IN THE COURT OF APPEALS OF IOWA

No. 0-81 / 89-388

FILED
MAY 24 1990
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RICK LEE SNOW,

Appellant.

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Appeal from the Iowa District Court for Washington County, Richard J. Vogel, Judge.

The defendant appeals from his conviction, following a jury trial, for first-degree murder. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General, Gerald N. Partridge, County Attorney; and Barbara A. Edmundson, Assistant County Attorney; for appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J. 322

Rick Lee Snow was accused of shaking his infant stepdaughter so hard that death resulted. A jury found Snow guilty of first-degree murder. Snow has appealed the conviction.

Snow contends the evidence was not sufficient to establish either (1) his identity as the person responsible for the fatal injuries or (2) if he was responsible, he acted with malice aforethought.

Snow also argues the district court erred by restricting cross-examination of his wife, who testified against him. In an attempt to impeach her testimony, Snow wanted to cross-examine her about a three- to five-year-old incident in which she accused a third person of sexual abuse. This complaint was later dismissed by the county attorney's office. The district court declined to permit this cross-examination.

We find no error and affirm the district court.

Our scope of review is on error of law. Iowa R. App. P. 4.

Our task in reviewing a challenge of the sufficiency of evidence is clear.

> When sufficiency of the evidence is challenged...we review the evidence in the light most favorable to the state. The evidence must be such that, when considered as a whole, a reasonable person could find guilt beyond a reasonable doubt. All legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict. A jury verdict is binding on us if there is substantial

> evidence to support it. By "substantial" evidence we mean evidence which could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt.

State v. Goeders, 423 N.W.2d 901, 903 (Iowa App. 1988), citing to State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981) (citations omitted).

Snow contends the essential elements of the charge against him, namely his identity as the perpetrator of the infant's fatal injuries, and the requisite malice aforethought for first-degree murder were proven only through speculation. We do not agree.

1. Identity of Perpetrator. There is evidence to show on the afternoon of Friday, August 5th, the defendant and Deana, his wife, argued. When Stephanie, the six-week-old baby cried, Snow prevented Deana from attending to her. According to Deana, he either tripped her or threw her on the floor and pounded her head on the floor. He told her the baby could wait and would not release Deana for about five minutes. The couple continued to argue throughout the afternoon and evening. At one point Deana threw a candle at Snow, which caused him to again throw her on the floor and pound her head until she cried.

Snow left the house at about 6:30 p.m. He returned at 11:00 p.m., at which time he and Deana reconciled. Upon entering the house, they heard Stephanie crying. Snow said he would attend to the baby if Deana would cook him dinner on the outdoor grill. She agreed and went outside and cooked while talking with friends.

For the next twenty to thirty minutes Snow remained with the baby in her bedroom. Right before midnight Snow ran outside with Stephanie in his arms yelling "Help, she's not breathing." A rescue team arrived a few minutes later and, although unable to resuscitate the six-week-old, were able to regain a heartbeat. Stephanie was connected to a life-support system at the University of Iowa Hospital.

The doctors treating Stephanie concluded there was little doubt an adult had seriously abused the baby and the abuse had been ongoing. X-rays revealed three fractured ribs and a fractured ankle. According to the doctors, the baby's brain was no longer functioning. When they disconnected her life-support system, she died.

In reviewing the evidence in the light most favorable to the State, and indulging all legitimate inferences arising reasonably and fairly from that evidence, we conclude there is substantial evidence which could convince a rational trier of fact Snow is the perpetrator of the fatal injuries to Stephanie.

2. **Malice.** The trial court gave the following instructions regarding malice in this felony-murder trial:

> "Malice" is a state of mind which leads one to intentionally do a wrongful act to the injury of another out of actual hatred, or with an evil or unlawful purpose. It may be established by evidence of actual hatred, or by proof of a deliberate or fixed intent to do injury. It may be found from the acts and conduct of the defendant, and the means used in doing the wrongful and injurious act. Malice requires only such deliberation that would make a person appreciate and understand the nature of the act and its consequences, as distinguished from an act done in the heat of passion.

> "Malice aforethought" is a fixed purpose or design to do some physical harm to another which exists before the act is committed. It does not have to exist for any particular length of time. It is sufficient if it exists any time before the killing.
>
> Malice may be inferred from the commission of felony child endangerment which results in death.

We conclude there is ample evidence of malice to support the verdict of first-degree murder.

The State is not required to prove either premeditation or specific intent to kill in order to prove its case on felony murder. The State must prove the defendant acted with malice aforethought. State v. Ragland, 420 N.W.2d 791, 793 (Iowa 1988).

Malice may be inferred from the underlying forcible felony. Id. at 794. Heaton v. State, 420 N.W.2d 429, 431 (Iowa 1988); State v. Oliver, 341 N.W.2d 744, 747 (Iowa 1983); State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980); State v. Galloway, 275 N.W.2d 736, 738 (Iowa 1979).

Snow was indicted for child endangerment and first-degree murder. Iowa Code section 702.11 defines child endangerment as a forcible felony. Iowa Code section 707.2(2) provides a person commits murder in the first degree when the person kills another person while participating in a forcible felony. Malice may be concluded from the commission of a forcible felony which results in death. Schrier v. State, 347 N.W.2d 657 (Iowa 1984); State v. Oliver, 341 N.W.2d at 747 (Iowa 1983).

The record itself contains evidence sufficient for a reasonable trier of fact to find the existence of malice beyond a reasonable doubt.

State Medical Examiner Thomas Bennett, who has performed several hundred autopsies on children, testified the "shaken/slammed baby syndrome" requires forceful action to jerk the victim's head back and forth. He stated because baby bones were so flexible, the fractures of Stephanie's ribs required a force so strong it flattened her chest. His examination revealed she had suffered very severe injuries caused by the violent whipping of her head. He compared the whipping to an average sized adult being rattled back and forth by a thousand-pound gorilla. He testified he had never seen a case this severe where survival was even remotely possible.

Dr. Randall Alexander, an assistant professor of pediatrics and a nationally-known expert on child abuse, testified Stephanie's injuries were deliberately inflicted. He described the force used to inflict those injuries as "tremendous," "massive," and "extreme." He compared the injuries as akin to those received in high-impact car crashes and a fall from a three-story building.

Lastly, Dr. Wilbur Smith, a pediatric radiologist who is also a leading national expert in child abuse, testified Stephanie's brain had been ripped apart by a great force

that caused a tremendous amount of swelling and bleeding. He stated the injuries were equivalent to those received from a bullet or other tremendous life-threatening force "that has taken the part of the brain tissue apart and split them."

Dr. Alexander estimated Stephanie's injuries occurred between ten minutes and one hour before she stopped breathing. Dr. Bennett estimated the injuries probably occurred three to five minutes, or at the most, fifteen to thirty minutes before she became unresponsive. Snow testified he was alone in the bedroom with the baby for approximately thirty minutes.

There is sufficient evidence in the record for a rational trier of fact to conclude Snow acted with malice.

3. Exclusion of Cross-Examination. Snow's final claim of error is the district court's refusal to allow him to cross-examine his wife regarding a sexual abuse complaint she made in 1986. The complaint, against a third person, was subsequently dismissed by the county attorney.

A trial court's decision on the admissibility of evidence is within its discretion, subject to reversal only when that discretion has been abused. State v. Chadwick, 328 N.W.2d 913, 917 (Iowa 1973). We find no abuse of discretion in excluding this evidence.

AFFIRMED.