IN THE COURT OF APPEALS OF IOWA

No. 3-161 / 91-1826

FILED
OCT 28 1993
CLERK SUPREME COURT
000579

STATE OF IOWA,

Appellee,

vs.

PAUL A. ANDERSON,

Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

The defendant appeals his conviction and sentence, following a jury trial, for first-degree murder. **REVERSED AND REMANDED FOR DISMISSAL.**

James L. Ottesen, Davenport, and Kent A. Simmons, Davenport, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; William E. Davis, County Attorney; and Joseph Grubisich, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

000580

OXBERGER, C.J.

Paul Anderson appeals from a jury verdict convicting him of murder in the first degree. He assigns numerous errors on appeal. We reverse and remand for dismissal.

I. Background Facts and Proceedings.

On March 5, 1988, at about 5:30 p.m., a citizen discovered Joe Brown barely alive in a wooded ravine near his place of employment. He had been shot twice in the head and died shortly thereafter. In attempting to notify his next of kin, the police discovered his wife, Laura Brown, dead at the couple's home.

During the investigation of the ravine, officers found two sets of footprints leading to the body. The officers did not take impressions of prints but took pictures of some of the prints. They also made a plaster cast of tire prints in the parking lot.

The investigation revealed Joe was associated with a prison gang and knew the defendant, Paul Anderson. Anderson received collect phone calls from the Quad Cities to his residence in McHenry, Illinois, on March 3 and 5. The March 5 phone call took place at 5:45 p.m.

During a police interview, Anderson indicated both phone calls were from Joe. After learning Joe was unconscious at 5:45 on March 5, Anderson indicated the second call was from Donald Tharp. The police later learned Tharp was in jail on March 5 and had not made the

000581

call. When Anderson learned this, he told the officer he received a collect call from a man who initially identified himself as Joe Brown and then told Anderson he was a member of a prison gang. The caller allegedly told Anderson Joe was dead and he was looking for drugs Joe had stolen. The caller then allegedly threatened Anderson and his family in an attempt to locate the drugs.

During the investigation of Anderson, police attempted to obtain a search warrant in Illinois to seize tires from his vehicle, but were unsuccessful. They then went to Anderson's home and told him they wished to take his tires. Anderson agreed as long as he received substitute tires. The officers returned with tires and took Anderson's tires. Subsequent testing determined the tire prints at the crime scene matched Anderson's tires.

While investigating Anderson in Illinois, two officers gained entrance to Anderson's locked apartment building by ringing buzzers until someone let them in. Anderson declined to speak to them. The officers proceeded to leave, but one hid under a stairwell. The other officer left, slamming the door behind him. The remaining officer overheard allegedly inculpatory statements made by Anderson to a third party in the hallway of the apartment building.

The State subsequently charged Anderson with murder. The trial information alleged alternative theories of premeditated and felony murder.

Anderson moved to suppress the evidence obtained as a result of the seizure of the tires and the evidence obtained by eavesdropping. Anderson argued the failure of the officers to bring him new substitute tires, as allegedly agreed to, rendered the seizure nonconsensual. Anderson also claimed the officers threatened him with arrest if he did not agree to the exchange. After a hearing, the court overruled the motion.

At the close of the State's case and again at the close of all the evidence, Anderson moved for judgment of acquittal. The court denied the motions.

The jury returned a guilty verdict for first-degree murder. Anderson moved in arrest of judgment for a new trial. The court overruled the motion and subsequently entered judgment on the verdict. Anderson appeals.

II. Sufficiency of Evidence.

Anderson first challenges the sufficiency of the evidence to support the guilty verdict. Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably

000583

be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

As evidence of Anderson's guilt, the State offered evidence of tire prints matching Anderson's tires found at the murder scene. However, the State was unable to present any evidence indicating when the tire prints were made. State's witness, John Kilgore, a criminalist with the department of criminal investiation, was unable to testify with certainty as to how long a tire track of that type could remain in existence without being destroyed by nature. He did, however, testify that atmospheric conditions could have a very detrimental effect on tire prints. The defense presented testimony from Terry Swails, chief meteorologist with KWQC-TV in Bettendorf, Iowa. Mr. Swails indicated the last time prior to March 5, 1988, when even a trace of precipitation occurred was February 23, 1988. Thus, the last precipitation which could have impacted the tire prints occurred more than ten days before the murder. Thus, the tire prints used to convict Anderson could conceivably have been made at least ten days prior to the murder. The evidence at most establishes that Anderson's car was in the victim's parking lot at some time after the last event of nature which could have obliterated tire tracks in the mud.

The State next contends Anderson's inconsistent stories regarding a collect phone call from the Quad City area to his home the evening of the murder are inculpatory. There is absolutely no evidence to indicate who made the telephone call, nor is there any evidence to indicate the nature of the call. While we agree that this raises suspicion and speculation, we cannot hold this evidence can be viewed as substantial.

The State also contends Laura Brown's neighbor overheard her say, "You're drunk, you're drunk, can't we work this thing out." The witness, John Hillman, testified he then heard her say, "Paul." The State offers this to show the defendant was in the area of the murders on the afternoon of Joe Brown's murder. However, neither Hillman nor any other witness testified seeing anyone matching Anderson's description that afternoon. There is no evidence of any sort to place Anderson in the Quad Cities area the afternoon of the murder.

The State also presented evidence of Anderson's motive for killing Brown. The State's evidence indicates Brown and Anderson were involved in a burglary ring in which Brown was also cheating Anderson. However, this evidence, without more, does not rise to the level of substantial evidence.

Finally, we address the alleged inculpatory statements made by Anderson to a cellmate and later, to a neighbor. First, Anderson's cellmate, Timothy Cullen, testified

Anderson made the following remarks upon receiving papers from the State of Iowa regarding the murder. When Cullen asked whether the defendant committed the murder, Anderson allegedly responded, smiling, "[t]he guy got permanent air conditioning." Anderson then made a gesture imitating a gun pointed to his head. Anderson also allegedly stated, "They'll never get me," and indicated he had covered his tracks pretty good. Second, Jose Ruiz, Anderson's former neighbor, testified as follows:

> Q. [PROSECUTION] And what did Paul say? A. [RUIZ] He said they were trying to hook two murders on him.
> Q. And what did you say? A. I asked him if they think you killed two people.
> Q. And what did he say? A. He said, "Know it, but they can't prove nothing."

Iowa Rule of Criminal Procedure 20(4) provides:

> The confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense.

Corroboration need not be strong nor need it go to the whole of the case so long as it confirms some material fact connecting the defendant to the crime. State v. White, 319 N.W.2d 213, 214 (Iowa 1982). The existence of corroborative evidence is an issue for the court and its sufficiency is ordinarily for the jury. State v. Hobson, 284 N.W.2d 239, 243 (Iowa 1979).

In State v. Origer, 418 N.W.2d 368, 370 (Iowa App. 1987), the defendant's alleged admissions, which were assumed to amount to a confession, were the only direct

evidence of the defendant's involvement with the victim's death. The corroborating evidence, held adequate for sufficiency purposes, was merely the consistency between what the defendant confessed and the facts of the case. Id. at 371. The two primary statements made by the defendant were that the victim had been shot with a gun and the body was hidden in a remote area. Id.

In this case, Anderson's confession also included several statements which were consistent with the facts of the case. He indicated the victim had been shot with a gun. A witness testified that Anderson told him on March 9 or 10 the victim had been shot twice in the head. A police officer testified he did not tell Anderson the victim had been shot twice in the head until March 11. However, Anderson's wife and several friends had been interviewed by police prior to that time. We think it an entirely reasonable assumption that Anderson's wife informed him of the number of gun shots received by the victim.

We distinguish the facts in the case at bar from the facts in Origer. In Origer, the defendant clearly knew key information that could only be known by one who had committed the crime or who had been told by one who had committed the crime. In this case, Anderson had access to information regarding the murder from other sources. To allow the simple fact that Anderson knew, four or five days after the murder, the victim had been shot twice in the head to be sufficient corroboration of his confession would

000587

create a mockery of Iowa R. of Crim. P 20(4), particularly since Anderson had public access to the information.

We find no confirmation of a material fact connecting Anderson to the crime and, accordingly, find no corroboration. Thus, we conclude Anderson's presumed confession cannot, without more, warrant this conviction. As we previously noted, there is simply no other evidence from which a reasonable fact finder could conclude, beyond a reasonable doubt, the defendant committed the crime.

We reverse and remand for dismissal.

REVERSED AND REMANDED FOR DISMISSAL.

McCartney, S.J., concurs; Donielson, J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. Appellant claims the evidence is insufficient to support his conviction. I would affirm the jury's verdict as based on substantial evidence.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. We view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports guilt. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Normally, it is for the jury to determine the credibility of witnesses. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984) (citing State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978)). The jury also determines what weight to give to evidence. State v. Watts, 441 N.W.2d 395, 399 (Iowa 1989) (citing State v. Schertz, 328 N.W.2d 320, 322 (Iowa 1982)). We normally defer to the jury's choice when evidence conflicts. See Robinson, 288 N.W.2d at 340.

Evidence presented at trial indicated Anderson and the victim were involved in a burglary ring in which the victim

000589

was also cheating Anderson. Tire prints matching Anderson's tires were found at the murder scene. Anderson offered three contradictory explanations regarding a collect phone call from the location of the murder to his residence in McHenry, Illinois, made approximately fifteen minutes after the victim's body was found. A co-worker of Anderson's testified Anderson told him on March 9 or 10 the victim had been shot twice in the head. A police officer testified he did not tell Anderson there were two gunshot wounds until March 11, although Anderson's wife was interviewed by police earlier and may have been told the number of gun shots.

Anderson's cellmate, Timothy Cullen, testified Anderson made the following remarks upon receiving papers from the State of Iowa regarding the murder. When Cullen asked whether the defendant committed the murder, Anderson allegedly responded, smiling, "[t]he guy got permanent air conditioning." Anderson then made a gesture imitating a gun pointed to his head. Anderson also allegedly stated, "They'll never get me," and indicated he had "covered his tracks pretty good."

Jose Ruiz, Anderson's former neighbor, testified as follows:

> Q. [PROSECUTION] And what did Paul say?
> A. [RUIZ] He said they were trying to hook two murders on him.
> Q. And what did you say? A. I asked him if they think you killed two people.
> Q. And what did he say? A. He said, "Know it, but they can't prove nothing."

In addition, Anderson's alleged alibi was conflicting and indefinite. His alibi witnesses were unable to say, with any reasonable degree of accuracy, the date or the time they observed Anderson at home. Testimony presented placed Anderson at the victim's home the afternoon of the murder, which was a short distance from the location where the body was found.

I believe the evidence and testimony presented at trial is sufficient, taken together, to allow a jury to find appellant guilty beyond a reasonable doubt.