FILED
DEC 27 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-617 / 89-1674

STATE OF IOWA,

Plaintiff-Appellee,

296

vs.

JEFFREY LEE HASS,

Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Van D. Zimmer and Kristin Hibbs, Judges.

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

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

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, Denver D. Dillard, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

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

SACKETT, J.

Defendant Jeffrey Lee Hass appeals his conviction for first-degree murder. He contends (1) he should have a new trial because the State's attorney made improper remarks during closing arguments, (2) the trial court improperly instructed the jury, and (3) there was not sufficient evidence to support his conviction. We affirm.

Defendant was charged with killing Leah Wara in the early morning hours following her high school prom night. The victim's parents found her body the next day in a closet in defendant's apartment. Defendant was arrested in South Dakota, and upon questioning admitted the murder in a statement admitted in evidence. Defendant contends he killed the victim when she became angry after she complained about his performance during intercourse and scratched him.

I.

Defendant first claims the district court abused its discretion in failing to grant a mistrial after the State's attorney advanced his opinion in closing arguments that defendant forced the victim to engage in intercourse. In his closing remarks, the State's attorney admitted there was no evidence to confirm or deny defendant's statement his intercourse with the victim prior to her death was consensual. The prosecutor suggested a scenario in which sex was not consensual. In his rebuttal, the prosecutor

characterized his hypothesis as a reasonable, logical explanation of the circumstances.

Outside the presence of the jury, defendant moved for a mistrial on the ground the prosecutor's insinuation defendant was guilty of the uncharged offense of sexual abuse violated his rights to a fair trial and due process. The defendant further objected to the remark made by the attorney for the State that "[t]he fact that I didn't use (the phrase 'uncaring' in characterizing defendant) doesn't mean I don't think it."

It can be misconduct for a prosecutor to create evidence by argument or express a personal belief regarding the defendant's guilt. See State v. TeBrockhurst, 305 N.W.2d 705, 709 (Iowa 1981); State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975). To be entitled to a new trial on the ground of prosecutorial misconduct, a defendant must demonstrate he or she was so prejudiced by the misconduct he or she was denied a fair trial, and the district court's ruling constituted an abuse of discretion. State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986); State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983); State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982). We find the trial court did not abuse its discretion in overruling defendant's motion for mistrial.

II.

Defendant next contends the trial court incorrectly instructed the jury the victim's words could not be considered in determining whether he was seriously provoked to kill her.

At the close of trial, defendant objected to language in a jury instruction defining serious provocation for voluntary manslaughter. The instruction said "[w]ords alone, however abusive or insulting, cannot be serious provocation." The court overruled the objection.

Defendant argues the instruction given was only partially correct as a statement of the law. Defendant admits in Iowa that mere words, however abusive or insulting, cannot alone constitute adequate provocation to support a verdict of voluntary manslaughter. See State v. Rutledge, 243 Iowa 179, 192, 47 N.W.2d 251, 259 (1951); State v. Hockett, 70 Iowa 442, 453, 30 N.W. 742, ____ (1886). But defendant argues insulting language may aggravate an otherwise marginal provocation so that it will be sufficient.

In his closing argument, defense counsel made it clear defendant's theory of voluntary manslaughter contained elements of both verbal and physical provocation:

> He talked about provocation and "words alone;" but when he talked about that, he says there can't be provocation but there were only words; but he forgets there were also scratches, but he leaves that out because that doesn't fit his theory of the case. There was more than just "words alone" if you're looking at provocation."

Defendant argues the jury instruction told the jury it could not consider the statements made by the victim to defendant in determining whether he was seriously provoked, and had the instruction not included the objectionable language, this problem would not exist.

The trial court instructed the jury as follows:

> Concerning element number 3 of Instruction No. 26 [the provocation element of the voluntary manslaughter marshalling instruction], a "serious provocation" is conduct that would cause a reasonable person to have a sudden, violent and irresistable passion.
>
> Passion is not sudden, violent and irresistible if there is an interval of time during which a reasonable person would, under the circumstances, have time to reflect and bring his passion under control and suppress the impulse to kill.
>
> Words alone, however abusive and insulting, cannot be serious provocation. (emphasis added).

Defendant objects to the emphasized portion of the instruction.

The instruction was a correct statement of the law, and it did not mislead the jury. "A party cannot complain if instructions fail to emphasize circumstances favorable to him." State v. Lindsey, 302 N.W.2d 98, 102 (Iowa 1981); State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974).

The jury was free to find, according to the instruction, that defendant was provoked, not by mere words alone, but by the words and actions of the victim. Based on the evidence presented, it was quite reasonable for the jury to reject that proposed finding of provocation. It was nonetheless available. We find no error in this issue.

III.

Defendant's last contention is there was insufficient evidence in the record for a rational jury to find him guilty of murder in the first degree. Defendant contends the elements of willfulness, deliberation, premeditation and malice aforethought, required for a conviction of murder in the first degree, were proven solely through speculation, and this is an insufficient basis for a criminal conviction.

We view evidence in the light most favorable to the State to determine if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980), citing Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560, 573 (1979). We look at all the evidence presented, not just that supportive of guilt. State v. Robinson, 288 N.W.2d at 340.

As defendant notes, only he and the victim were present at the time of the murder. Defendant never admitted the elements of malice or willful, deliberate and premeditated killing. Proof of malice and willful, premeditated and deliberate murder therefore must come from circumstantial evidence.

Part of defendant's statement was that during consensual sex with the victim, she told defendant he was not doing it right, she became hostile and began to scratch

him, and defendant lost it and reached over for a tie on the nightstand and choked her.

Defendant implies the jury must take his statements at face value. However, the jury may give whatever weight it deems appropriate to any evidence presented at trial. The jury might very well reject defendant's suggestion his actions in choking the victim were the result of reasonable provocation (voluntary manslaughter) or unintentional choking during a reckless assault (involuntary manslaughter), and instead conclude that they constitute premeditated murder.

The act of choking, even according to defendant's version of the events, was a willful action. Premeditation and deliberation need not last for any particular length of time. The jury could well have found from the evidence defendant had the opportunity to and in fact did premeditate and deliberate.

The victim in this case had two bruises on the neck, one just below the jaw line right behind the right ear, and one just below the Adam's apple. The medical examiner also found a triangular hole in the thyroid cartilage because of a torn ligament that exposed the airway passage. He testified the fracture to the thyroid cartilage required "excessive" force, and noted the type of strangulation involved in this case could take up to five minutes. On cross-examination, the doctor testified the victim may have

stopped breathing immediately when the thyroid fracture occurred, but further testified on rebuttal, that "[i]f oxygen [had been] delivered to her within, oh, a five-minute period, the brain [would] or might recover" before the brain would die from lack of oxygen.

The jury could have concluded from the evidence presented that defendant either (1) suffocated the victim for up to five minutes -- and at some point during that time fractured the thyroid cartilage by use of excessive force -- or (2) immediately fractured the cartilage in her neck by use of excessive force and then did not seek medical assistance immediately when she stopped breathing. In either event, the jury could conclude that defendant's use of excessive force in choking the victim was premeditated and deliberated, and that he had malice aforethought. There is substantial evidence to support the verdict. We affirm.

AFFIRMED.