IN THE COURT OF APPEALS OF IOWA

No. 0-13 / 89-46

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

DUANE JOSEPH SMITH,

Appellant.

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Appeal from the Iowa District Court for Polk County, Harry Perkins, Judge.

Defendant appeals from his conviction, following a jury trial, of second-degree murder. **AFFIRMED.**

Thomas J. Miller, Attorney General; Julie A. Halligan, Assistant Attorney General; James Smith, County Attorney; and Maggi Moss, Assistant County Attorney, for appellee.

Raymond E. Rogers, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

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

HABHAB, J.

Defendant Duane Smith appeals from his conviction, following a jury trial, of second-degree murder. The sole issue defendant raises in this appeal is whether the trial court erred in its instruction on the defense of intoxication. We affirm.

On May 23, 1988, defendant went to his uncle's home in Des Moines to borrow a bicycle. At approximately 7:00 p.m., defendant rode to several convenience stores where he purchased five or six cans of beer. After imbibing these beverages, defendant proceeded to ride to a bar at East 12th Street and Grand Avenue in Des Moines. There defendant consumed five to six bourbon and Cokes.

The woman who bartended that night testified that she served the drinks the defendant consumed. When the defendant first arrived, he sat alone at the bar. After about fifteen or twenty minutes, another man came in and sat next to the defendant. The two struck up a conversation that consisted of a discussion on religion and Vietnam. She testified that during the conversation both men said that once you start killing, you can never stop. When they started to talk about killing, she told the two of them to change the subject. About five or ten minutes later, the man the defendant talked to left the bar. The defendant then struck up conversations with other persons at the bar.

Defendant was ultimately asked to leave the bar because he was disturbing its patrons. After leaving the bar, defendant occupied an automobile outside the bar until he was forcibly removed by the owner's husband and another man. Defendant was seen riding east on Grand Avenue and then turning south on 17th Street. He was subsequently seen peering into the basement of the victim's home, and at the back door of the house.

At some point between 4:30 a.m. and 6:00 a.m., defendant was found by his uncle asleep in a chair in the uncle's home. Defendant's uncle noticed blood on defendant's clothing. After unsuccessfully trying to awaken defendant, his uncle went back to bed. When defendant did awake, he said he could not remember what had transpired the night before.

The defendant's aunt found several items of jewelry in the pockets of defendant's clothing. Later that evening, defendant's uncle and aunt saw a news report about the murder. Because the description of the man sought for questioning by police resembled his nephew, defendant's uncle told him they should talk to the police. Defendant and his uncle took the jacket he had worn the evening before and some of the jewelry found in his clothing with them to the police station. One item of jewelry had the victim's name on it.

Subsequent to being charged by trial information with first-degree murder, defendant served notice of his

intention to rely upon the defense of intoxication. See Iowa R. Crim. P. 10(11)(c).

At defendant's trial, evidence was introduced which showed that the blood found on defendant's coat was consistent with the blood of the victim. Additionally, blood found on the rear door and south doorway of the victim's residence was consistent with the blood of defendant. The State also presented evidence that a shoe print found at the crime scene matched one of defendant's shoes. The defense presented evidence concerning intoxication. A jury found defendant guilty of the lesser-included offense of second-degree murder.

Our review is on assigned errors of law. Iowa R. App. P. 4.

Instruction No. 14, the instruction at issue, stated:

> The defendant has claimed that at the time and place of the commission of the offense he was intoxicated. The fact that a person is under the influence of intoxicants does not excuse nor does it aggravate his guilt. However, intoxication may be shown where it is relevant to the person's specific intent at the time of the act charged.
>
> However, even though a person is under the influence of an intoxicant, if he still possesses a mental capacity sufficient to form the intent requisite to the offense charged; or, if he has the intent present in his mind before he falls under the influence of the intoxicant and then commits the act, he will not be absolved of the responsibility for the act. Thus, intoxication is a material issue only when it produces a mental disability such as will render the person incapable of forming the intent which is an element of the offense charged.
>
> In considering the question of the defendant's intoxication, it should be considered along with

> all the other evidence in the case which bears on the question of intent which is explained in Instruction No. 32.
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> The issue of the defendant's intoxication does not change or alter the burden resting upon the State to prove by evidence beyond a reasonable doubt that defendant was able to and did form the specific intent required.

Defendant objected to the first sentence of this instruction, claiming it relieved the State of its burden of proof concerning defendant's actions on the night in question for it in effect amounts to an admission on the part of the defendant that he was at the scene of the crime at the time material. Defendant reasserts the same argument on appeal.

We note initially that the origin of the first three paragraphs of Instruction No. 14 is the former stock instruction on intoxication. See 2 Iowa Uniform Jury Instruction 210 (1984). In determining the adequacy of jury instructions, we view the instructions as a whole. See State v. Holmes, 276 N.W.2d 823, 826 (Iowa 1979). When the instructions given in this case are read in their entirety, no doubt remains that the State had the burden of proving each and every element of the crime charged.

The record reveals that the jury instructions, when taken as a whole, clearly informed the jury that the defendant denied committing the offense and that it was the State's burden to prove beyond a reasonable doubt that he committed the murder. First, the statement part of the instructions read:

> [T]he county attorney filed a trial information against the defendant, Duane Smith . . . and charges that [he] did commit Murder in the First Degree resulting in the death of Irene Armstrong . . . . To this Trial Information, the defendant has entered a plea of not guilty.

Next, Jury Instruction No. 2 told the jury:

> The plea of the defendant is a denial of each and every material allegation in the Information and places upon the State the burden of proving the guilt of the defendant in the manner and to the extent as hereinafter set forth.

The marshalling instruction reads:

> You will first determine whether the defendant is guilty of Murder in the First Degree. You must find the defendant not guilty of Murder in the First Degree, unless the State proves by evidence beyond a reasonable doubt each of the following elements in their entirety set out under No. I below:
>
> I
>
> (a) That on or about May 24, 1988, this defendant did commit the unlawful stabbing of Irene Armstrong.
>
> (b) That the stabbing of Irene Armstrong was done willfully, deliberately, premeditatedly, and with specific intent to kill Irene Armstrong.
>
> (c) That Irene Armstrong died as a result of being stabbed.
>
> (d) That said stabbing was done with malice aforethought.
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> * * *
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> If the State has proved by evidence beyond a reasonable doubt each of the foregoing elements in No. I above . . . it will be your duty to find the defendant, Duane Smith, guilty of Murder in the First Degree; but, if the State has failed to prove any one or more of the aforementioned elements set out in No. I above by evidence beyond a reasonable doubt . . . then you will find the defendant, Duane Smith, not guilty . . . .

The defendant was convicted of murder in the second degree. The instruction with regard to that crime reads:

> Before the defendant can be found guilty of the crime of Murder in the Second Degree as a lesser included offense, the State must establish by evidence beyond a reasonable doubt each of the following propositions:
>
> 1. That on or about May 24, 1988, the defendant stabbed Irene Armstrong.
>
> 2. That Irene Armstrong died as a result of being stabbed.
>
> 3. That the stabbing was done with malice aforethought.
>
> If the State has proved by evidence beyond a reasonable doubt each of the foregoing propositions, it will be your duty to find the defendant guilty of Murder in the Second Degree; but, if the State has failed to prove any one or more of the above propositions . . . .

Instruction No. 6 reads in part:

> By "burden of proof" is meant the obligation resting upon the State to prove the truth of the allegation made by the State which is denied by the defendant . . . .

It is a firmly-established legal tenet that "[a] jury is presumed to have followed its instructions absent evidence to the contrary." State v. Mullin, 421 N.W.2d 517, 520 (Iowa 1988) (quoting State v. Morrison, 368 N.W.2d 173, 176 (Iowa 1985).

We conclude the instructions given in the case sub judice clearly states that the State retained its burden to prove beyond a reasonable doubt that the defendant did commit the act of stabbing to death Irene Armstrong.

As it relates to defendant's complaint that he should have been allowed to raise intoxication and denial as alternative defenses and that Instruction No. 14 "prevented Smith from raising both of his defenses,"[1] we likewise find this assertion of error to be meritless. Voluntary intoxication does not constitute a defense to a crime. State v. Caldwell, 385 N.W.2d 553, 557 (Iowa 1986). It may negate criminal intent if such intent is an element of the crime charged. Id. at 557. From our review of the record, we find nothing that prevented the defendant from raising both of these issues for the jury's consideration. The intoxication instruction was given. The jury was told that the defendant denied stabbing Irene Armstrong. When the defendant entered his plea of not guilty, his denial of the commission of the crime then required the State to overcome the presumption of innocence and to proceed forward with proving beyond a reasonable doubt each and every element of the offense charged.

But even if we determined that Instruction 14 should have been tailored to fit the factual circumstances of this case, we would be compelled to rule that the instruction as

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1. The county attorney argued that Smith could not claim that he was intoxicated and that he was somewhere else during the period in question. According to State v. Broughton, 425 N.W.2d 48, 51 (Iowa 1988), the State's position was incorrect. When we review the record, we find that the trial court did not rely on the county attorney's reasoning when it overruled the defendant's objection to Instruction No. 14.

given was not prejudicial. An error in instructing the jury does not necessitate reversal unless it is prejudicial. State v. Gibb, 303 N.W.2d 673, 686 (Iowa 1981); State v. Jacoby, 260 N.W.2d 828, 836 (Iowa 1977); State v. Chatterson, 259 N.W.2d 766, 771 (Iowa 1977).

Viewed as a whole, the instructions clearly set out the elements the State had to prove in order to justify a guilty verdict. The main argument of the defendant is that by using this instruction, it interfered with his right to present his defense that he was not at the Armstrong home during the commission of the crime and that he does not remember what happened to him that night due to an alcohol-induced blackout.

It is here that we determine that the instruction was not prejudicial. On the evening in question, the defendant was seen drinking at the bar which is located next door to the victim's home. Around midnight, the defendant was seen walking his bike towards the Armstrong home. The defendant was seen at the victim's home looking in the basement window. He was also seen standing on the back stairs with the screen door open. The witness who testified in those respects also testified that she thought the defendant was entering the house. This witness identified the defendant from a pretrial photo spread and during her trial testimony. She made these observations around midnight.

Dr. Bennett testified that the victim's death occurred around 12:20 and that his estimate was accurate within

thirty minutes. The criminologist who was called to testify stated that the blood consistent with the defendant's was found at the point of entry. A lamp shade which was found near the victim had the defendant's left shoe print on it. The morning after the murder, the defendant was discovered sleeping at the home of his aunt and uncle. His clothing, including his pants and an Army camouflage jacket, had blood on it. The blood on defendant's clothing was found to be consistent with the victim's and inconsistent with his own. His shoes had blood on them. In the pockets of his Army jacket, jewelry items belonging to the victim, including a pin with the name of the victim, was found.

The defendant presented two witnesses who testified that he had a history of alcohol blackouts and that he was probably in a blackout during the period of time in question. It is reasonable to conclude that the jury found the testimony regarding the defendant's intoxication sufficient to negate specific intent to kill in that they returned a verdict for second-degree murder, rather than first-degree murder. See State v. Wilson, 243 Iowa 60, 76, 11 N.W.2d 737, 745 (1943). We conclude that it is clear beyond a reasonable doubt that had the instruction not contained the objectionable sentence, the jury nonetheless would have concluded that the defendant had in fact stabbed the victim.

Finding defendant's arguments to be without merit, we affirm defendant's sentence and conviction.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur with the affirmance of defendant's conviction.

Jury instruction No. 14 was not correct. The instruction certainly indicates to the reader that defendant has admitted being at the place the murder was committed when it was committed. These are elements on which the State has the burden of proof. I do not agree with the majority that the other instructions correct this problem. Only because the evidence was overwhelming that defendant was at the decedent's house that evening, do I concur with the affirmance of the conviction.