IN THE COURT OF APPEALS OF IOWA

No. 1-237 / 99-0770
Filed September 26, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDY ALAN ZAABEL,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Randy Alan Zaabel appeals from the judgments and sentences entered upon his convictions for second-degree murder and nonconsensual termination of a human pregnancy. **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidener, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Ron Robertson, County Attorney, and Scott Brown, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ., but decided by Sackett, C.J., and Huitink and Zimmer, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Zaabel was charged with murder following Michelle Gibson's death on March 29, 1998. He was charged with nonconsensual termination of her pregnancy because Gibson's unborn child also died as the result of her injuries.

Gibson's body was discovered along Mining Boulevard, a rural Webster County road, by law enforcement officers responding to Zaabel's call for emergency assistance. Zaabel reported that he and Gibson were attacked there by one or more people he assumed were stranded motorists. According to Zaabel he was knocked unconscious during this encounter and awoke to find Gibson gravely injured, prompting his call for assistance. He speculated that Gibson might have known their assailants from her prior experience in the local drug culture.

The state medical examiner subsequently determined that Gibson died of massive head injuries inflicted by multiple blows from a wooden object, a portion of which was found in Gibson's hair. The medical examiner also determined that portions of Gibson's skull and brain were missing. Investigators did not find a murder weapon at the Mining Boulevard location, nor did the physical evidence gathered there account for all of Gibson's missing skull fragments and brain tissue. Investigators, however, found blood and tissue on the muffler and rear tire wells of Zaabel's truck, suggesting Gibson may have been attacked elsewhere and moved to the location where her body was found.

On March 31, 1998, investigators asked Zaabel if they could examine any of Gibson's personal belongings remaining at his residence. Zaabel signed a

written "permission for search and seizure" form authorizing the search of his residence, surrounding real estate, and motor vehicles located at his farmstead. During the course of this warrantless search, investigators found a bloodstained 2" x 2" piece of lumber protruding from a drainage tile on Zaabel's property and blood under or near a manure spreader parked on the property. As a result of these discoveries, investigators sought and obtained a search warrant authorizing an extended search of Zaabel's farmstead. The resulting search yielded additional skull fragments, brain tissue, wood, and wood splinters. Subsequent laboratory analysis and a second autopsy matched these items with those discovered at the Mining Boulevard scene and during Gibson's first autopsy.

Zaabel's motion to suppress any evidence seized as the result of the March 31 search of his residence and surrounding acreage was denied. In its ruling the district court rejected Zaabel's claim that investigators "failed to obtain valid consent" to search his residence and surrounding property "because the terms and circumstances indicated that consent was not given knowingly and intelligently."

According to the State's theory of the crime advanced at trial, Zaabel murdered Gibson because he wanted to resume his relationship with his former girlfriend, Bobbie Jo Pargo, and collect the proceeds of Gibson's recently purchased life insurance policy. The State's case included the physical evidence earlier referred to as well as other evidence supporting its theory of the crime.

Zaabel's motions for judgment of acquittal and new trial were denied. The jury found Zaabel guilty of second-degree murder and nonconsensual

termination of a human pregnancy. As a result, the district court sentenced Zaabel to consecutive terms of fifty and twenty-five years. Zaabel was also ordered to pay $150,000 restitution.

On appeal Zaabel raises the following issues:

> 1. The trial court erred by denying Zaabel's motion to suppress as his consent was not knowingly and voluntarily obtained, and thereby violated his constitutional rights under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Iowa Constitution.
>
> 2. The trial court erred by denying Zaabel's motion for a judgment of acquittal on the charge of murder in the second degree because each and every element of the offense was not proven beyond a reasonable doubt.
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> 3. Imposing judgment and sentence on Zaabel for both second-degree murder and the nonconsensual termination of a human pregnancy during the commission of a forcible felony is unconstitutional under the laws of the United States and the State of Iowa.
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> 4. The trial court erred in denying Zaabel's motion for a mistrial when State's witness Bobbie Jo Pargo testified unresponsively that Zaabel was abusive and the resulting prejudice could not be cured by a limiting instruction.
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> 5. The trial court erred as a matter a law in denying Zaabel's request to have the autopsy reports admitted as evidence.
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> 6. The trial court erred in failing to declare a mistrial or issue a curative instruction where the jurors complained about comments made during the proceedings from one or more of the spectators, thereby denying Zaabel his right to a fair trial.
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> 7. The verdict in this case was contrary to the weight of the evidence and therefore the trial court erred in denying Zaabel's motion for a trial.
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> 8. The sentencing court abused its discretion by sentencing Zaabel to consecutive sentences and failing to make an adequate record of why consecutive sentences were imposed.

9. Imposition of restitution in the amount of $150,000 pursuant to Iowa Code section 910.3B violated the Constitutions of the United States and the State of Iowa.

10. The cumulative effect of the trial court's constitutional errors denied Zaabel a fair trial as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Iowa Constitution.

We address those issues properly preserved for our review in the order they have been raised.

II. Motion to Suppress.

We review constitutional issues de novo in light of the totality of the circumstances. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999).

The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect persons against unreasonable searches and seizures by government officials. U.S. Const. amend. IV; Iowa Const. art. I, § 8; *State v. Cline*, 617 N.W.2d 277, 281 (Iowa 2000). A search and seizure without a valid warrant is per se unreasonable unless it falls within a recognized exception. *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct. 2408, 2412, 57 L. Ed. 2d. 290, 298 (1978). It is well established that a search "without warrant and without probable cause, but with proper consent voluntarily given, is valid under the fourth amendment." *State v. Bakker*, 262 N.W.2d 538, 546 (Iowa 1978). The burden is on the State to establish the voluntariness of the consent by a preponderance of the evidence. *State v. Folkens*, 281 N.W.2d 1, 3 (Iowa 1979). A search is patently unreasonable when it is based on consent obtained by deception unless there is a justifiable and reasonable basis for the deception. *State v. Ahart*, 324 N.W.2d 317, 319 (Iowa 1982).

Zaabel argues the State failed in its burden, citing evidence indicating he lacked the requisite intelligence or sophistication to understand the significance of the requested consent-to-search form. Zaabel also cites evidence that he was impaired by sedatives and the fact investigators failed to fully disclose the objectives of the search. We disagree.

The district court's ruling on Zaabel's motion to suppress states:

> Under the totality of the circumstances test set forth by the Supreme Court, the Defendant signed the consent-to-search form voluntarily, knowingly, and intelligently. Mr. Zaabel was 26 years old; graduated from high school; cooperated fully with officials; was interviewed for several minutes before consent was given; was not coerced, intimidated, or threatened by authorities; was informed of his right to withhold consent; never objected to the search and watched passively; was asked to sign at his private residence; and was not promised leniency.

These findings are abundantly supported by the record, and we adopt them as our own. Additionally, Zaabel's claim that he was impaired by sedatives was the subject of conflicting medical testimony, which the district court resolved in the State's favor. Because the district court's determination that Zaabel was not impaired by sedatives implicates its assessment of the credibility of the witnesses who testified on that issue, we also defer to that factual finding.

Finally, we reject Zaabel's claims that the consent-to-search form was obtained by deception. In addition to other reasons given for the search, Zaabel was expressly told that investigators were searching for any evidence that would lead to the identity of Gibson's assailant. The record simply does not support Zaabel's claim that he was lied to or that his consent to search was otherwise obtained by deception.

We affirm on this issue.

III. Motion for Judgment of Acquittal.

Our review is on assigned error. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). We are bound by the jury's verdict unless there was not substantial evidence to support it. *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa Ct. App. 1995). In reviewing challenges to the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). We give consideration to all the evidence, not just the evidence supporting the verdict. *Id.* Evidence is substantial if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). "However, whether the evidence is direct or circumstantial, it must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981) (*citing State v. Schrier*, 300 N.W.2d 305, 308 (Iowa 1981)).

Zaabel argues the State failed to establish the essential element of malice aforethought necessary to support a murder conviction. *See* Iowa Code § 707.1 (1997) (definition of murder requires either express or implied malice aforethought). He also claims the State failed to prove he was the person who killed Gibson.

The State correctly argues that it is clear from the manner and severity of Gibson's head injury that Zaabel acted with malice aforethought. *See State v. Nunn*, 356 N.W.2d 601, 603-04 (Iowa Ct. App. 1984) (malice aforethought can be implied from use of a deadly weapon accompanied by an opportunity to deliberate). Also proof of motive, specifically Zaabel's romantic interest in Bobbi

Jo Pargo as well as Gibson's life insurance, may be considered in determining whether Zaabel acted with malice aforethought. *See State v. Smith*, 242 N.W.2d 320, 326 (Iowa 1976). In addition, the State presented considerable physical evidence implicating Zaabel, including the murder weapon, blood, skull fragments, and brain tissue. This evidence, in conjunction with Zaabel's inconsistent statements, provides sufficient evidence of identity to support the jury's verdict. *See State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984) (defendant's inconsistent statements support inference of guilt).

We also affirm on this issue.

IV. Zaabel's Double Jeopardy Claim.

We review this constitutional claim de novo. *State v. Lewis*, 514 N.W.2d 63, 68 (Iowa 1994). Zaabel argues that his convictions of murder and nonconsensual terminal of a human pregnancy violate his constitutional protection against double jeopardy. U.S. Const. amend. V. To determine whether these convictions violate the Double Jeopardy Clause we apply the legal elements test originally defined in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

State v. Taylor, 596 N.W.2d 55, 57 (Iowa 1999). If one crime is a lesser-included offense of the other crime, the offenses are the "same" and cumulative punishments cannot be imposed. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994). But if one offense is not included within the other, there is a presumption

that multiple punishments can be assessed. *Id.* The lesser-included offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. *Id.* If the lesser offense includes an element that is not required for the greater offense, the lesser is not included in the greater. *Id.*

We reject Zaabel's argument that punishment for both second-degree murder and nonconsensual termination of a human pregnancy violates the Double Jeopardy Clause as multiple punishments for the same offense. Nonconsensual termination of a human pregnancy requires proof of the following elements:

> (1) On or about the 29th day of March, 1998, Michelle Gibson was pregnant;
> (2) Zaabel committed a forcible felony upon Gibson;
> (3) The commission of the forcible felony terminated Gibson's pregnancy; and
> (4) The termination of the pregnancy was without Gibson's consent.

Second-degree murder requires proof of the following:

> (1) On or about the 29th day of March, 1998, Zaabel struck or inflicted force upon Michelle Gibson's head;
> (2) Gibson died as the result of Zaabel's actions; and
> (3) Zaabel acted with malice aforethought.

Because nonconsensual termination of a human pregnancy requires proof of an additional fact element, the Double Jeopardy Clause's protection against multiple punishments for the same offense is not implicated here. We affirm on this issue.

V. Pargo's Testimony.

We review rulings on motions for a mistrial for an abuse of discretion. *State v. Lawrence*, 559 N.W.2d 292, 294 (Iowa Ct. App. 1996).

Bobbie Jo Pargo was called by the State to testify concerning her relationship with Zaabel and conversations with him prior to Gibson's death. In response to a question by Zaabel's attorney concerning Pargo's earlier statement that she did not want to resume her relationship with Zaabel, Pargo volunteered that she did not want to resume the relationship because Zaabel was abusive. Zaabel's motion for a mistrial based on the prejudice resulting from Pargo's answer was denied. The district court prohibited any further inquiry on this issue, struck Pargo's answer, and admonished the jury: "I am now telling you to totally disregard as evidence the last statement made by this witness before we broke."

The content and context of the record on this issue indicate there was no dispute that Pargo's answer was improper and prejudicial. We agree with the State's position that the issue is therefore whether remedial action short of a mistrial was sufficient to protect Zaabel from any resulting unfair prejudice.

In similar situations involving voluntary interjection of improper and prejudicial evidence by witnesses we have applied the following rule:

> A reversal must be predicated upon the proposition that the (objectionable testimony) forbidden by the ruling on the motion in limine, was so prejudicial, its effect upon the jury could not be erased by this procedure and defendant was denied a fair trial. . . . Only in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained, despite its exclusion, and influenced the jury is the defendant denied a fair trial and entitled to a reversal.

State v. LaMatty, 263 N.W.2d 559, 563 (Iowa Ct. App. 1977) (*quoting State v. Peterson*, 189 N.W.2d 891, 896 (Iowa 1971)).

Generally, the striking of an improper response and an instruction to the jury to disregard the response will prevent prejudice. *State v. Brown*, 397 N.W.2d 689, 699 (Iowa 1986). A defendant who claims these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of the trial court. *Id.* We conclude the trial court's jury admonition and exclusion of further evidence concerning Pargo's claims that Zaabel was abusive were sufficient to cure any prejudice which arose from this isolated and ambiguous allegation. The trial court acted well within its discretion in denying Zaabel's motion for mistrial. We affirm on this issue.

VI. Autopsy Report.

On cross-examination Zaabel's attorney attempted to impeach the State medical examiner by offering the examiner's autopsy report in its entirety. The State's objection claiming the introduction of the entire report would be cumulative was sustained. Zaabel argues that this ruling was error because Iowa Code section 331.802(6) mandates admission of the state medical examiner's autopsy report into evidence during all legal proceedings in which it is relevant.

The State correctly contends this issue was not preserved for review because Zaabel did not argue that section 331.802(6) mandated its admission below. Because Zaabel failed to preserve this issue for appeal, we will not consider it. *See State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997).

VII. Spectator Issues.

During the course of the trial one or more jurors reported to the trial judge that they overheard and were concerned by spectator comments concerning the progress of the proceedings. In response to these concerns, the court admonished the spectators:

> Either you will sit in here and keep your mouths shut or get out of the courtroom. If you can't keep your mouth shut, I will reward you with 60 days in the Wright County jail the next time it happens. So if anybody has a problem with that, leave this courtroom.

The record fails to disclose Zaabel's timely motion for mistrial. As a result, he has waived any issue for our review. *See State v. Hutchison*, 341 N.W.2d 33, 39 (Iowa 1983).

VIII. Motion for New Trial.

Rulings on motions for new trial are reviewed for abuse of discretion. *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997).

Iowa Rule of Criminal Procedure 23(2)(b)(6) gives a trial court the discretionary ability to grant a new trial if the verdict is contrary to the evidence. The phrase "contrary to the evidence" calls upon the trial court to weigh the credibility of the evidence presented by each party and determine which side garners greater support. *State v. Ellis*, 578 N.W.2d 655, 657-58 (Iowa 1998). This is in stark contrast to the sufficiency-of-the-evidence standard utilized in a motion for acquittal where the court is only to view the evidence in the light most favorable to the State. *Id.* at 658. Therefore, in a motion for new trial the court is armed with far more expansive powers. *Id.* at 658-59. Despite the trial court's wide discretion in granting such motions, the court is to employ this broad sword

sparingly and only after careful contemplation. *Id.* This court is slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4).

In his motion for a new trial Zaabel cited multiple grounds including that the "verdict was contrary to the weight of the evidence." The district court summarily denied Zaabel's motion, stating that: "The Defendant's Motion for New Trial is denied it its entirety." The gist of Zaabel's argument is that the court failed to expressly apply the weight of the evidence standard *Ellis* requires, that under this standard a new trial is warranted, and at the very least a remand instructing the district court to apply the correct standard is required. We disagree.

Zaabel does not argue, nor does the record suggest, that the court applied the wrong standard in resolving Zaabel's motion for a new trial. In fact, the express language of Zaabel's motion and the context of his supporting argument made therein directly implicate the correct standard. We, like the State, believe the district court's ruling, although succinct, was presumptively based on the correct legal standard. *See generally State v. Miles*, 346 N.W.2d 517, 519 (Iowa 1984).

Moreover, we cannot find that the verdict was contrary to the weight of the evidence. The State presented considerable evidence discrediting Zaabel's version of events and linking him to the victim's injuries. In particular, Zaabel's claim that he had been unconscious for several hours was opined to be medically inconsistent with his subsequent physical symptoms; Zaabel's explanation of his and Gibson's activities on the night of the murder was inconsistent with the

pathologist's estimation of the time of Michelle's death; and Zaabel's story of ambush at the Mining Boulevard location was inconsistent with blood patterns found within his vehicle and on his jacket at the crime scene. At the same time, the State offered a variety of physical evidence indicating that Gibson's injuries had occurred on Zaabel's property. This evidence in conjunction with the inconsistencies in defendant's story serve to implicate him in the crimes charged. *See Blair*, 347 N.W.2d at 422 (defendant's inconsistent statements are probative circumstantial evidence from which the jury may infer guilt); *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt."). The court did not abuse its discretion in denying Zaabel's motions for new trial or judgment of acquittal. The district court is affirmed on this issue.

IX. Sentencing.

Zaabel argues the consecutive sentences imposed by the district court are contrary to law. He contends the court cited only the nature of the offense as the reason for its sentence and that factor alone cannot be determinative.

Pursuant to Iowa Code section 901.8, a sentencing judge may impose consecutive sentences for two or more separate offenses. A sentencing court must state on the record its reasons for selecting a particular sentence. Iowa R. Crim. P. 22(3)(d). Furthermore, in exercising its discretion a trial court is to weigh all pertinent matters in determining a proper sentence, "including the nature of the offense, the attending circumstances, defendant's age, character, and propensities and chances of his reform." *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979). However, failure to acknowledge each mitigating circumstance

does not indicate the court did not consider them when they are included in the record. *See State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995).

A sentence will be disturbed by a reviewing court only upon a showing that the trial court abused its discretion. *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). No abuse of discretion will be found unless the defendant shows that such discretion was "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

At the sentencing hearing the State offered victim impact testimony from Gibson's mother, father, step-mother, and grandmother. The court also heard mitigating evidence from Zaabel and Zaabel's brother, sister, and mother. The sentencing record also included a presentence investigation report.

The State argued for consecutive sentences citing the fact that Zaabel killed both Gibson and her unborn child. In its explanation of its sentencing choice, the court said:

> [T]his matter involved brutality that I have never seen before and hope that I never will again.
>
> The evidence at trial was clear that Michelle Gibson suffered no defensive wounds to her arms or her hands, which indicates to me that she was struck and rendered helpless or dead when she was totally unsuspecting or while she was attempting to flee the wrath that was about to befall her.
>
> I have given this very careful consideration in regard to the discretion that I have concerning whether the sentence should run consecutively or concurrently, and after that consideration I find that this very heinous act or taking Michelle Gibson's life and the act

which also took the life of the unborn child warrants independent punishment.

Although the court emphasized the brutality of Zaabel's offenses, the record is also clear that the court considered the fact that both Gibson and her unborn child died as a result of Zaabel's crimes. Moreover, our review of the record indicates that the court considered the fact that Zaabel had no prior criminal record, his age, and employment history. We find no merit in Zaabel's contention that the court failed to consider these circumstances in mitigation of punishment. Given the seriousness of Zaabel's crimes and the number of victims, we conclude the court acted well within its sentencing discretion by imposing consecutive sentences.

X. Remaining Issues.

We have carefully considered the remaining issues Zaabel has raised on appeal and find that they have either been effectively resolved by the foregoing or have been expressly waived in oral argument. The judgment of the district court is affirmed in its entirety.

AFFIRMED.