IN THE COURT OF APPEALS OF IOWA

No. 2-657 / 91-1870

FILED
FEB 23 1993
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ROBERT BOUDINOT,

Appellant.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Boudinot appeals from his conviction, following a jury trial, of voluntary manslaughter. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Chris Odell, Assistant Attorney General; John Sarcone, County Attorney; and Steve Foritano, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Hayden, J., and Perkins, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

The defendant, Robert Boudinot, appeals from his conviction of voluntary manslaughter.

In November 1990, a deer hunter discovered a human skull and a tub containing human remains wrapped in chicken wire near Runnells, Iowa. Investigators found a femur bone and later found a jaw bone near the scene. The medical examiner, Thomas Bennett, found the cause of death to be a blow to the back of the head with a heavy and blunt object. Dr. Bennett originally concluded the time of death was September 1990. Because he could not identify the body, Dr. Bennett forwarded the skull to an expert to have a reconstruction of the face made. Eventually, Karen Beisser and Julie Hall identified the decedent as Michelle Saul after seeing photos of the model head on television. Authorities then made a positive identification of Saul through her dental records. Saul was a prostitute who had lived with Robert Boudinot in Des Moines prior to her disappearance.

The State filed a grand jury indictment charging Boudinot with first-degree murder. At trial, several witnesses testified the last time they saw or heard from Saul was in May 1990. Other witnesses indicated they had seen Saul during a July 4, 1990, barbecue. Further testimony indicated Karen Beisser broke Boudinot's arm on July 19, 1990. Boudinot's arm was in a cast until September 3, 1990.

Other witnesses testified about several alleged altercations between Boudinot and Saul. Maria Sciachitano testified Boudinot took her son's baseball bat on May 12, 1990, and returned it the next day. Douglas Thorpe, and Maria and Richard Sciachitano all testified that several days later Boudinot told them he had hit Saul in the teeth with the bat. Boudinot said Saul had then left the house and that she would not be coming back. Karen Beisser also testified Boudinot told her he had hit Saul with a sharp object in the ribs and on her nose. Although he told Beisser he did not kill her, Boudinot again said Saul would not be coming back. Shawn Little testified Boudinot admitted killing Saul about one week prior to appearing before the grand jury. Based on the statements that Saul was last seen in May of 1990, Dr. Bennett changed his finding concerning the time of death to May 12, 1990.

During the redirect testimony of Officer Overton, an investigating officer, the following exchange occurred:

> Q: (Assistant County Attorney) Detective, during your investigation did you find any credible evidence to indicate Michelle Saul was alive past May 14, 1990? A: (Officer Overton) None that we could --
>
> Q: (Defense counsel) Objection, Your Honor. I'm going to object to that. That's invading the province of the jury.
>
> The court: Overruled. You may answer.
>
> A: None that we could locate.

At the close of the State's evidence and at the end of the defendant's evidence, Boudinot moved for a judgment of acquittal on the greater charge of first-degree murder.

The district court denied both motions. The jury found Boudinot guilty of the lesser-included offense of voluntary manslaughter. The district court denied Boudinot's motion for a new trial. The court then entered judgment and sentenced Boudinot to a term of imprisonment not to exceed ten years.

Boudinot now appeals. He contends the district court erred in: (1) admitting improper lay testimony, and (2) denying his motions for judgment of acquittal based upon the insufficiency of the evidence. On our review, we affirm the judgment of the district court.

I. **Officer Overton's Testimony**. Boudinot first contends the district court erred in admitting the redirect testimony of Officer Overton. Specifically, Boudinot contends the district court erred in failing to exclude Overton's testimony that she found no credible evidence during her investigation that Saul was alive after May 1990.

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

Iowa Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or

> inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

However, a witness should not be permitted to express an opinion as to the ultimate fact of the accused's guilt or innocence. State v. Maurer, 409 N.W.2d 196, 198 (Iowa App. 1987) (citations omitted).

Boudinot contends Overton's testimony goes to his guilt or innocence because it conveys an opinion concerning the credibility of several of Boudinot's defense witnesses who stated they had seen Saul in July 1990. Boudinot relies heavily on State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986), which holds an expert witness should not be allowed to give an opinion on matters which either directly or indirectly render an opinion on the credibility or truthfulness of a witness.

We initially note Overton was not testifying in the capacity of an expert witness. Overton was one of the principal investigators on the case and she was testifying regarding the official results of her investigation. However, regardless of whether Overton testified in the capacity of an expert, we do not find the above testimony invaded the province of the jury.

Overton was specifically asked if she had found any credible evidence "during [the] investigation" that Saul was alive after May 14, 1990. Her testimony that she had not found any credible evidence did not refer to the

testimony of the witnesses who testified they saw Saul in July 1990. During cross-examination, Officer Overton had testified regarding her investigation:

> Q: (Defense counsel) Well, did you ever tell them [grand jury] about anyone who said -- or told you that they saw Michelle Saul alive after May 14th? A: (Overton) After that date? I don't remember that anyone told me that they saw her alive after that -- after that time period.

Two of the witnesses who testified they had seen Saul in July 1990 were not interviewed until days before the trial. Overton's testimony on cross-examination indicates she did not consider the testimony of the witnesses who testified they had last seen Saul in July 1990 to be a part of her "investigation." It is reasonable to assume Overton's investigation began in November 1990 with the discovery of Saul's body and culminated when the grand jury indicted Boudinot in May 1991.

Because these witnesses were not part of Overton's investigation, her redirect testimony did not implicate their credibility. Overton's testimony was limited to an assessment of her investigation and was not an assessment of all the testimony which was presented at trial. We find the district court did not abuse its discretion in admitting the testimony of Officer Overton.

II. Sufficiency of the Evidence. Boudinot next contends the conviction of voluntary manslaughter is not supported by substantial evidence in the record.

Our standard of review on this issue 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 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).

Here, the evidence produced at trial, taken in the light most favorable to the State, may reasonably lead to the inference that Boudinot committed voluntary manslaughter. This evidence includes the physical evidence which linked Boudinot to Saul's death. Saul's body was found near Runnells, in an area which was near Boudinot's grandparents' home and was a place where Boudinot used to hunt. Saul's body was wrapped in a blanket which came from Boudinot's home. Fibers from the blanket matched a blanket and sweatshirt which belonged to Boudinot, and animal hair found on the blanket was consistent with hair from Boudinot's cat and dog. The blanketed corpse was covered with two kinds of wire seen at Boudinot's home, and placed in a plastic tub similar to one Boudinot owned. Saul's

legs had been removed by a chain saw, a tool Boudinot had purchased prior to Saul's death. Finally, Saul had died from a "blow to the back of her head from a heavy, blunt instrument." Boudinot had stolen a baseball bat on May 12, 1990.

This evidence also includes the testimony of several witnesses who testified Boudinot told them he had hit Saul with a baseball bat, and that "[s]he won't be back." Finally, Boudinot admitted to Shawn Little that he had killed Saul, and later urged Little to marry him to prevent her from testifying against him.

To support a conviction for voluntary manslaughter, there also must be substantial evidence that Boudinot acted solely as a result of serious provocation

> sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.

State v. LeGrand, 442 N.W.2d 614, 615 (Iowa App. 1989) (quoting Iowa Code § 707.4)). We find sufficient evidence of provocation, which would support a conviction for voluntary manslaughter.

This evidence includes the testimony of Douglas Thorpe who testified regarding a confrontation between Boudinot and Saul:

> Q: (Assistant County Attorney) Now do you recall an occasion in May of 1990 that there was an incident over this baseball bat? A: (Thorpe) Yes.

> Q: And Bob [Boudinot] took the baseball bat from your house? A: Yeah. I didn't know at the time, but obviously he did since we got it back there.
>
> Q: Got it back from him? A: Yeah.
>
> Q: Several days after that there was a conversation where Bob talked about the baseball bat? A: Yeah, I think.
>
> Q: There was a conversation where he said he hit Michelle [Saul], right? A: Yes.
>
> Q: Why don't you tell me about that conversation? A: Well, he said something about he -- she'd hit him with it and he took it away from her and hit her back.

The record is also replete with evidence of Saul's violent temperament and of incidents in which Saul stole from Boudinot. From this evidence, a rational trier of fact could find Saul hit Boudinot with the bat first and that his subsequent assault upon her was the result of a sudden and irresistible passion.

We find substantial evidence exists in the record to support the jury's verdict of voluntary manslaughter. The district court did not err in failing to grant to the motion for judgment of acquittal in relation to the charge of voluntary manslaughter.

The costs of this appeal are taxed to Boudinot.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.