggressive or confrontational, which supports a finding that Jessica

was not in custody. See *Smith*, 546 N.W.2d at 924. Jessica answered their questions and volunteered information on her own from time to time.

C. Extent of Confrontation with Evidence of Guilt

The interrogation began with questioning that was general in nature. Officers then asked Jessica about the nature of her relationship with Blair. Hill appeared to be relaxed and willing to talk to the officers. After approximately ten minutes of non-confrontational questioning about her relationship with Blair, the officers stated they believed there was more to the relationship than she was telling them. The officers then continued to question Jessica about her relationship with Blair.

The officers informed Jessica that certain evidence made it appear that Shane's death was not an accident. At times, suggestions were made that the officers suspected Jessica was involved in Shane's murder. For instance, at one point they asked Jessica, "Why do you think somebody would say that you and [Blair] may have conspired to do this?" The officers stressed the importance of Jessica telling the truth and mentioned several times that they could look at Jessica's messages and emails to verify that she was telling the truth. Toward the end of the conversation, officers asked Jessica about her conversations with Blair, stating they needed to know "how long this has been in the works." Officers also suggested that Jessica got on the computer the morning of Shane's death to set into motion a plan to kill Shane. However, for the majority of the eighty minutes, the officers asked non-confrontational questions that were general in nature. The questions were not leading or repetitive and were asked

in a calm and quiet manner. Jessica appeared willing to talk and volunteered information during the entire interview.

D. Freedom to Leave

Officers did not inform Jessica that she was free to leave; however, they also did not tell her that she could not leave. Jessica was not restrained in any manner during the interrogation. Jessica was not arrested after the interrogation and was allowed to return home. After roughly eighty minutes of questioning, Jessica was given a break. During the break, she was allowed to use the restroom and to go to her car to smoke and make calls on her cell phone. She had her car keys at the time and admitted at the suppression hearing that nothing would have stopped her from leaving at that time. Hill returned to the station on her own.

After considering all of the factors, we are convinced a reasonable person would not have understood this situation to be one of custody. We do not believe it would be error to admit the first roughly eighty minutes of the interrogation at retrial.

Because we conclude that inadmissible hearsay was presented to the jury and prejudiced Hill in an otherwise close case, we reverse her conviction and remand for new trial.

REVERSED AND REMANDED.