FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )
Plaintiff-Appellee, ) Filed January 24, 1983
vs. )
RICHARD WILLIAM NICKENS, ) 3-373 / 69511
Defendant-Appellant. )

Appeal from the Iowa District Court for Polk County - Ray A. Fenton, Judge.

Defendant appeals from his conviction of voluntary manslaughter as defined in Iowa Code section 707.4 (1981). AFFIRMED.

John P. Roehrick of Roehrick, Lavorato, Schuster & Hassel, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

Defendant, Richard W. Nickens, appeals from his conviction of voluntary manslaughter as defined in Iowa Code section 707.4 (1981). He raises issues as to the admission of certain evidence and as to the propriety of certain instructions. We affirm the trial court.

I. Flight Instruction. The defendant and his girlfriend, Tina Marshall, gave a party in their apartment. Several friends of the defendant and his girlfriend attended the party including the victim, Rodney Perry, and three of the victim's brothers. After receiving complaints of noise, the defendant asked the guests to leave. Shortly thereafter some kind of altercation broke out in the parking lot. Defendant subsequently appeared at the door of the apartment building carrying a knife he had either picked up in the hallway of the apartment building or had brought from his apartment. There was a struggle between the defendant and Rodney Perry after which Perry was bleeding from the front and back of his chest area. Defendant returned to his apartment where two of the victim's brothers kicked down the door and allegedly threatened the defendant with a gun. The victim's brothers left, however, to take the victim to the hospital. The victim died approximately fourteen hours later from the knife wounds. When the police arrived, they found defendant running down an embankment behind the apartment building and apprehended him at the door of another apartment building approximately 100 yards away from the defendant's apartment building.

The trial court instructed the jury in instruction number eighteen as follows:

> If you find the offense charged in the Indictment was committed, and that the Defendant thereafter fled from the scene of the crime for the purpose of avoiding or retarding prosecution, then such flight is a circumstance you may consider in determining the guilt or innocence of the Defendant.
>
> The credit and weight, if any, to be given such circumstance is for the jury to determine from a consideration of all the evidence in the case.

The defendant contends that this instruction was error because it constituted an impermissible comment upon the evidence by the judge, that the evidence did not support giving the instruction, that the instruction is directly opposed to the presumption of innocence and that there was no rational relationship between the proven facts and the fact to be inferred under this instruction. We disagree.

Defendant argues that the evidence shows that the reason he fled the apartment building was because of his fear of the victim's brothers rather than under circumstances of guilt. There was also evidence, however, that defendant did not flee as soon as the victim's brothers left his apartment, but rather he fled when the police returned to the scene of the crime several minutes later after questioning witnesses at the hospital. An instruction on flight may be proper even though there is no direct evidence the accused fled to avoid arrest. State v. Thrasher, 175 N.W.2d 397, 403 (Iowa 1970). We believe that under these facts it was for the jury to say whether the defendant departed the scene because of his consciousness of guilt.

The instruction as given does not shift the burden of proof or detract from the presumption of innocence. The jury may use the inference as evidence of guilt after proof of the basic fact, but it must be convinced of all the elements of the crime of voluntary manslaughter beyond a reasonable doubt in order to return a guilty verdict. See Ulster County Court v. Allen, 442 U.S. 140, 157, 99 S. Ct. 2213, 2224-25, 60 L. Ed. 2d 777, 792 (1979); State v. Savage, 288 N.W.2d 502, 507 (Iowa 1980). Further, the instruction on flight was germane to the evidence. See State v. Bester, 167 N.W.2d 705, 711 (Iowa 1969). The evidence was in sharp conflict as to whether the stabbing was accidental, in self defense, or something more that would amount to murder in the second degree or one of the included offenses.

It is clear that the instruction as given permits an inference of guilt rather than a presumption of guilt. See State v. Gates, 306 N.W.2d 720, 723-25 (Iowa 1981). As such, the supreme court has specifically found that there is a rational

connection between flight in an attempt to avoid and retard the prosecution and guilt. State v. Barr, 259 N.W.2d 841, 842 (Iowa 1977). Finally, the instruction as given is not an improper comment by the judge on the evidence. The jury was simply told a permissible use of certain evidentiary facts. Other instructions also instructed the jury as to the use of other evidentiary facts and charged the jury with the responsibility of finding each element of the crime beyond a reasonable doubt.

Defendant's objections to the flight instruction are without merit.

II. Hearsay Evidence. The victim was taken to Broadlawns Hospital at approximately 11:00 p.m. His mother, Shirley Brown, arrived shortly thereafter. Sometime early the next day between 12:35 a.m. and 5:00 a.m., Mrs. Brown heard the victim say "Richard [defendant] tried to kill me, Momma." The statement was made in the intensive care unit while the victim was in pain caused by his injuries. Mrs. Brown was unable to say the exact time her son made the statement. Prior to 12:35 a.m. Mrs. Brown had been unable to see her son because he was undergoing medical treatment. The statement was therefore made approximately one and one-half to six hours after the victim was stabbed. There was no evidence of the victim's state of consciousness during that period.

The defendant contends the trial court erred by admitting the testimony from the victim's mother under the excited utterance exception to the hearsay rule. The defendant specifically asserts that there was no evidence that the victim's statement was induced by a startling event and that sufficient time had passed to allow the victim to fabricate his testimony.

Hearsay consists of extra-judicial statements offered in evidence to prove the truth of what was said. State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). It is clear from the record that the statement made by the victim to his mother was offered into evidence for the truth of the matter asserted. The State, however, asserts that the testimony falls with the hearsay exception of excited utterance.

See State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981); Fed. R. Evid. 803(2); Iowa R. Evid. 803(2). We agree.

An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." State v. Ogilvie, 310 N.W.2d at 196. The trial court has discretion to determine whether a statement is induced by stress of excitement caused by the startling event or condition. Id.

Even assuming the statement was made six hours after the event, we believe Mrs. Brown's testimony falls within the excited utterance exception to the hearsay rule. The victim had sustained severe injuries and, in fact, died shortly thereafter of those wounds. There is nothing in the record to indicate that the statement was made in response to any questioning. The victim indicated to his mother that he "hurt" just prior to making the statement. Under the record here, we hold the trial court did not abuse its discretion in admitting evidence of the victim's statements under the excited utterance exception.

No error has been shown.

AFFIRMED.