

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 24 1981

CLERK SUPREME COURT

451

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed March 24, 1981

vs.

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RICHARD KEVIN GORDON,

)

0-377

62893

Defendant-Appellant.

)

Appeal from Johnson District Court - Harold J. Swalles, Judge.

Defendant appeals from his conviction of voluntary manslaughter in violation of section 707.4, Supplement to the Code 1977, asserting his guilty plea was not made voluntarily or intelligently because trial court failed to determine 1) that he understood the nature of the charge to which he pleaded guilty and 2) that there was a factual basis for the guilty plea. AFFIRMED.

Phillip B. Mears of Iowa City, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Defendant, Richard Kevin Gordon, appeals from his conviction of voluntary manslaughter in violation of section 707.4, Supplement to the Code 1977. He asserts his guilty plea was not made voluntarily or intelligently because trial court failed to determine 1) that he understood the nature of the charge to which he pleaded guilty and 2) that there was a factual basis for the guilty plea. We affirm.

On July 12, 1978, defendant was charged by a county attorney's information with second degree murder as a result of the strangulation death of Orville Iverson. An August 4, 1978, joint application was made to transfer defendant to Oakdale for a mental health examination. Defendant filed a notice of defense of diminished responsibility on August 11, 1978. On September 20, 1978, defendant pleaded guilty to the lesser included offense of voluntary manslaughter in violation of section 707.4, Supplement to the Code 1977. Trial court found that the plea was voluntarily entered and had a factual basis. On October 19, 1978, defendant was sentenced to a term of not more than ten years in prison.

Defendant filed a pro se notice of appeal on December 20, 1978. The supreme court granted defendant's application for a delayed appeal.

I. Scope of Review. Because a constitutional challenge is involved, we find the facts *de novo*. State v. Olsen, 293 N.W.2d 216, 217 (Iowa 1980).

II. The Guilty Plea.

A. Defendant's Understanding of the Charge. Defendant contends his guilty plea was not voluntarily and intelligently entered because trial court failed to establish that he understood the nature of the charge. We disagree.

The principles for ascertaining the voluntariness of a guilty plea are set forth in detail in State v. Fluhr, 287 N.W.2d 857, 863-69 (Iowa 1980). We need not repeat them here.

From our review of the record, we find that trial court made a careful inquiry into defendant's competency to make a voluntary plea. We see no merit in defendant's assertion that the factors of his age of 22, his eleventh grade education, and his one prior conviction necessitated greater than usual care in the plea determination.

During the plea hearings, defendant twice indicated that he understood the charge against him, that he understood each element of the offense as stated by trial court would have to be proved (thus including that he intentionally strangled Iverson), that he understood the penalty for the charge, that he had had adequate opportunity to confer

with his attorney about the charge, that he did commit the offense, and that he agreed with his counsel's summation of the events of the offense. Defendant also gave his version of the offense and admitted that his actions went beyond any needed for self defense.

We note that prior opinions of the supreme court and federal courts "... have required documentation of the defendant's understanding of the specific intent element of the offense in order to uphold a guilty plea." Fluhr, 287 N.W.2d at 866. The intent element for voluntary manslaughter is, however, only that of general criminal intent. See Uniform Jury Instruction 215. In State v. Worley, 297 N.W.2d 368 (Iowa 1980), the court, while citing to Fluhr, 287 N.W.2d at 866, noted only that "[w]here the State must prove an element of intent, a court must be certain that the defendant, before pleading guilty, understands that element. 297 N.W.2d at 371 (emphasis added).

The first element the State was required to prove for voluntary manslaughter was that defendant did "intentionally strangle" Iverson; trial court clearly apprised defendant of this mens rea element by stating each element of the offense directly to defendant. Trial court asked the defendant if he understood the charge and, in relating the facts to the elements of the case, also had the defendant give his version of the offense. While reference to the intent element through instruction no. 215 would have been helpful in further ascertaining defendant's understanding of the charge, we find it was unnecessary here. We do not find that the facts present a situation requiring an especially careful determination that defendant understood the law in relation to the facts as in State v. Buhr, 243 N.W.2d 546 (Iowa 1976) (involving the court's omission of the specific intent element distinguishing robbery with aggravation from the lesser included offense of robbery without aggravation where the plea was made to the charge of robbery with aggravation). 243 N.W.2d at 550. Here, defendant was charged with second degree murder, the intent element for which was set forth in the information. His plea, however, was to the lesser included offense of voluntary manslaughter; trial court clearly stated the elements to this charge, including the intent element, prior to defendant's plea. We find that trial court did not err in determining that the defendant understood the intent element.

We also find no reason for trial court to have pursued further defendant's claim of self defense. Defendant admitted to trial court that his actions went beyond self defense and he agreed with his trial counsel's summation that his acts went beyond self defense. We agree with the State that, following defendant's admissions, self defense

was no longer an exculpatory explanation. Further, defendant's counsel did not pursue the claimed defense of diminished responsibility although he filed notice that he might rely on that defense. We therefore find trial court's questioning sufficiently established that defendant's wish to plead guilty was not in spite of any meritorious defenses or mitigating factors. See Commonwealth v. Chumley, 394 A.2d 497, 503 (S. Ct. Pa. 1978). We conclude no error occurred on this issue.

B. Factual Basis for Guilty Plea. Defendant next contends that trial court failed to establish a factual basis for his guilty plea. He claims that the minutes of testimony and the representation of counsel are insufficient to support a factual basis and, in addition, that his testimony of acting in self defense must be considered an equivocal statement of intent, requiring the plea to have outside support in the record to be valid. We therefore examine the factual record in this regard, applying the principles set forth in State v. Inger, 292 N.W.2d 119, 122 (Iowa 1980), for establishing a factual basis for voluntary manslaughter.

Defendant testified that he had engaged in sex with Orville Iverson; that half an hour or so later Iverson wanted more sex; and that when he refused, Iverson came at him violently. Defendant further testified that Iverson intended to tie him up with a rope and that to defend his own life, he took Iverson's. Defendant agreed with trial court's statement that he experienced a sudden violent passion which arose over additional sex between himself and Iverson and that he lost his temper and ability to control himself to the point where he acted beyond what might have been necessary to defend himself against Iverson. Defendant testified that he struggled with Iverson to get the rope and caused Iverson's death by strangulation. When trial court asked if it was correct that defendant took the rope, placed it around Iverson's neck and strangled Iverson, defendant responded "right." He then agreed with his counsel's summation of the incident as involving taking the rope and strangling Iverson. In addition, defendant testified that the statements by the state's witnesses in the memorandum of testimony were correct statements of the factual situation involving Iverson's death.

We find that defendant's testimony in his own words and in response to trial court's and his counsel's questioning provides a sufficient factual basis to meet the subjective requirement that defendant acted solely as a result of sudden, violent, and irresistible passion. See Id. Iverson's acts of attempting to tie up defendant in order to force him to have additional sex appear to satisfy the "serious provocation" requirement. The record further establishes that there was an interval between the

provocation and the killing in which a person of ordinary reason and temperament would regain his or her control and suppress the impulse to kill. Id. Having already determined that self defense was not viable as a meritorious defense for defendant, we do not discuss his arguments based on self defense. We therefore conclude that there was an adequate factual basis to support defendant's plea to voluntary manslaughter.

Concluding that no error occurred, we affirm defendant's conviction.

AFFIRMED.