IN THE COURT OF APPEALS OF IOWA

No. 8-153 / 97-0746

FILED
APR 24 1998
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

PAUL HARLAN TONDERUM,

Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Arlen Van Zee, Judge.

Paul Tonderum appeals from his conviction, following a jury trial, for assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (1995).

AFFIRMED.

Steven J. Kahler of Schoenthaler, Roberg, Bartelt & Kahler, Maquoketa, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and Lawrence H. Schultz, County Attorney, for appellee.

Heard by Sackett, P.J., and Streit and Mahan, JJ.

000446

SACKETT, P.J.

Defendant-appellant Paul Tonderum was convicted following a jury trial of assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (1995). Defendant contends there is insufficient evidence supporting his conviction and the district court should have granted him a new trial. We affirm.

Defendant was convicted of hitting Angela Claeys on the head on November 20, 1996, while she lay on a couch in his living room. As a result, Claeys needed eleven staples to close the wound in her head. Defendant, a thirty-nine-year-old farmer, was single and lived alone. He had been keeping company with Claeys. They had a sexual relationship, Claeys became pregnant, and she advised defendant the child was his. The relationship defendant had with Claeys was filled with strife.

Claeys testified defendant had given her permission to drive to his farm on the night of the incident. She said she arrived there about 7:45 p.m., noticed the driveway cleared of snow, saw lights on in the house, and saw one of defendant's two cars parked in the garage and the other in the driveway. Claeys said she called defendant's name, but no one answered. She said she then lay down on the couch with her face to the back of the couch. She said she fell asleep between 9:00 and 10:30 p.m. Claeys claimed she next heard footsteps and then received a blow to the back of her head. She testified she then heard noises in the kitchen and asked who was there, but

got no response. She testified she heard the perpetrator leave through the kitchen door to the garage.

Claeys said she immediately called 911, and while still on the phone, defendant came into the room. He offered to take her to the hospital, but she refused. Defendant began looking through the house.

The sheriff arrived to find defendant outside. Defendant told the sheriff all footprints outside the house were his. There was no evidence of a break-in, nor were any items missing from the house.

Defendant contends there is insufficient evidence to prove beyond a reasonable doubt he committed the crime with which he was charged. In reviewing a conviction for insufficient evidence, we must uphold a jury verdict unless the record lacks substantial evidence to support the charge. *State v. Miller*, 542 N.W.2d 241, 245 (Iowa 1995). In making this determination, we consider all the evidence in the light most favorable to the State, giving the State all reasonable inferences and presumptions the evidence will bear. *State v. Uthe*, 542 N.W.2d 810, 815 (Iowa 1996). Evidence is substantial if it could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994). Direct and circumstantial

000148

evidence are equally probative. Iowa R. App. P. 14(f)(16); *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996); *Bayles*, 551 N.W.2d at 608.

Defendant raised the issues in a motion to dismiss and for new trial. Defendant contends both should have been sustained. Defendant's position is the evidence at trial was not consistent with guilt. He contends the investigating officers failed to look carefully at the premises before the ambulance arrived. He said very minimal effort was made to check outside footprints. He points out that on arrival of the ambulance, the outside evidence was destroyed. He contends the time between the incident and his entry to the house was sufficient for an intruder to leave. Defendant further argues the State did not prove a motive. The State contends defendant's actions and the evidence at the scene support a finding there was no unknown intruder. We agree and affirm on this issue.

Defendant next contends the trial court should have sustained his motion for a new trial. The district court can grant a new trial when, for any cause, the defendant has not received a fair and impartial trial. Iowa R. Crim. P. 23(2)(b)(9). The court has discretion to grant a new trial based on fair trial considerations. *State v. Luncsford*, 428 N.W.2d 314, 315 (Iowa App. 1988); *State v. Schatz*, 414 N.W.2d 840, 841 (Iowa App. 1987). On appeal, we presume the court properly exercised its discretion. *State v. Mercer*, 470 N.W.2d 67, 68 (Iowa App. 1991). We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4).

Defendant contends the trial court should have sustained his motion for new trial because the jury could have reasonably concluded Claeys was injured by her own act. He contends she had various motives for making up the story. He says the cut was shallow and could have been self-inflicted.

Defendant contends the trial court admitted prejudicial evidence. There is no showing defendant objected to this evidence in the trial court. The issue is not preserved for our review. *See State v. Cuevas*, 288 N.W.2d 525, 529 (Iowa 1980).

Defendant also contends the new trial should have been granted because the prosecuting attorney utilized evidence that should not have been admitted to implicate defendant. He contends the prosecutor showed Claeys a T-shirt which she testified she was wearing when hit, but the shirt was not offered as an exhibit. Defendant did not object at trial and therefore has failed to preserve error. *State v. Steltzer*, 288 N.W.2d 557, 559 (Iowa 1980).

Defendant next contends he should have a new trial because of newly-discovered evidence. He advances the day after receiving the verdict an attorney representing Claeys sent a letter to his attorney asking that he acknowledge paternity of Claeys' child, agree to pay child support, and pay $300,000 to settle Claeys' civil claims arising from the claimed assault. Defendant contends this shows Claeys had a motive to injure herself and pressure the county attorney to try the case.

To be successful on a motion for a new trial based on newly-discovered evidence, defendant must show (1) the evidence was discovered after the verdict;

000450

(2) the evidence with due diligence could not have been discovered earlier; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence probably would have changed the outcome. *See State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992).

There is no showing defendant attempted to determine prior to the filing of the civil lawsuit whether Claeys intended to bring it, though he should have been aware such a claim could exist. The evidence at most is impeaching. We affirm the trial court.

AFFIRMED.