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IN THE COURT OF APPEALS OF IOWA

No. 0-489 / 89-1381

STATE OF IOWA,

Appellee,

vs.

RUSSELL ALLEN MILLIKIN,

Appellant.

Appeal from the Iowa District Court for Wapello County, Richard Vogel, Judge.

Millikin appeals his convictions, following a jury trial, for two counts of first-degree burglary and two counts of attempted murder. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bruce Kempkes and Thomas H. Miller, Assistant Attorneys General, and William Appel, County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, P.J.

Defendant Russell Millikin appeals his convictions of two counts of attempted murder and two counts of first degree burglary. See Iowa Code §§ 707.11, 713.1, 713.3 (1987). We affirm.

Two women from the same Ottumwa neighborhood were attacked in the early morning hours in the span of two weeks in the summer of 1988. Millikin was tried for the attacks and accompanying burglaries.

The first attack occurred before dawn on July 16; a young woman awoke with a man standing over her. The man held a knife and suggested he was going to rape her; however, using a ruse, she escaped and alerted her roommate. The man fled. The victim discovered that she had a serious cut across her neck. The roommates' purses and a six-inch kitchen knife were missing. The intruder had gained entrance through a window.

The second attack occurred shortly before dawn on July 28. A teenager awoke to find someone in her bedroom. She was struck repeatedly in the head with a fireplace poker. The girl's mother discovered a man with no shirt in the house, but the man fled in the excitement. Two purses were missing. Two large knives had been taken from the kitchen and were found elsewhere in the house. The intruder had pried open a window to gain entrance to the house.

Less than ten minutes after the second attack, a police officer found Millikin, without a shirt and with red marks

on his chest, walking near the location of the second attack. Millikin could produce no identification and claimed he was too drunk to find his car. (A breath analysis later that morning showed no alcohol in his system.) He had blood on his jeans. The officer did not arrest Millikin but took him in for questioning.

Meanwhile, another police officer located Millikin's car parked in a nearby school parking lot. In plain view were three purses, two of which matched the description of purses taken during the burglary that morning (the third turned out to be a purse stolen on July 23). With officers standing by the car, another went to obtain a search warrant.

At the police station, the police informed Millikin of his Miranda rights and obtained a written waiver from him. When he was told that an attorney would be appointed for him if he could not afford one, he stated that "he didn't believe that the lawyers were free, that they cost you in the long run." The officers present did not respond to the statement. The officers questioned Millikin for about an hour, during which time he denied having committed the burglaries.

About twenty minutes later, officers again informed Millikin of his Miranda rights and again obtained a written waiver from him. During this second questioning, Millikin confessed to having committed the burglaries and assaults. At trial Millikin testified that officers had yelled at him

and slammed chairs against a table. The defense introduced evidence that Millikin was easily intimidated into saying that which an aggressive person sought from him. The interrogating officers testified, however, that they had not raised their voices to Millikin or taken any threatening actions. Officers also testified that at the initiation of the second questioning Millikin briefly appeared to become upset with realization about the trouble he was in, but at all other times he appeared to be alert and to understand his rights.

Millikin was charged with two counts of first-degree burglary and two counts of attempted murder. All four charges were tried to a jury in a single trial. The jury found Millikin guilty of all four charges. He has appealed the resulting convictions.

Millikin contends the district court should have suppressed all evidence regarding the incriminating statements he made during the second questioning. He argues that once he made his comment that an appointed attorney would cost in the long run, interrogation should have ceased until the officers ascertained whether he understood his right to appointed counsel. He also argues the evidence did not establish a knowing, voluntary, and intelligent waiver of his Miranda rights.

Millikin also contends the district court erred by overruling his motion to sever charges arising out of the first incident from the charges arising out of the second

incident. He argues the charges should have been severed because the two incidents, separated by twelve days, were not part of a common plan, scheme, or design.

Finally, Millikin challenges the sufficiency of the evidence to support one of the attempted murder charges. He argues that in the second incident, neither the victim's injuries nor any other evidence supported the inference that he intended to kill that victim.

Millikin never argued in his suppression motion that he effectively invoked his right to counsel. Instead, he argued his confession was "made in response to interrogation by officers without being properly advised of his constitutional rights to counsel." The district court, therefore, never considered the argument he now makes on appeal. Defendant may not pursue one theory at trial and a different one on appeal. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

We are less than convinced, moreover, that defendant's statement that "lawyers cost" amounted to an invocation of his right to counsel. State v. Lamp, 322 N.W.2d 48, 56 (Iowa 1982) (defendant must clearly assert right to counsel). There is abundant evidence from trial and the suppression hearing that defendant understood his right to counsel and, his statement notwithstanding, that a lawyer would be provided to him without cost. We doubt that, as defense counsel now suggests, defendant was anticipating restitution costs at that early date.

Millikin argues that the police obtained his incriminating statements through indirectly coercive means. He testified he became scared when officers shouted at him, pounded tables, and slammed a chair against a table. He admits that officers did not physically abuse him or make any threats or promises during questioning. To support this, he offered testimony of his learning disability and that he would say anything to appease someone whom he believes to be intimidating. There is much evidence, however, that defendant generally appeared calm, sober, rational, and responsive. There is also considerable evidence that the interrogating officers conducted themselves appropriately and did not use abusive or intimidating tactics.

The burden of proof was on the State to prove by a preponderance of the evidence that defendant's waiver of constitutional rights was knowingly, voluntarily and intelligently given. See State v. Reid, 394 N.W.2d 399, 402 (Iowa 1986). An express written waiver alone is not enough to establish waiver. Fryer v. State, 325 N.W.2d 400, 409 (Iowa 1982). The State also has the burden of establishing by a preponderance of evidence that the defendant's inculpatory statement was made voluntarily. State v. Hodges, 326 N.W.2d 345, 347 (Iowa 1982). Thus, the voluntariness of both the waiver and the statement is at issue.

We use a totality of the circumstances test to determine whether the statement was the "product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired." Id. (quoting State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976); accord State v. Vincik, 398 N.W.2d 788, 790 (Iowa 1987). Having examined the totality of the circumstances as recited above, we are unconvinced that the police officers coerced incriminating statements from defendant. See Colorado v. Connelly, 479 U.S. 157, 170 (1986); Vincik, 398 N.W.2d at 789-90. Consequently, we hold that the trial court did not err in admitting defendant's statements.

Defendant further contends that the trial court should have severed charges arising out of the separate attacks. He relies on Iowa Rule of Criminal Procedure 6(1), which states:

> Two or more public offenses which arose from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise. . . .

This rule, which is more liberal than the rule considered in State v. Bair, 362 N.W.2d 509 (Iowa 1985), gives the trial court discretion to sever charges. Defendant would have us concentrate on the "same transaction or occurrence" language in rule 6(1). The Bair

court adopted an Oregon definition of this phrase which states that "two charges arise out of the same act or transaction if they are so clearly linked in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge." Id. at 511 (quoting State v. Fitzgerald, 267 Or. 266, 516 P.2d 1280, 1284 (1973)).

We think, however, that the striking similarity in the modus operendi employed, the proximity of the crime scenes, the relatively small time frame involved, and the similarity of the assaults and the items taken in the burglaries bring this case within the common scheme or plan language of rule 6(1). Although we agree with defendant that the State's interest in judicial economy here was de minimus, we nevertheless think he is unable show that he was prejudiced by having these charges consolidated for a bench trial. It is evident from rules allowing severance that the aim is to protect the defendant from unfortunate effects of a jury being unable to compartmentalize the various evidence offered to prove the different charges. Here, however, the trial court was obligated to set forth its findings of fact and conclusions of law, which are available for our review on appeal. Having examined these, we believe defendant's rights were adequately protected during his trial.

Millikin also contends that the State failed to prove beyond a reasonable doubt that he intended to kill one of

the victims or that he reasonably expected that his acts would cause her death. We disagree.

Our standard of review 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 evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. We view the evidence 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). Nevertheless, 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).

We think more than substantial evidence supported the trial court's finding of attempted murder. It showed that the defendant viciously struck a newly awakened teenage girl several times about the head with a fireplace poker--breaking the poker in two--and that he only stopped beating her when another person came to investigate. The record also showed that defendant had taken the time to acquire the poker and a large knife and that he anticipated confrontation. The victim offered no resistance. We hold that there was substantial evidence to support defendant's conviction of the second attempted murder charge.

We hold that the trial court should be affirmed on all grounds and that defendant's convictions on two counts of attempted murder and two counts of burglary should be upheld.

AFFIRMED.