

IN THE COURT OF APPEALS OF IOWA

No. 6-577 / 95-0926

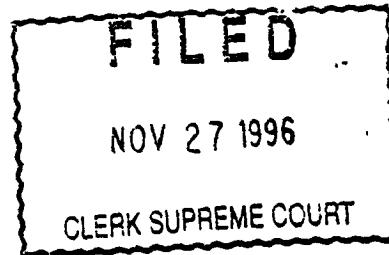
STATE OF IOWA,

Plaintiff-Appellee,

vs.

CHRISTOPHER BENNETT,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Glen E. Pille and Gene L. Needles, Judges.

Christopher Bennett appeals from his conviction, following a jury trial, for first-degree murder in violation of Iowa Code section 707.2 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Chris Cooklin and Annette L. Hitchcock, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat and Mark Sandon, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Cady and Huitink, JJ.

SACKETT, C.J.

Defendant-appellant Christopher Bennett appeals from his conviction, following a jury trial, for first-degree murder in violation of Iowa Code section 707.2 (1993). Defendant contends: (1) the district court erred in admitting evidence he claims was obtained following an illegal search and seizure; (2) he was denied a fair trial when the State commented on the invocation of his right to remain silent; (3) the trial court erred in admitting hearsay and prior bad acts evidence; and (4) there was not sufficient evidence to support the verdict. We affirm.

Police officers were called to defendant's apartment by Jerry Hupp, a friend of defendant. Hupp had had a conversation with defendant and was concerned about defendant's live-in girlfriend, Julie Wacht, who was tied up in the bedroom of the apartment she shared with defendant. After knocking on the door and attempting to enter defendant's apartment, the police called a locksmith who helped them enter. Inside, they found Julie dead in the bedroom. She lay on her back on the floor. A plastic bag was over her head and a rope was wrapped around her neck. Defendant was charged with her murder.

Defendant first contends the trial court allowed the admission of evidence obtained from an unlawful search. Prior to trial, defendant filed a motion to suppress the evidence seized from his apartment. He alleged the initial search without a warrant and the second search with a warrant were illegal. The district court denied

the motion finding the emergency situation facing the police fell within the exigent circumstances exception to the warrant requirement.

Defendant challenges the violation of a constitutional right. Our review is de novo and we make our own independent evaluation of the totality of the circumstances. *State v. Lamp*, 322 N.W.2d 48, 50 (Iowa 1981); *State v. Johnson*, 395 N.W.2d 661, 663 (Iowa App. 1986).

Defendant challenges the search which was the entry when the police found Julie's body. Defendant advances there was no outside sign of any problems nor was there anything coming from inside the apartment that would have alerted police to problems inside. Defendant claims in the fifty or so minutes it took the officers to find a locksmith to let them in, the officers could have obtained a search warrant.

The officers went to the apartment after receiving a call from Hupp indicating his concern that a woman may be held against her will in the apartment. The officers therefore were operating under an emergency aid exception to normal rules governing the cause of a search.

An objective determination of reasonableness, as opposed to a formal inquiry regarding probable cause, is a sufficient protection of individual privacy under the circumstances. *State v. Carlson*, 548 N.W.2d 138, 142 (Iowa 1996). To establish reasonableness, the police have the burden of showing specific and articulable facts that indicate their actions were proper. *Id.* In addition, the scope of the entry and search must be limited to the justification thereof, and the officer may not do more

than is reasonably necessary to determine whether a person is in need of assistance and to provide that assistance. *Id.*

Applying these standards, the search was proper and the trial court correctly denied defendant's motion to suppress the fruits on the first search.

Defendant next contends the trial court should have granted his motion for mistrial based on comments made by the attorney for the State in opening statements.

During opening statements, the attorney for the State made the statement defendant did not want to talk to the police without his lawyer present. Defense counsel objected to the prosecutor's statement as an improper comment on defendant's constitutional right to remain silent and his right to counsel. The district court did not grant a mistrial but told the jury opening statements were not evidence, a person is not required to be interviewed, and no inference may be drawn from any refusal to be interviewed.

An attorney representing the State in a criminal matter should never comment on a defendant's right to remain silent. *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). However, a comment on a defendant's exercise of a fifth amendment right does not automatically require a reversal. *State v. Bishop*, 387 N.W.2d 554, 562 (Iowa App. 1986). To gain reversal, a defendant must show first that the remarks were not proper and secondly that the improper remarks prejudiced his substantial rights and deprived him of a fair trial. *Id.* at 562-63. The trial court admonished the jury. Defendant has failed to show the required prejudice.

Defendant next contends the trial court should not have admitted evidence of his prior bad conduct. Specifically, over defendant's objections, the State presented evidence defendant earlier was convicted of domestic abuse based on his injuring Julie; and two of Julie's co-workers testified they saw Julie when she had injuries Julie said were caused by defendant. The State argues the acts were admitted to show intent and motive as there is a reasonable similarity between the act and the current case. *See State v. Barrett*, 401 N.W.2d 184, 188 (Iowa 1987). The State argues all acts were malicious acts. Defendant raises a number of objections to admission of this evidence which we have considered and found to be without merit.

Defendant next contends there is not sufficient evidence of malice aforethought, willfulness, deliberation, premeditation, and specific intent to convict him of first-degree murder.

The defense focused on the volatility and immaturity of the couple's relationship. Defendant was eighteen years old; Julie was sixteen. Defendant portrayed Julie as one prone to exhibiting jealous and violent rage by yelling and physically assaulting him. He claimed on the night of Julie's death she was on one of her tirades so he "hog-tied" her (arms and legs together) and put a sock in her mouth. He claimed when she did not calm down he tied a pillow to her face to muffle the sound she was making. He then left for a friend's house, returning later to find Julie dead. He untied her arms and legs and removed the pillow. He put a plastic bag over her head so that he did not have to look at her. Defendant testified he did not

mean to kill Julie. He claimed to be scared to the point of being hysterical and suicidal. He went to a friend's house, and from there his friend took him to Broadlawns for psychiatric care. The police apprehended defendant at Broadlawns.

At the close of evidence, defendant moved for a directed verdict of acquittal arguing the evidence was insufficient to show malice aforethought or premeditation. The motion was overruled.

On a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *See State v. Hall*, 371 N.W.2d 187, 188 (Iowa App. 1985). We look at the circumstances surrounding Julie's death, together with other evidence, and affirm on this issue.

AFFIRMED.

Huitink, J., concurs; Cady, J., specially concurs.

CADY, J. (specially concurring)

I concur in the result reached by the majority, but for a different reason than expressed by the majority concerning the admission of statements by the victim to co-worker Victoria Padavich identifying defendant as the person who caused her prior injury. This testimony was hearsay, and does not fall within any recognized exception to the rule against hearsay due to the long delay between the injury and the statement.

Nevertheless, the issue was not properly preserved by defendant at trial. Defendant's objection came after the witness had given the hearsay answer and no request was made for the objection to precede the answer. In any event, I would conclude the inadmissible evidence was harmless considering all the facts and circumstances of the case.