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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
HOWARD DEAN ROUSE,	)	8-264 86-1695
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Woodbury County (42196), Michael S. Walsh, Judge.

Defendant appeals his conviction, following a bench trial, for the crime of second-degree murder. **AFFIRMED.**

Howard Dean Rouse, Anamosa, pro se.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, J. 303

The defendant appeals his conviction, following a bench trial, for the crime of second-degree murder. He challenges the sufficiency of the evidence, certain evidentiary rulings, and the court's acceptance of his election to a bench trial.

On the night of July 7, 1986, defendant Howard Dean Rouse met the victim, Craig Rice, in a gay bar. Rouse and Rice left the bar together later that evening in Rice's car, accompanied by another bar patron, Jim Green. Green testified at trial that he heard Rouse ask for money in exchange for sex. Rice stated he did not have the money, but that Rouse could stay at Rice's farmhouse that evening and he would provide food for him.

Rice then drove Green and his roommate, whom they found walking along the road, to their apartment. After dropping Green and his roommate off, Rice and Rouse drove to Rice's house. The next day Rice was found dead on his bed at his farmhouse. Medical evidence indicated Rice was killed by a severe blow to the forehead. Rouse, who had taken Rice's vehicle, was apprehended in South Dakota a few days later.

The record contains additional evidence. Upon bench trial, the court found Rouse guilty of second-degree murder and sentenced him to not more than 50 years imprisonment.

I. Rouse first contends the State failed to produce substantial evidence he committed murder. Specifically, he claims that the evidence was insufficient on the element of

malice aforethought. See Iowa Code § 707.1-3 (1986). Malice aforethought is defined as "that condition of mind which prompts one to do a wrongful act intentionally, without legal justification or excuse." State v. Love, 302 N.W.2d 115, 119 (Iowa 1981) (quoting State v. McCollom, 260 Iowa 977, 988, 151 N.W.2d 519, 525 (1967)). The use of a deadly weapon, accompanied by an opportunity for deliberation, is evidence of malice. Id. Proof of specific intent is not required for a conviction of second-degree murder. State v. Miller, 359 N.W.2d 508, 511 (Iowa App. 1984). When reviewing a case for sufficiency of the evidence, we are faced with the task of determining whether the evidence, taken as a whole, supports a finding of guilt, State v. Farnum, 397 N.W.2d 744, 747 (Iowa 1986), and we construe the record in the light most favorable to the State. State v. Moses, 320 N.W.2d 581, 586 (Iowa 1982).

Our review convinces us that substantial evidence exists to support the court's finding of guilt beyond a reasonable doubt. The evidence shows that Rouse, who had engaged in consensual sexual activity with Rice only hours before Rice's death, was the last person seen with Rice when the two men traveled to Rice's farmhouse in Rice's

vehicle.[1] The evidence also shows that Rice died in the early morning hours of July 8, 1986, from a severe blow to his left forehead, and that Rouse was seen at 5:45 a.m. that morning driving Rice's vehicle. The weapon, thought to be some type of blunt instrument, was never found.

While the record indicates that Rouse had been drinking, the State produced strong evidence to support the trial court's finding that Rouse nonetheless possessed the rational state of mind necessary to deliver the fatal blow. Moreover, the severity of the blow rendered sufficed to establish the malicious nature of the attack.

Based upon the foregoing, we conclude that there was substantial evidence to support the verdict.

II. Rouse next contends that the court erred in permitting the State to impeach him with his inculpatory statements given to investigating officers who improperly refused to honor his request for an attorney.

Upon Rouse's arrest in South Dakota, two Iowa officers interviewed him. During this interview, Rouse made several

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1. At trial, testimony was heard from Rice's neighbor which indicated that a second vehicle pulled into Rice's driveway some fifteen minutes after the first vehicle. The trial court found that "the presence of these vehicles and who was in the vehicles has not been explained and remains a mystery but does not cast doubt on the guilt of the Defendant." Based upon our review of the record, we see no reason to disagree with this finding.

inculpatory statements. Prior to trial, defense counsel moved to suppress these statements. Upon hearing, the district court granted the motion and concluded that "the statements should be suppressed because the defendant asked to have an attorney present and one was not provided."

At trial, the State sought to use Rouse's inculpatory statements solely for his impeachment, and offered to present evidence with respect to the voluntariness of those statements. The court found that no evidence on the issue of voluntariness was necessary and allowed the State to impeach Rouse with his prior inconsistent statements. In overruling defendant's objections, the court stated:

> It was clear to me, and it is clear still, that the statements given by the defendant were voluntary in nature. At no time did I intend to indicate . . . that his statements were not voluntary in fact. They were voluntary in fact. They were not voluntary, however, in terms of him voluntarily and intelligently waiving his right to counsel because he asked for counsel and they did not give him counsel. And he never waived that right. Therefore, the statements were suppressed.

In Harris v. New York, 401 U.S. 222, 224, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1, 4 (1971), the United States Supreme Court held that statements made by an accused to police under circumstances rendering the statements inadmissible to establish the prosecution's case in chief under Miranda are nonetheless admissible for purposes of impeaching the accused's credibility, provided that the trustworthiness of the evidence satisfies legal standards.

The Iowa Supreme Court adopted this same principle in State v. Donelson, 302 N.W.2d 125, 134 (Iowa 1981). This court reviews the issue of voluntariness de novo and requires preponderant proof by the State to establish its argument. State v. Vincik, 398 N.W.2d 788, 789-90 (Iowa 1987). The test for voluntariness is whether the "totality of the circumstances" demonstrates that the statement was the "product of an essentially free and unconstrained choice made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired." Vinicik, 398 N.W.2d at 790.

We believe the record supports the trial court's findings with respect to the voluntary nature of Rouse's statements. These is no evidence in the record that Rouse was coerced or tricked by the two investigating officers into talking. To the contrary, the record indicates that Rouse spoke freely with the officers for about an hour and a half after his arrest. Rouse's only hesitations during the conversation occurred when he asked the officers if he should get a lawyer, to which the officers responded that they couldn't tell him either way.

Rouse's only evidence on the issue of voluntariness concerned the fact that he admitted himself into a hospital for treatment of alcohol abuse the day of his arrest. Sergeant Carlson offered testimony, however, that Rouse did not appear to be under the influence of alcohol or drugs

during the interview, and we see no reason to believe otherwise. We believe that the trial court correctly allowed the State to use the defendant's inculpatory statements for the purposes of impeachment at trial.

III. Rouse further complains that the trial court erred in allowing the admission of the medical examiner's testimony at trial. He argues that the medical examiner failed to perform all possible tests and failed to preserve physical evidence, thereby causing the loss of potentially exculpatory evidence. He cites State v. Brown, 337 N.W.2d 407 (Iowa 1983), in support of his claim on this point. In Brown, the State sought to use the results of a blood-alcohol test at trial to support a charge of involuntary manslaughter. Because the testing laboratory had failed to preserve the underlying blood sample, the district court granted defendant's motion to suppress.

The case at bar is distinguishable from Brown. There is no evidence that Rouse was blocked access to any physical evidence collected by the State during its investigation, or was denied the opportunity to conduct an independent examination on it. Moreover, defendant's argument that other evidence might have been obtained by the medical examiner is purely speculative, and without factual support in the record. See Brown, 337 N.W.2d at 511. We thus find defendant's third argument to be without merit.

IV. Rouse also contends that the district court erred by accepting his election of a bench trial rather than a jury trial. He contends his decision was not voluntary. We disagree. The record is devoid of any measure of evidence which supports Rouse's contentions. To the contrary, the transcript of the proceedings indicates that Rouse made a fully informed and intelligent choice to forego his right to a jury trial.

We fail to find merit in any of defendant's contentions for reversal and we therefore affirm the defendant's conviction of second-degree murder.

AFFIRMED.