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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 9, 1988

vs.) 7-386
86-1324

ARTHUR ELVIN KILLINGER,)

Defendant-Appellant.)

Appeal from the Iowa District Court for Black Hawk County (No. D7X004257), L.D. Lybbert, Judge.

The defendant appeals his conviction of first-degree murder. **REVERSED AND REMANDED.**

Charles Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; and Thomas Ferguson, Assistant Black Hawk County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

Defendant Arthur Killinger appeals his conviction of first-degree murder in violation of Iowa Code section 707.2 (1985). He contends the district court erred: (1) by not suppressing portions of a statement he made to investigating officers because portions of the statement were improperly induced by promissory benefit; (2) by refusing to let him impeach a witness with evidence of the witness's history of alcohol abuse; and (3) by refusing to submit involuntary manslaughter as a lesser included offense. We reverse and remand.

The defendant and a friend, Michael Cleghorn, spent most of Friday, May 31, 1985, together. Around midnight they went to the home of Madeline Travis. Prior to this they had been to a local bar. The three were visiting when the defendant went upstairs to use the bathroom a second time. According to Cleghorn and Travis, the defendant remained upstairs for ten to twenty minutes. The defendant testified he was smoking while upstairs.

When he came downstairs the defendant told Cleghorn he wanted to leave immediately. Cleghorn said he wanted to use the bathroom, but the defendant said he could use one at the store. After this conversation, smoke was seen coming from upstairs. The lights went out and attempts to rescue Travis' baby son were unsuccessful.

The police detained the defendant after they learned arson was a possibility. They frisked the defendant and discovered two bars of soap, a large amount of change, a lighter, and three books of matches. The defendant was Mirandized and taken to the station where he agreed to give a statement.

Prior to giving the statement the defendant asked Officer Stoll how long this was going to take and when he could leave because he had to make a meat loaf for his family reunion. Stoll told him he could probably leave after giving the statement. After the interview, however, the defendant was detained so

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he could speak with the investigators about discrepancies in his story. The defendant was then arrested.

The defendant's first contention is that the trial court erred in not suppressing the first written statement and any subsequent testimony referring to it. He argues the statement was induced by promissory benefit and, therefore, involuntary.

In determining whether the defendant's statements were voluntary our scope of review is de novo and we examine the totality of the circumstances. State v. Whitsell, 339 N.W.2d 149, 153 (Iowa 1983). The State bears the burden of proving by a preponderance of the evidence that the statement was voluntary. State v. Hodges, 326 N.W.2d 345, 347 (Iowa 1982). A statement obtained as a result of a promissory inducement of help or leniency is not voluntary and is inadmissible. Whitsell, 339 N.W.2d at 153. However, every offer of help made by an officer does not constitute a promise of leniency. Id. at 153-54.

We hold the State has met its burden to show the defendant's statement was voluntary. The officer's statement that the defendant could probably go home after the statement cannot be construed as a promise. Officer Stoll was merely answering the defendant's question. The defendant also agreed to give a statement prior to asking the question. This case is different from State v. Hodges, 326 N.W.2d 345 (Iowa 1982), where a police officer told the defendant that if he gave a statement there was better chance he would receive a lesser charge. Id. at 347. Our examination of the record reveals that the defendant was not induced by a promissory benefit to give his statement.

The defendant's second assignment of error is that the trial court erred in precluding him from presenting evidence regarding a witness's history of alcohol abuse. He argues the evidence was relevant to impeach Cleghorn by showing his history of alcohol abuse was inconsistent with the small amount

of alcohol he claimed to have consumed the night of the fire; evidence would also show Cleghorn had a motive to lie in order to avoid a probation violation; and Cleghorn's habit of abuse impaired his ability to observe.

The challenged evidence consisted of two prior O.W.I. convictions, two prior convictions for public intoxication, and that Cleghorn had been involved in counseling for alcohol abuse. The trial court allowed questioning on how much Cleghorn drank that evening and whether that was a normal amount for him.

A trial court has broad discretion in ruling upon the admissibility of impeachment evidence. State v. Clark, 325 N.W.2d 381, 383 (Iowa 1982); State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974). Specific acts of past conduct are not admissible to prove the witness acted similarly on the occasion in question unless the conduct is relevant to the witness's character for truthfulness. Iowa R. Evid. 608(b). Evidence showing that a witness was intoxicated at the time of the incident about which he testifies is relevant to challenge the witness's credibility. See State v. Ivory, 247 N.W.2d 198, 204 (Iowa 1976).

We hold there was no abuse of discretion by the trial court. The court allowed the defendant to question Cleghorn about his alcohol consumption during the evening. This line of questioning allowed the defendant to fully challenge the witness's capacity to recount the evening's events. Additionally, the convictions and counseling are not crimes or conduct involving dishonesty. We therefore find no abuse of discretion by the trial court in overruling defendant's request.

The defendant's final assignment of error concerns the trial court's refusal to instruct the jury on involuntary manslaughter. He argues there was sufficient evidence to submit both types of involuntary manslaughter to the jury.

The State asserts error was not preserved since the defendant in submitting the involuntary manslaughter instructions urged a different underlying public offense than urged on appeal. We hold the defendant preserved the error. The

instructions submitted were sufficient to alert the trial court to the error counsel was urging. See State v. Fisher, 279 N.W.2d 265, 267 (Iowa 1977).

Involuntary manslaughter is a lesser included offense of first-degree murder and satisfies the legal test. See State v. Ware, 338 N.W.2d 707, 714 (Iowa 1983); State v. Inger, 292 N.W.2d 119, 123 (Iowa 1980). The record must also provide a factual basis for submission of the offense. Ware, 338 N.W.2d at 714. A factual basis is established where substantial evidence exists in the record from which the jury could conclude the defendant is guilty of the lesser offense. See State v. Morgan, 322 N.W.2d 68, 69 (Iowa 1982).

We find the trial court erred in not submitting the involuntary manslaughter instructions. The trial court relied on State v. Aswegan, 331 N.W.2d 93 (Iowa 1983), in overruling defendant's request. This reliance was misplaced. Aswegan does not hold where the felony involved in a felony murder is arson, there is no lesser included offense; rather, it holds second- and third-degree arson are not lesser included offenses in such a case.

We hold the evidence was sufficient to provide a factual basis for the submission of either public offense or reckless act involuntary manslaughter. The appropriate underlying offense would be reckless use of fire in violation of Iowa Code section 712.5 (1985).

The State's experts testified the fire was started by an open flame. They all admitted it could have been started by a discarded match. The State tries to downplay this evidence because it was given in response to a hypothetical question. Evidence elicited by a hypothetical question is no less probative because a hypothetical question was used. The weight to be given such evidence is in the province of the factfinder. There was no direct evidence on how the fire started. The evidence supporting both the State's and defendant's theories is substantial. The defendant told police he was smoking while in the bedroom

and discarded a match. The State's experts agreed that a match could have been completely destroyed by the fire. The State also found three matchbooks in the defendant's possession after their search. This evidence is consistent with defendant's theory that the fire started accidentally. Under these facts, the jury could have found the defendant unintentionally but recklessly caused the infant's death. We, therefore, reverse the defendant's conviction and remand this case for a new trial consistent with this opinion.

REVERSED AND REMANDED.