FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee	)	Filed April 30, 1985
vs.	)	4-506 83-1409
ELAINE MILLER,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Harrison County - Leo Connolly, Judge.

Defendant appeals from judgment and sentence for murder in the first degree asserting that: (1) her conviction of first degree murder on the theory of aiding and abetting was not supported by substantial evidence; (2) the trial court erred by excluding any inquiry regarding the principal's guilty plea to second degree murder; (3) the trial court erred by admitting a photograph of the victim's body into evidence; and (4) the trial court erred by ordering defendant to pay restitution to the victim's estate in the amount of $500,000.00. AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Charles Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender for defendant-appellant.

Thomas J. Miller, Attorney General and Marcia Mason, Assistant Attorney General for plaintiff-appellee.

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

Defendant, Elaine Miller, appeals from her conviction of first-degree murder.

The defendant and one Karl Sprinkel were jointly charged with first degree murder and conspiracy to commit murder as a result of the death of Charles Miller, defendant's husband. Prior to the defendant's trial, Sprinkel pled guilty to second degree murder.

Sprinkel admittedly shot Charles Miller on October 2, 1982. Sprinkel claimed the shooting was a result of an argument and struggle. Miller's body was subsequently buried; and in March of 1983, Sprinkel led the police to the body.

I.

Defendant first challenges the sufficiency of the evidence to sustain a conviction of murder in the first degree. Our review of this issue is not de novo. The jury's verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. In making this determination we consider the whole record, including the evidence which is favorable to defendant or detracts from the weight of the State's case. Where the evidence is in conflict, however, the jury is empowered to resolve those confiicts in accordance with its own views as to the credibility of the witnesses. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984).

The defendant admits that taking the evidence in the light most favorable to the State, the prosecution proved defendant hated her husband, wanted him killed and concealed his murder. However, defendant contends this evidence coupled with Sprinkel's admission of the killing and defendant's denial of aiding and abetting Sprinkel is not substantial evidence to support the conviction. We determine the record establishes additional facts, including the defendant and Sprinkel lived together both before and after the killing, Miller had financial resources, some of which the defendant had transferred to her name prior to the

shooting, the defendant had solicited certain persons to kill Miller, and some of the solicitations were made in Miller's presence. The record also reveals that the testimony of Sprinkel as to how the shooting occurred is not consistent with the physical facts. In addition thereto, defendant told her son in late October or early November that Miller had been killed and related to her son several stories of how it happened. One story was that she shot Miller, another that she held Miller while Sprinkel shot him, and another that Sprinkel shot Miller. There are numerous other inconsistencies in the defendant's stories with reference to Miller's death.

We find direct and circumstantial evidence abundant to support the guilty verdict. See State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981).

II.

Defendant next contends the court erred in refusing to permit the defendant to examine Sprinkel with reference to his plea of guilty and its terms. On appeal defendant contends Sprinkel's culpability for first degree murder was an essential element of the State's case and Sprinkel's testimony was critical, not only because of its direct exculpatory effect on the defendant, but also because it refuted the State's contention that Sprinkel committed a first degree murder. The State contends this issue has not been preserved for review.

Karl Sprinkel testified as a witness for the defendant. The State filed a motion in limine asking that Karl Sprinkel not be allowed to testify as to his second degree murder plea. Prior to Sprinkel's testimony, the court made inquiry of counsel with reference to the issues raised in the motion. Defendant's counsel indicated he was planning to bring out the fact that Sprinkel entered into a plea bargain. The dialogue between the court and defendant's counsel was as follows:

DEFENSE COUNSEL: But, I do want to ask him the fact that he did enter the plea.

THE COURT: What is the probative value of that?

DEFENSE COUNSEL: More credibility from my standpoint, but I think it's germane that the jury ought to know that I am getting into my final argument. That he wasn't called by or at no time did the State ever ask him to testify against Elaine.

THE COURT: You can go into that, I'm going to sustain the motion in limine at this point.

No further record was made.

The record made before the trial court indicated that the defendant wanted to show Sprinkel was not asked to testify for the State. The trial court allowed Sprinkel to so testify. A careful reading of the record indicates that at no time did defense counsel advise the trial court that he wanted Sprinkel's second-degree murder plea entered into the record. Neither did he make an offer of proof of the plea nor did he advance any argument or contention as to why the plea should be admitted other than the fact that he wanted to make it clear that the State never asked Sprinkel to testify or called him as a witness. The court allowed the defendant to ask the question in the requested area. The defendant asked for nothing more. We agree with the State that the issue was not preserved for review. The defendant may not urge for the first time here a contention not raised in the trial court. State v. Rosewall, 239 N.W.2d 171, 173 (Iowa 1976); Miller v. Young, 168 N.W.2d 45, 50 (Iowa 1969).

III. Photograph

The defendant next complains the trial court erred in admitting a photograph taken of decedent's body. The photo showed a dowel running through the wound in decedent's head and was used to illustrate the angle of the gunshot. The defendant does not argue the relevancy of the exhibit, but submits that the prejudicial impact outweighs its probative value. The photo was taken after Miller's body had started to decompose. We have examined the photograph and

fail to find it to be unusually gruesome or inflammatory and agree with the trial court that it was properly admissible. See State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984).

IV.

The trial court ordered the defendant to pay restitution to Miller's estate in the amount of $500,000. The defendant contends there is no indication that the court made a determination of the loss to decedent's estate or whether the defendant could pay the sums charged. Defendant asks that the restitution order be vacated and the case be remanded for imposition of a restitution order which reflects and articulates the actual loss to the victim and the defendant's ability to pay.

The State contends a predetermination of defendant's ability to pay only applies to attorney fees and court costs, not to victim restitution costs. We agree. Iowa Code §910.2(1983) unconditionally requires the sentencing court to order offenders to make restitution to their victims, and it makes full payment to the victim a condition precedent to payment to the county for court costs and attorney fees. State v. Harrison, 351 N.W.2d 526, 528 (Iowa 1984). The reference to the offender's reasonable ability to make restitution is an express condition on the determination of the amount of restitution for court costs and attorney fees as opposed to the amount of restitution to the victim. Id. at 529.

We next determine whether a remand to consider the amount of the restitution plan should be ordered. Iowa Code §910.2(1983) provides (in applicable part) that where there is a verdict of guilty, the sentencing court shall order restitution to the victims of the offender's criminal activities. Iowa Code §910.3(1983) provides that the county attorney shall prepare a statement of pecuniary damages to victims of the defendant. It further provides if the

defendant believes no person suffered pecuniary damages, the defendant shall so state. Iowa Code §910.1(2)(1983) defines pecuniary damages as:

> All damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium. Without limitation, pecuniary damages include damages for wrongful death. (emphasis added).

The trial court, in setting the amount of restitution, stated:

> I must order restitution in this case, and of course, I cannot order restitution of a human life. Therefore, the common practice is to pick a figure of dollars to be ordered. In this case, I am going to order you to make restitution in the amount of $500,000 to the necessary parties which in this case would be the estate of Mr. Miller—Frank Miller.

Obviously the court had no basis for selecting the amount ordered. The county attorney did not submit a statement of pecuniary damages as required by Iowa Code section 910.3. In short, the trial court did not have the facts before it when it made a determination of the restitution amount.

Chapter 910 of the Iowa Code does not give the trial court authority to set the amount of restitution arbitrarily. We are not dealing here with readily ascertainable damages; but, clearly, such damages must be actual damages as evidenced by the record. See State v. Janz, 358 N.W.2d 547, 549 (Iowa 1984).

We determine that the trial court ordered restitution arbitrarily without evidence of the victim's loss. We affirm defendant's conviction, but vacate the restitution award and remand. The court shall order the county attorney to prepare a statement of the victim's pecuniary damages and require the clerk of court to prepare a statement of court costs and court-appointed attorney's fees. Thereafter, the court shall conduct a hearing to determine the amount of restitution.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.