FILED
JUN 30 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

DANNY EUGENE HIMES,

Appellant.

Filed June 30, 1978

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Appeal from Van Buren District Court - Phillip R. Collett, Judge.

Defendant appeals his conviction for second degree murder. Affirmed.

James R. Millen, of Cromwell, Cahill & Millen, Burlington, for appellant.

Richard C. Turner, Attorney General, Mark S. Beckman, Assistant Attorney General, and James A. Dorothy, Van Buren County Attorney, for appellee.

Heard by Allbee, C.J., Donielson, Snell and Oxberger, JJ.; Carter, J., takes no part.

PER CURIAM

Danny Eugene Himes appeals his conviction for second degree murder, a violation of § 690.3, The Code. He raises several contentions which we treat in the order briefed.

I. Defendant first argues that trial court should have granted his motion for change of venue. Our review is de novo to determine whether trial court abused its discretion in finding that defendant failed to demonstrate a reasonable likelihood he would not receive a fair trial in Van Buren County. State v. Pelelo, 247 N.W.2d 221, 223 (Iowa 1976).

Defendant brought no newspaper or other news media accounts of the crime before the court. The affidavits produced contain general statements that the affiants believed defendant could not get a fair trial and that the affiants had heard the case discussed and that Himes was generally believed to be guilty. They lack the specificity required in such affidavits. See, e.g., Coleman v. State, 222 N.W.2d 497, 500 (Iowa 1974); State v. Dague, 206 N.W.2d 93, 94-95 (Iowa 1973). No abuse of discretion appears.

II. In the next two divisions of his brief, defendant challenges trial court's refusal to grant a directed verdict at the end of the State's case and at the close of all the evidence. The principles of review are set out in State v. Overstreet, 243 N.W.2d 880, 883-84 (Iowa 1976). Trial court's ruling on the motion for new trial contains a recital of sufficient facts from the record to demonstrate that the directed verdicts were properly denied. (X. 134-35.) That recital meets all the arguments which defendant preserved at trial. We therefore approve and adopt it.

III. Defendant next makes three attacks on the instructions given by trial court. The first is essentially an argument that first and second degree murder should not have been submitted to the jury due to a lack of evidentiary support. There was evidence to support submission of the murder allegations; in so doing, trial court complied with the general rule set out in Miller v. International Harvester Co., 246 N.W.2d 298, 300-01 (Iowa 1976) and State v. Willis, 250 N.W.2d 428, 430 (Iowa 1977).

The second attack complains that the jury was not told to consider defendant's possible intoxication in connection with the second degree murder charge. Specifically, he claims that specific intent is an element of second degree murder which can be negatived by a showing of intoxication. He is mistaken. Specific intent is required for

first degree murder, but not for second degree. It is the primary distinction between the two. State v. Smith, 242 N.W.2d 320 (Iowa 1976); State v. Decklotts, 19 Iowa 447 (1866). Intoxication will not reduce second degree murder to manslaughter; it does not negate malice. State v. Hall, 214 N.W.2d 205, 209 (Iowa 1974) citing State v. Pierce Wilson, 166 Iowa 309, 144 N.W. 47 (1914) and various secondary authorities. The question of provocation, which might require consideration of intoxication in relation to second degree murder, was not presented here.

Defendant's complaint that instruction 11 impermissibly shifted the burden of persuasion of intoxication was not raised below; we do not consider it now. State v. Blyth, 226 N.W.2d 250, 273 (Iowa 1975).

Defendant's third attack is a multi-faceted assault on the instructions defining manslaughter. We do not consider these contentions, however. Because defendant was convicted of second degree murder, he could not have been prejudiced by any possible error in instructing on manslaughter. State v. Coffee, 182 N.W.2d 390, 394 (Iowa 1970). The jury, in following the instructions of the court in this case, would never have reached the manslaughter issue. See State v. Rutledge, 243 Iowa 179, 191, 47 N.W.2d 251, 259 (1952).

IV. Finally, defendant complains of trial court's refusal to grant a new trial. The only new contention here is that a new trial was warranted on the basis of newly discovered evidence. Specifically, the claim was made that Ricky Morris had admitted to defendant that he had lied and that his testimony would be different at a new trial. Trial court found that the evidence was merely impeaching. We agree. We also note that the fact that Morris was lying at the first trial, if indeed he was, would have been known to the defendant because defendant was also a witness to all the critical elements related in Morris's testimony. The new evidence therefore fails to meet both the second and the third requirement of State v. Jackson, 223 N.W.2d 229, 233 (Iowa 1974). We find no error in trial court's disposition of the motion.

AFFIRMED.