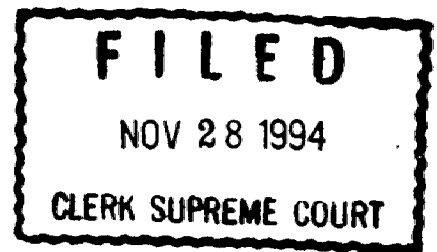


IN THE COURT OF APPEALS OF IOWA

No. 4-336 / 93-1027



STATE OF IOWA,

Appellee,

vs.

JAMES WENDELL HALL,

Appellant.

Appeal from the Iowa District Court for Linn County,
Kristin L. Hibbs, Judge.

Defendant appeals from judgment and sentence, following jury trial, entered upon his conviction of murder in the first degree in violation of Iowa Code sections 707.1 and 707.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Cady and Huitink, JJ.

DONIELSON, C.J.

Defendant James Hall appeals his conviction for murder in the first degree. He asserts: 1) there was insufficient evidence to establish the identity of the perpetrator; 2) the alternative charge of felony-murder was not supported by substantial evidence; and 3) the trial court abused its discretion in failing to grant a mistrial. We affirm on all issues.

I. Identity

Hall contends there was "virtually no evidence" from which a rational finder of fact could find beyond a reasonable doubt he caused the death of Susan Hajek.

In determining the sufficiency of the evidence to support a guilty verdict we consider the evidence in the light most favorable to the State. State v. Origer, 418 N.W.2d 368-69 (Iowa App. 1987). Substantial evidence means evidence which would convince a rationale trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). However, whether evidence is direct or circumstantial, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. Origer, 418 N.W.2d at 369-70. We must consider all of the evidence, not merely that supportive of the conviction, in determining

the sufficiency of the evidence to support a guilty verdict. See State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Viewing the evidence in the light most favorable to the State, we find there was substantial evidence from which the jury could find Hall guilty of the crime charged. Phillip Parker testified that shortly after 10 p.m. on the night of March 19, 1992, Hall had told him he knew a girl named Susie who previously had sex with Hall and two other men after she got high. Hall asked Parker if he wanted to go to Susie's house and have sex with her. Parker indicated he wanted to go along and the two men went to Hajek's house. Upon finding Hajek's boyfriend at her home, Hall and Parker left and returned around 11 p.m. after the boyfriend had gone.

At Hajek's house Hall and Hajek smoked some crack cocaine. Afterward Hall encouraged Parker to go into the bedroom and remove his pants. Parker declined and Hall chided him for being scared. Hall entered the bedroom, partially disrobed and repeatedly called for Hajek to join him. Hajek refused to do so and asked Hall to leave. When Hall did not leave Hajek asked Parker to tell him to go, and Hall and Parker left Hajek's home.

After Parker and Hall left Hajek's house, Hall expressed anger or agitation about not having had sex with Hajek. He indicated several times to Parker "[s]he shouldn't have done me like that" and he was going back.

At approximately 12:15 a.m. on March 20, 1992, Hall awakened his sleeping girlfriend, Debra Mayfield, and said something to the effect of "[y]ou've got to go with me or I'm a dead man." According to Mayfield she and Hall then drove around Cedar Rapids for approximately an hour before going to Hajek's house. Hall and Mayfield provided vague and unconvincing explanations when asked why they went to Hajek's home at this time of the morning. Considerable evidence was introduced at trial to establish Mayfield and Hajek were no longer friends and were not on speaking terms on March 20, 1992.

When they arrived at Hajek's residence Mayfield jumped from the car, ran to Hajek's home, knocked on the door and hollered "Susie" several times. Mayfield tried to open the front door but was unable to do so. She testified she intended to knock and walk right in as it was what she always did at Hajek's home. After being unable to obtain entrance at the front door, Mayfield and Hall went to the back door. Mayfield hollered "Susie" and they walked in the open back door. They found Hajek's body on the floor of her bedroom. The cause of her death was manual strangulation.

At 1:38 a.m. Hall called 911 to report a suspected death at Hajek's home. Between the time of his call to 911 and the arrival of police officers, Hall claimed he administered CPR to Hajek, attempted to call a police officer for whom he worked as a drug informant, emptied an

ashtray into a toilet, drank from a beer can he found in the living room, looked in the refrigerator for alcoholic beverages, used the bathroom and smoked a cigarette. A police dispatcher testified police officers arrived at the scene only a minute-and-a-half after she had received Hall's 911 call.

Hall told conflicting stories to the officers who arrived at Hajek's home. He provided inconsistent versions of the facts as to when he had last seen Hajek and whether she and her boyfriend were arguing when he had stopped by her house earlier that evening. Furthermore, at the crime scene Hall told officers of only his first visit earlier in the evening to Hajek's home. He did not disclose his second visit nor did he tell officers Parker had been with him during those earlier visits

Contrary to Mayfield's testimony, Hajek's boyfriend, friends and a family member indicated no one had such a close relationship with Hajek he or she would just knock on her door and walk right into her home without being invited to do so. Hajek's boyfriend testified only he used the back door of her home.

In his role as a drug informant Hall had previously identified or described to Officer Choate of the Cedar Rapids Police Department 24 people who were trafficking in drugs. Hall had known Parker since November or December of 1991 and admitted he had previously purchased "a lot" of drugs from him, yet he had not identified Parker as a drug

dealer to Choate prior to Hajek's death. On March 20, 1992, Hall spoke with Choate and, for the first time, identified Parker as a drug dealer and offered to engage in a drug buy from him. While Hall had previously engaged in one controlled buy for the drug task force, this was the first time he had offered to initiate a drug buy from a specific dealer.

Hall had not told the police officers at Hajek's home that Parker had been with him in the home earlier in the evening. However, during his March 20 conversation with Officer Choate Hall disclosed Parker had been there and told Choate Parker had indicated to him he was going back to Hajek's home after they had left. Hall told Choate he thought Parker might have killed Hajek. When asked what motive Parker might have to kill Hajek, Hall stated "I think he wanted some action and got turned down."

A day or two after Hajek's death Parker and Hall had a conversation and Parker lead Hall to believe the police had spoken to him about Hall. Hall told Parker not to tell anybody they had been over to Hajek's house and he repeatedly said "[h]ear no evil, see no evil, speak no evil."

Numerous inconsistencies in the statements and testimony of Hall and Mayfield could lead a jury to the conclusion they were attempting to create an alibi for Hall. For example, in her first statement to police Mayfield indicated she and Hall had left their home around

11 p.m. and drove around for approximately two and one-half hours before they went to Hajek's house. When confronted with contradictory information Mayfield admitted she had not left with Hall until after midnight when he had awakened her with the statement that if she did not come with him he was a dead man. Similarly inconsistent was Hall's testimony he performed CPR on Hajek when in fact law enforcement officials found Hajek's body on its side and had to roll her on her back before they could administer CPR.

A jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. State v. Thornton, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence presented and place credibility where it belongs. State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984). Hall's inconsistent statements and attempts to deflect suspicion to others could be construed by the jury as attempts to fabricate an alibi or conceal his guilt. We find there was sufficient evidence of opportunity, motive and presence from which a jury could find Hall guilty.

II. Felony-Murder

Hall was indicted for first-degree murder upon the alternative theories of willful, deliberate premeditated, killing or felony murder with the underlying felony being

assault with intent to commit sexual abuse. Hall claims the record is devoid of evidence from which a rational jury could find beyond reasonable doubt he participated in an assault with intent to commit sexual abuse causing Hajek's death.

For a felony-murder conviction the State must prove the defendant was participating in the underlying felony. Conner v. State, 362 N.W.2d 449, 455 (Iowa 1985). Intent is seldom susceptible to direct proof and may be inferred from the circumstances. State v. Beer, 193 N.W.2d 530, (Iowa 1972). In determining if a defendant had the intent to commit sexual abuse a fact finder is not limited to the evidentiary facts of a crime scene but may consider the defendant's conduct prior to the commission of the act. See, e.g., State v. Casady, 491 N.W.2d 782, 786-87 (Iowa 1992) (evidence of modus operandi used in two prior sexual assaults was probative of defendant's intent to commit sexual assault in present case); State v. Spargo, 364 N.W.2d 203, 209 (Iowa 1985) (defendant's pattern of conduct toward other young boys was relevant to issue of defendant's intent to commit sexual abuse in present case).

We find substantial evidence was presented to support the charge of felony-murder. Evidence supporting submission of the felony-murder alternative to the jury includes: 1) Hall's admission he and Hajek had an ongoing sexual relationship; 2) Hall's purpose in going to Hajek's home on the night of March 19, 1992, was to engage in sex

with Hajek; 3) Hall attempted to draw Hajek into the bedroom of her home but she rejected his advances and asked him to leave; 4) Hall was angered by Hajek's rejection and told Parker "she shouldn't have done me like that" and he was going back; 5) Hajek was found dead on her bedroom floor a few hours later ; and 6) Hall attributed a sexual motive to the crime by telling a police officer he believed Parker had killed Hajek because he thought Parker "wanted some action and got turned down."

We find there was substantial evidence to support submission of the felony-murder charge and unanimity of the jury verdict was not compromised by submission of the alternative theories. See State v. Bratthauer, 354 N.W.2d 774, 776 (Iowa 1984) (unanimity of the jury as to mode of commission of crime is not required where substantial evidence was presented to support each alternative method of committing a single crime). Even if there had not been sufficient evidence to warrant submission of the felony-murder charge, a recent United States Supreme Court decision indicates due process does not require reversal of a conviction in such circumstances if the verdict was legally supportable on one of the grounds submitted to the jury. Griffin v. U.S., 502 U.S. 46 (1991).

III. Mistrial

The trial was transferred to Scott County due to extensive press coverage in Linn County. Hall's unresisted

motion in limine to exclude any testimony concerning his involvement and conviction in a 1973 strangulation death was granted. The record reflects the trial court and trial counsel took commendable efforts to exclude from the jury any individuals who had knowledge of the prior criminal proceedings and had preconceived ideas about Hall's guilt or innocence with respect to Hajek's death. The record reveals the prosecution cautioned its witnesses to make no references to the 1973 case or Hall's prior incarceration.

During the course of the trial Hall twice moved for a mistrial. His first motion came after Parker testified he had seen Hall by a convenience store and Hall kept saying "[d]on't send me back to the penitentiary." He moved for a mistrial again after another witness testified Hall had said to him "I'm going through it again." The district court concluded the statements did not warrant a mistrial and denied the motions. It struck the first statement from the record and admonished the jury to disregard it. The trial court declined to admonish the jury with respect to the second statement because it felt doing so would unduly emphasize it.

Trial courts have considerable discretion in ruling upon motions for mistrial since they are present throughout the trial and are in a better position than the reviewing court to gauge the effect of the matter in question on the jury. State v. Jirak, 491 N.W.2d 794, 796 (Iowa App. 1992). The trial court's ruling on such a motion will not

be set aside except upon a clear showing of abuse of discretion. Id. Ordinarily abuse of discretion is found upon the denial of a mistrial only where there is no support in the record for the trial court's determination. Id.

Both of the statements at issue were of a voluntary nature and were not anticipated by the court or counsel. Neither statement directly referred to Hall's prior involvement in the 1973 strangulation case. We reject Hall's argument that the statements necessarily built a bridge in the jurors' minds between the present and prior murder cases. The trial court's admonishment adequately addressed the first statement and the second statement was sufficiently innocuous that admonishment was not warranted. We find no abuse of discretion in the trial court's denial of a mistrial.

AFFIRMED.