FILED
APR 23 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-05 / 89-1971

STATE OF IOWA,

Plaintiff-Appellee,

vs.

297

IVAN EUGENE SWIGART,

Defendant-Appellant.

Appeal from the Iowa District Court for Lucas County, James W. Brown, Judge.

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

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie Ann Halligan, Assistant Attorney General, and Paul Goldsmith, County Attorney, for appellee.

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

SACKETT, J.

Defendant-appellant Ivan Eugene Swigart appeals his conviction of first degree murder.

The crucial issues in this case are whether the trial court erred in overruling defendant's motion to suppress statements defendant made during an interview with two DCI agents, and whether the trial court abused its discretion in refusing to grant a new trial based on alleged juror misconduct. We affirm the trial court.

At about 4:00 a.m. on July 3, 1989, the victim, Terry Masters was found dead from a bullet wound to his face. His body was in his pickup on a gravel road outside Chariton, Iowa. Dwight Kennedy and the victim had been passengers in the victim's pickup. Kennedy said Shawn Shelton had driven Shelton's pickup at them on the wrong side of the road. Kennedy said after this confrontation, he saw a man in the back of the Shelton pickup with a rifle. Kennedy heard a shot, and glass from the Master's windshield sprayed on him. The Shelton pickup left, Kennedy went to a nearby farm house and, returning with help, found the victim dead.

Kennedy and the victim had been at a party at Etter's Hog Yard earlier the morning of July 3. Shelton and defendant were at the same party. Kennedy identified Shelton as the driver of the pickup. Kennedy did not identify the second man in the truck. On July 3,

defendant, together with others who had attended the Etter party, were interviewed by DCI agent Joseph Motsinger. It was a thirty-minute interview in the Lucas County Sheriff's office. Little was learned from defendant at that interview. On July 4, 1989, Motsinger and a second agent, Quinn, decided they wanted to interview defendant again.

At 5:00 p.m. on July 4 the agents went to defendant's apartment at Second and University in Des Moines. The agents left a message with defendant's girlfriend to have defendant call the police dispatcher. The agents waited across the street from defendant's apartment until 8:00 p.m. when defendant arrived home.

The trial court made the following findings of fact about what transpired. There is substantial evidence to support these findings.

> At about 8:00 p.m. Swigart returned to the apartment and phoned DCI. The agents then approached Swigart's apartment, where they spoke to Swigart through an open window.
>
> The agents informed Swigart they wished to ask him some more questions. The agents did not have probable cause to arrest Swigart for any crime. One of the agents suggested that the interview be conducted at DCI headquarters, in the Wallace State Office Building, less than a five-minute drive from Swigart's apartment. The agents told Swigart that he was not under arrest, that he was free to go, and that they wanted to interview him at the Wallace Building simply because their offices were air-conditioned.
>
> Swigart agreed to accompany the agents to the Wallace Building. Swigart testified that he believed he had to go to the Wallace Building and that if he had refused, the agents would have compelled him to accompany them. Swigart testified that once at the Wallace Building he

believed he had to stay until the agents "let" him go. The agents deny they restrained Swigart's freedom of movement in any manner.

The agents questioned Swigart at DCI headquarters beginning about 8:20 p.m. The agents twice told Swigart he was not under arrest, that he was free to go and that the agents would take him back to his apartment upon his request. Swigart did not appear to the agents to be physically ill or emotionally distraught. Swigart claims on July 4, 1989, he was as sick as he ever remembered being. The agents asked their questions in a soft-spoken manner, did not yell at Swigart and did not threaten him.

About 9:39 p.m., almost 80 minutes after the interview at the Wallace Building began, the interview was stopped and Swigart was allowed to get a drink of water and use the men's room. The interview recommenced about 9:43 p.m. Some 15 minutes later, Quinn told Swigart that the agents knew Swigart was involved in Masters' death, that they had been honest with him and that they now wanted him to be honest with them. Swigart then made inculpatory statements to the agents. Swigart cried during the course of these statements. The agents admit that Quinn's claim that the agents knew of Swigart's involvement in Masters' death was false.

The agents did not inform Swigart that anything he told them could be used against him. Swigart testified he thought oral statements could not be used against him and that they were less incriminating than written statements.

The interview at the Wallace Building lasted from approximately 8:20 p.m. to sometime before 11 p.m. Swigart, Quinn and Motsinger were present during the entire interview, except for a short time when one of the agents left the interview to obtain soft drinks. After Swigart made the inculpatory remarks, the agents arrested him for first-degree murder and he was taken to the Lucas County jail.

Swigart is 28 years old. He quit school when he was in the 11th grade and appears to be of at least average intelligence. He understood the responded to questions asked at the evidentiary hearing. Swigart had been arrested, handcuffed and jailed more than once prior to July 4, 1989.

In addition to the trial court's findings, we find the following facts to be undisputed. The agents took defendant to the Wallace Building in their car. The statements to defendant that he was free to leave were made before any interview commenced. At no time prior to defendant's arrest did the agents give defendant any Miranda warnings. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Defendant contends the trial court erred in overruling his motion to suppress because he was seized without probable cause and interrogated without first receiving a Miranda warning. The State contends the statements are admissible because the defendant was not in custody when the statements were given. The defendant contends the statements were made during custodial interrogation.

The safeguards prescribed by Miranda become applicable as soon a suspect's freedom of action is curtailed to a degree associated with a formal arrest. Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317, 335 (1984); California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983), State v. Cook, 330 N.W.2d 306, 311-13 (Iowa 1983). The relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Berkemer v. McCarty, 468 U.S. at 442; State v. Little, 421 N.W.2d 172, 173 (Iowa App. 1988). Whether a defendant is the focus of a

custodial interrogation is a factual determination that must be made on a case by case basis. United States v. Crisco, 725 F.2d 1228, 1231 (9th Cir.), cert. denied U.S. 104 S. Ct. 2360, 80 L. Ed. 2d 832 (1984). The interrogators' intentions do not weigh very heavily in our analysis. United States v. Jimenez, 602 F.2d 139, 145 (7th Cir. 1979). We focus instead on the defendant's understanding of what is going on. United States v. Carter, 884 F.2d 368, 370 (8th Cir. 1989).

Factors relevant to whether an accused is in custody include (1) the language used to summon the individual, (2) the physical surroundings of the interrogation, (3) the duration of the detention; (4) the degree of pressure applied to detain the individual, and (5) the extent to which the accused is confronted with evidence of guilt. See United States v. Wauneka, 770 F.2d 1334, 1338 (9th Cir. 1985).

Factors that weight in the State's favor are:

1. Defendant went voluntarily with the agents.

2. Defendant was advised before the interview commenced that he could leave.

3. Defendant was not under arrest when he made the statements.

4. Defendant was not physically restrained when he made the statements.

The State also contends we should consider the fact the interview was brief, the agents were not in uniform, and

the defendant was taken to an office in a state building that did not have guns on the walls or bars on the windows. We do not consider these facts in reaching our decision. The interview lasted from 8:20 p.m. to 11:00 p.m. We do not find it to have been a brief interview.

Factors that weigh in the defendant's favor include:

1. The questioning was conducted by two DCI agents.

2. The agents were waiting for defendant when he came home and came to him within minutes of receiving a call from the state dispatcher.

3. The agents transported defendant to the Wallace Building in their car.

4. The agents took defendant to their offices in the Wallace Building. The Wallace Building was closed to the public that day because of the holiday.

5. The office defendant was taken to was not familiar to him and was surrounded by a maze of cubicles which would be confusing to a person seeking an exit.

6. In the office, defendant was isolated from others who might lend him assistance or moral support.

7. Defendant was questioned for over an hour before he made the incriminating statements.

8. Defendant made the incriminating statements only after the agents told the defendant they knew he was involved with the Master's slaying and they were being honest with defendant. The agents later admitted these statements were false.

9. While the defendant was given permission to leave, the permission was given before not during questioning.

It is a close question whether when the defendant made the incriminating statements he was in a position where he could reasonably conclude he was deprived of his freedom in a significant way. See California v. Beheler, 463 U.S. at 1125, 103 S. Ct. at 3520, 77 L. Ed. 2d at 1279; Miranda, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706.

While recognizing the degree to which one is confronted with evidence of one's guilt is relevant, the State argues in part that the evidence was not damning enough to convince defendant the officers knew of his involvement. Defendant knew the agents had done substantial investigation on the case. Defendant had the right to rely on the agents' statements as being truthful. However, in considering all factors, we find the trial court's decision to overrule defendant's motion to suppress to be correct.

Defendant next contends his motion for new trial based on juror misconduct should have been sustained. The trial court denied the motion finding there was not a reasonable probability the misconduct influenced the verdict. In support of the motion, defendant filed an affidavit signed by juror Wright. The affidavit provided in applicable part:

* * *

> 2. On Friday, November 17, 1989, after the jury deliberation began, I reviewed the instructions provided by the Court and decided that I did not believe the State had proved beyond a reasonable doubt that the defendant had "aided and abetted" another in the commission of the crime charged according to the definitions set out in the Court's instructions.

3. At approximately 4:30 PM the jury was sent home for the weekend and ordered to return on the following Monday.

4. On Saturday, November 18, 1989, I consulted the American Heritage Dictionary of the English Language and looked up the words "aid" and "abet."

5. Based upon the dictionary definition of the word "aid," which I substituted for the court's definition of "aid and abet," I changed my position on this defendant's guilt and decided to vote for guilty.

6. On Monday morning I returned to the courthouse to continue deliberations and voted in favor of Defendant's guilt of the crime charged, murder in the first degree based upon the dictionary definition of the word "aid."

During an evidentiary hearing on the motion, juror Wright testified:

Q. Prior to your consultation of that dictionary, what was your position with regard to the issues in this case, if you knew or had one at that time? A. I really didn't think it was first degree murder. I thought it was probably second.

Q. Did you change your position when you consulted the dictionary that you have indicated you consulted? A. Yes.

* * *

Q. And should I understand that you substituted the dictionary definition for the Court's instruction? A. I substituted it in place because I could not remember the Court's instructions altogether but I assumed that they were probably one and the same.

Q. When did you change your position then concerning the issue in this case? A. When we went back Monday morning.

Q. And was that on the basis of anything other than your review of the dictionary? A. No.

Juror Wright's American Heritage Dictionary of the English Language (1969) dictionary defines "aid" as "[t]o help; assist."

The court gave the jury the following instruction on aiding and abetting:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.
>
> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.
>
> If you find the State has proved the defendant directly committed the crime, or knowingly "aided and abetted" another person in the commission of the crime, then the defendant is guilty of the crime charged.

Iowa R. Crim. P. 23(2)(b)(2) provides that the district court may grant a new trial "[w]hen the jury has received any evidence, paper or document out of court not authorized by the court." Iowa R. Crim. P. 23(2)(b)(3) provides a basis for a new trial where a juror has "been guilty of any misconduct tending to prevent a fair and just consideration of the case."

To receive a new trial on the basis of jury misconduct, a party must meet the following conditions:

> (1) evidence from the jurors must consist only of objective facts as to what actually occurred in or

> out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984). Defendant must show the trial court abused its discretion. Id.

The important question is whether the juror's conduct was calculated to and with a reasonable probability did influence the verdict. See Cullen, 357 N.W.2d at 27; Harris v. Deere & Co., 263 N.W.2d 727, 729-34 (Iowa 1978). The trial court has broad discretion on this issue. Id.; see also State v. Harrington, 349 N.W.2d 758, 762-63 (Iowa 1984). The reasonable probability requirement is not easy to satisfy. See Cullen, 357 N.W.2d at 28; Harrington, 349 N.W.2d at 762-63, State v. Christianson, 337 N.W.2d 502, 504-06 (Iowa 1983).

A juror may not by affidavit or testimony after deliberations impeach a verdict or state what influenced the jury in reaching its decision. See Harrington, 349 N.W.2d 762, State v. Huston, 209 N.W.2d 42, 49 (Iowa 1973). To justify a new trial it must appear independently of juror testimony the misconduct was calculated to and probably did influence the verdict. Cullen, 357 N.W.2d at 28. The trial court did not abuse its discretion. We affirm.

AFFIRMED.