IN THE COURT OF APPEALS OF IOWA

No. 0-2008 / 98-0169
Filed February 7, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN MICHAEL KONCEL,
Defendant-Appellant.

Appeal from the Iowa District Court for Jackson County, Patrick J. Madden, Judge.

Brian Koncel appeals from his convictions following a jury trial, for first-degree murder and first-degree kidnapping in violation of Iowa Code sections 707.1, 707.2(2), 710.1(4) and 710.2 (1997). **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.**

Kermit Dunahoo of Dunahoo Law Firm, Des Moines, until withdrawal, and then Mark L. Lawson, Maquoketa, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Phillip Tabor, County Attorney, and James Kivi, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

Brian Koncel appeals from his convictions for first-degree murder and first-degree kidnapping following a jury trial. Koncel claims the trial court erred in instructing the jury on joint criminal conduct, there was insufficient evidence to support a conviction of first-degree kidnapping, there was insufficient evidence to support a conviction of first-degree murder, and the trial court erred in overruling his motion to suppress. We affirm in part, reverse in part, and remand for new trial.

I. Background facts.

When Marty Budde and a friend drove by his parents' farm which was rented by Brian Koncel's mother they noticed lights on in an out-building. After dropping his friend off, Budde returned to the farm. The next morning Budde's wife reported him missing. The search led to the farm where a large amount of blood was found. The officers searched the farm area and asked Brian's brother Joseph for permission to search the house where they found a crowbar behind the stove, a knife behind the sofa, and wet clothing in the bathtub. Budde's truck and body eventually were located in a wooded area eight miles from the farm.

During questioning, Brian Koncel told the police he heard a noise and went outside to find Joseph hitting someone with a crowbar. Brian said he helped Joseph load Budde in the back of his truck and they drove to a secluded area where Joseph pulled Budde into the surrounding woods. A short time later Joseph came back and said Budde was not dead. Joseph returned to the woods holding a knife and came back a short time later. The state charged Brian with

felony murder in violation of Iowa Code sections 707.1 and 707.2(2) and first-degree kidnapping in violation of Iowa Code sections 710.1(4) and 710.2 (1997).

II. Jury trial.

At trial the former state medical examiner testified the blows received at the farm, if untreated, would have resulted in death within about thirty minutes. He also opined, given the amount of blood found in the truck, that Budde was still alive when he was moved. He testified that the small amount of bruising near the knife wounds indicated they were received shortly before death. The marshalling instruction for first-degree murder said in part that the State needed to prove "the defendant *or Joseph Koncel* struck Marty Lee Budde." (Emphasis added). The jury found Brian Koncel guilty of first-degree kidnapping and first-degree felony murder. The court sentenced him to concurrent life sentences.

III. Claims and scope of review.

Koncel raises four claims on appeal. He challenges jury instructions concerning joint criminal conduct and first degree murder. He alleges there was insufficient evidence to support either his felony murder or first-degree kidnapping convictions. We review these three claims for errors of law. Iowa R. App. P. 4; . Koncel also raises a constitutional claim concerning the police search of the home and the court's denial of his motion to suppress. We review the district court's ruling on the motion to suppress de novo. *State v. Knutson*, 234 N.W.2d 105, 106 (Iowa 1975).

A. Motion to suppress. Koncel claims the court erred in failing to grant his motion to suppress because Joseph Koncel had no authority to consent to a search of his mother's residence. The State responds that Joseph possessed

either actual or apparent authority to consent and Brian was present during the search and did not object.

Frances Koncel, Brian and Joseph's mother, rented the farmhouse which the police searched. At the time of the incident, she was in Chicago. Brian had begun staying with her about two weeks before the incident. Joseph's girlfriend had kicked him out the day before and he was staying at his mother's house. At the suppression hearing, Frances acknowledged she had earlier told investigators she left both Brian and Joseph at the house to care for her dogs. When the officers came to the door, Joseph answered and Brian could be seen lying on the couch. The officers asked who was in charge and Joseph informed them they were there to watch the house for their mother while she was in Chicago. Joseph signed a permission to search form and the officers searched the house. One officer spoke briefly with Brian during the search. Brian made no objection to the search and did not claim Joseph lacked authority to give permission for the search.

Any co-inhabitant has the right to permit a search in his own right. *State v. Knutson*, 234 N.W.2d 105, 107 (Iowa 1975) (citing *United States v. Matlock*, 415 U.S. 170-71 n. 7, 97 S. Ct. 988, 993, 39 L. Ed. 2d 242, 250 (1974)). Brian was present during the search, spoke with at least one officer, yet did not object to the search, weakening his claim the search was improper. *United States v. Bradley*, 869 F.2d 417, 419 (8th Cir. 1989). Neither brother was the principal authority in the house. Given their similar circumstances as guests in their mother's home, left to watch the house in her absence, we find either brother had authority to

consent to a search. We affirm the district court's denial of Brian's motion to suppress.

B. First-degree kidnapping. Koncel next claims the court erred in submitting first-degree kidnapping to the jury because Budde suffered his fatal injuries prior to any confinement or removal. He contends that because the removal did not contribute to Budde's death, there was not sufficient evidence to support a first-degree kidnapping charge. "Kidnapping is kidnapping in the first degree when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or sexual abuse." Iowa Code § 710.2 (1997). We have construed death to be the most serious of injuries and in no way to be exclusive of serious injury. *State v. Rhode*, 503 N.W.2d 27, 40 (Iowa App. 1993). In line with *Rhode*, the district court instructed the jury that serious injury included death.

We review sufficiency of the evidence claims for errors at law. Iowa R. App. P. 4. A jury verdict is binding on appeal unless the verdict is not supported by substantial evidence. *State v. Lewis*, 514 N.W.2d 63, 65-66 (Iowa 1994). We consider the evidence in the light most favorable to the State. *State v. Query*, 594 N.W.2d 438, 445 (Iowa App. 1999). We consider all the evidence, not just that which is inculpatory. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). We accept all legitimate inferences that may fairly and reasonably be deduced from the evidence. *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). Evidence is substantial if it could convince a rational jury the defendant is guilty beyond a reasonable doubt. *State v. Brown*, 612 N.W.2d 104, 110-11 (Iowa App. 2000).

Direct and circumstantial evidence are equally probative, but evidence which merely raises suspicion, speculation, or conjecture is insufficient. *Id.* at 111.

Dr. Bennett testified the blows to Budde's head would have been fatal if left untreated. Based on the amount of blood in the pickup truck and the fact that Budde bled into the wounds received in the woods, a reasonable jury could find he was alive when kidnapped and died in the woods. A jury also could find the kidnapping prevented Budde from receiving treatment for his injuries, thus causing his death. We conclude the record contains substantial evidence from which the jury could find Brian Koncel guilty of first-degree kidnapping beyond a reasonable doubt. The district court did not err in instructing the jury on first-degree kidnapping. We affirm Koncel's conviction for first-degree kidnapping.

C. *Felony murder.* Koncel's next claims the court should not have submitted felony murder to the jury because there was insufficient evidence of his participation in the underlying felony of first-degree kidnapping. Evidence in support of a jury instruction must be substantial. *State v. Broughton*, 425 N.W.2d 48, 51-52 (Iowa 1988). Evidence is substantial if it could convince a rational fact finder. *State v. McFarland*, 598 N.W.2d 318, 321 (Iowa App. 1999). Because we have determined substantial evidence supports his conviction for first-degree kidnapping, we conclude the district court correctly decided to submit felony murder to the jury.

D. *Jury instruction on joint criminal conduct.* Koncel also claims the trial court erred in giving a jury instruction on joint criminal conduct because it contemplates that a "different crime" would be committed by another participant

in furtherance of the defendant's offense.[1] The challenged instruction was taken verbatim from Iowa Criminal Jury Instruction 200.7:

> When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. The defendant's guilt is the same as the other person's unless the acts could not reasonably be expected to be done in aiding the commission of the crime.

Koncel claims that because Joseph beat Budde fatally prior to the kidnapping, the murder/beating could not have been in furtherance of the kidnapping. He contends this instruction, coupled with the marshalling instruction on first-degree murder, allowed a jury to find him guilty of murder even if he did not personally commit the assault, or aid and abet his brother in the assault. The challenged language of the marshalling instruction provided the State must prove:

1. On or between March 5 and March 6, 1997 the defendant *or Joseph Koncel* struck Marty Lee Budde. (Emphasis added).

We review jury instructions as a whole to determine if they accurately state the applicable law and are supported by substantial evidence. *State v. Walker*, 600 N.W.2d 606, 608 (Iowa 1999). To warrant reversal, a defendant must show that the challenged instruction exists for application in a different factual situation and that using it in the present factual situation misstated his culpability in some material way. *State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998). It is not reversible error to instruct on joint criminal conduct "if there is no

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[1] Iowa Code section 703.2 defines joint criminal conduct:

When two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and each person's guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.

opportunity for the defendant to have been found guilty based on anything other than his own conduct as a principal or an aider and abettor." *Id.*

There was sufficient evidence presented at trial from which a reasonable jury could find Joseph Koncel was the sole assailant who caused Budde's fatal injuries. The opportunity existed, therefore, for Brian Koncel to be found guilty based solely on Joseph Koncel's conduct. Taking the instruction on joint criminal conduct together with the marshalling instruction on first-degree murder, we conclude the instructions misstated Brian Koncel's culpability in a material way. The presumption of prejudice created by these jury instructions cannot be overcome beyond a reasonable doubt. *See, e.g., State v. Caldwell*, 423 N.W.2d 564, 566 (Iowa App. 1998). We therefore reverse Koncel's murder conviction and remand for a new trial on that charge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.