FILED
FEB 26 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 26, 1986

vs.)

MARK R. SAULS,) 5-657 337
85-521

Defendant-Appellant.)

Appeal from the Iowa District Court for Scott County (No. 109603) - Max R. Werling, Judge.

Defendant appeals from his conviction of second-degree murder as defined in Iowa Code section 707.3 (1981). **AFFIRMED.**

Mark D. Cleve of *McDonald, Stonebraker & Cepican, Davenport, for defendant-appellant.*

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Elaine C. Kopf, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Snell, JJ.

Defendant appeals from his conviction of second-degree murder as defined in Iowa Code section 707.3 (1981). He asserts (1) that the trial court should have suppressed as involuntary one of the three statements he made to police after his arrest, (2) that the trial court should have sustained his objection to the jury instruction regarding participation in a forcible felony, and (3) that the trial court abused its discretion in refusing to grant his motion for new trial based on juror misconduct.

Defendant, Mark R. Sauls, and a codefendant, Michael L. Marit, were accused of stabbing a man named Steven Estabrook, in Estabrook's car. Estabrook died after running from the car. The two were tried together before a jury. They were both convicted of first-degree murder. Defendant's conviction was reversed on appeal, (State v. Sauls, 356 N.W.2d 516 (Iowa 1984)), and he was retried separately, again to a jury. At trial, the State submitted three theories of liability. The first was that defendant had stabbed the victim himself. The second was that defendant had aided and abetted Marit by actively participating with him in the stabbing or by encouraging him in some manner before or during the robbery. The third was based on joint criminal conduct—that the stabbing had occurred in furtherance of a robbery in which defendant had knowingly participated.

Before trial began, defendant moved to suppress three statements he had made to police in the hours after his arrest. He asserted that the statements were involuntary because he had not had sufficient food or rest when he made the statements. The trial court denied defendant's motion to suppress and the three statements were admitted into evidence. In one of the statements, defendant admitted some participation in the incident, at least by being present, but he asserted that it was Marit, not he, who did the stabbing.

The evidence at trial indicated that when the stabbing occurred, the victim was in the driver's seat of his car, Marit was in the front passenger seat, and defendant was in the back seat. Defendant objected to the jury instruction regarding participation in a forcible felony which was patterned from uniform criminal jury instruction 203. The instruction provides:

> The law provides that a person is participating in a forcible felony, during part or the entire period commencing with the first act done directly toward the commission of the offense, and for the purpose of committing that offense, and terminating when the person has been arrested or has eluded pursuers, if any there be. A person is participating in a forcible felony during this period whether the person is successful or unsuccessful in committing the offense.

Defendant asserted that the evidence showed that he had not actually participated in a forcible felony which involved stealing the victim's car battery, but was at most only an accessory after the fact because he supposedly disposed of his and Marit's knives after the victim ran from the car. The trial court overruled defendant's objection to the jury instruction.

The jury found defendant guilty of second-degree murder. Defendant filed a motion for new trial, asserting that over a weekend recess two jurors had performed experiments on cars of the same make as the victim's and that the experiments showed that a person in the back seat could have reached and stabbed a person in the driver's seat. After a hearing, the trial court denied defendant's motion for new trial; it noted the pictures of the interior of the victim's car which had been admitted into evidence and the statement of the jury foreman that the experiments had not influenced his decision.

I.

Defendant submits his three confession statements which were given within twelve hours of his arrest should have been suppressed. The defendant anchors his claim of the fact that he was scared and had not slept or eaten before he

was informed of the charges brought against him. The reasons raised by defendant are recognized as factors which are probative of the voluntariness of confessions. See State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1982).

Our review of issues of constitutional dimension is based on an independent evaluation of the totality of the circumstances. Fryer v. State, 325 N.W.2d 400, 407 (Iowa 1982); Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980); State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976). Iowa authority provides that:

> A lack of sleep and food may indicate that the will has been overborne, Reck v. Pate, 367 U.S. 433, 81 S. Ct. 1541, 6 L. Ed. 2d 948 (1961), but there is no indication that [defendant] ever complained or that he was pushed beyond his limits. Cf., State v. Cullison, 227 N.W.2d 121 (Iowa 1975) (defendant flown halfway across the country and interrogated continually for nine and one-half hours to point of collapse—statement involuntary).

Fryer v. State, 325 N.W.2d at 410.

Guidance is also provided in State v. Munro, 295 N.W.2d 437, 443 (Iowa 1980), where the court noted that a probative factor in finding the statement was voluntary was that "no indication appears of physical mistreatment or of prolonged periods of interrogation." With these considerations in mind, we turn to the specific facts of the case.

While a lack of food and sleep can be grounds to suppress confession statements, defendant's asserted tiredness and lightheadedness does not indicate that his statements were given when he was unable to understand the gravity of the situation. Defendant would have us believe that due to his lack of sleep and food that his confession was not voluntarily given. We cannot find this to be the case.

Notwithstanding a request for coffee, which happened to be available, defendant never asked for food and there is no indication food was withheld as punishment. Similarly, defendant's lack of sleep was understandable given

the nature of the crime, but was in no way caused by police misconduct. Defendant was placed in a single cell at 1:00 a.m. Even if defendant did not sleep until the final confession, which was given at 7:00 a.m., defendant's tiredness does not indicate to us that the confession was involuntary.

II.

A second ground for appeal by defendant was that certain jury instructions were misleading. The relevant jury instructions provided:

> 13. The law provides that when two or more persons, acting in consort, knowingly participate in a forcible felony, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and defendant's guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in furtherance of the commission of the offense.
>
> 14. The law provides that a person is participating in a forcible felony, during part of the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has eluded pursuers, if any there be. A person is participating in a forcible felony during this period whether the person is successful or unsuccessful in committing the offense.
>
> * * *
>
> 22. That the defendant did act in consort with and knowingly participate in the commission of a forcible felony with another, that on or about December 13, 1982, in Scott County, Iowa, Steven Wayne Estabrook, Sr., was unlawfully stabbed, and that such stabbing could reasonably have been expected to be done in the furtherance of the commission of that offense. . . .

Defendant contends the jury could have thought hiding the knives, instead of the robbery, constituted participation in a forcible felony which, under these facts, could not result in a conviction for murder. He believes the jury could have convicted him upon an act which took place after the stabbing. The defendant's argument that these instructions are misleading runs as follows: Defendant

admitted to disposing of the knife after the stabbing which the jury could interpret as participation in the forcible felony of robbery under instruction number 13, and the jury could have found that the robbery offense terminated only upon arrest so that defendant could have been charged with murder under instruction 22 when the disposal of the knife occurred after the stabbing which led to the murder.

Defendant's expansive view of participation in the joint criminal conduct instruction is not sufficient grounds for reversal. Defendant feels the jury could have confused the disposing of the knife, which made him an accessory after the fact, as participating in a forcible felony. We disagree.

A guiding principle in such matters is that jury instructions are to be read together, and related to each other, not in an artificial or piecemeal fashion. State v. Johnson, 243 N.W.2d 598, 604 (Iowa 1976).

Instruction 18 is a marshalling instruction which sets forth the elements of a robbery. This instruction indicated:

> The law provides that a person commits robbery, when, having the intent to commit a theft, he commits an assault, or threatens another with or purposely puts another in fear of immediate serious injury or threatens to immediately commit murder, to assist or further the commission of an intended theft or the person's escape from the scene with or without the stolen property.
>
> Theft is defined in another instruction.
>
> Robbery is a forcible felony.

The jury could not have concluded defendant "participated" in robbery merely by hiding a knife. Thus, we find no error in the instructions. The jury could not have been confused as to which offense (i.e., robbery, not hiding weapons) constituted the forcible felony. The jury did not convict the defendant solely on acts which occurred after the stabbing because the hiding of a knife could not constitute robbery under these instructions.

In addition, the State maintains defendant failed to preserve error by not submitting a theory of defense instruction. According to the State, defendant's objections were exceptions to a definitional instruction instead of a request for a theory of defense instruction. Such a submission in this case would have amounted to claiming that if the defendant's only culpable act was disposing of the knife after the stabbing, then this act was not enough to convict defendant of murder. The defendant claims that his attempt to have a portion of instruction 14 stricken constituted tailoring the instruction as a theory of the defense.

The most recent Iowa discussion of theory of the defense instructions was in State v. Conner, 362 N.W.2d 449, 452-54 (Iowa 1985), where the court stated:

> A proper theory of defense instruction is one which sets forth a set of facts which would preclude a finding of guilt. State v. Kase, 344 N.W.2d 223, 226 (Iowa 1984). Such an instruction is neither a marshalling instruction which sets forth the elements of the crime and requires the State to prove those elements, nor an instruction which defines one of the elements set forth in the marshalling instruction. We found in Conner that the marshalling instruction and the definitional instruction, instructions 11 and 12, were not defective in the respects claimed by defendant. 241 N.W.2d 464.
>
> The first problem with Conner's present contention is that of preservation of error. He did not ask for a theory of defense instruction on the grounds that he now advocates, but bootstraps his present contention by referring to his objection to the marshalling instruction and the definitional instruction. Thus, when we found that the language at issue was not requested as a theory of defense instruction, we determined that error was not preserved.

Similarly, the defendant is challenging a definitional instruction and his claimed error is not preserved as in Conner. As with Conner, we choose to also address the merits of defendant's contentions regarding the instructions.

Defendant posits that instruction 14 was confusing because it indicated a robbery terminates upon arrest which, under these facts, could have led the

jury to believe the disposing of the knife after the stabbing, by itself, was sufficient to convict him of murder.

Instructions 13 and 14 are patterned verbatim from uniform jury instructions which means we are reluctant to disapprove of them. See II Uniform Jury Instructions (Criminal) annot. at No. 203, 209 (1983); State v. Doss, 355 N.W.2d 874, 881 (Iowa 1984).

Our reading of the instructions convinces us that the instructions were proper and did not confuse the jury. Instruction 22 can only be read to conclude that an act before the stabbing need be present and that a sole act after the stabbing of hiding a weapon was not sufficient for second-degree murder.

III.

Finally, defendant contends that juror misconduct denied him a fair trial. We disagree. The trial court has broad discretion on a motion for new trial based on juror misconduct. State v. Harrington, 349 N.W.2d 758, 761 (Iowa 1984); State v. Cuevas, 288 N.W.2d 525, 535 (Iowa 1980). The test in Iowa for jury misconduct involves a three-pronged analysis: (1) the evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct, (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation by constituting jury misconduct, and (3) it must appear the misconduct was calculated to, and it is reasonably probable it did, influence the verdict. State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984); see also Rhiner v. City of Clive, 373 N.W.2d 466, 478 (Iowa 1985); State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983); Harris v. Deere & Co., 263 N.W.2d 727, 729-30 (Iowa 1978).

The first prong of Cullen requires objective facts as to what occurred. A juror may not submit the factors which influenced the verdict because such

facts "inhere" in the verdict. Iowa R. Evid. 606(b); State v. Rouse, 290 N.W.2d 911, 916 (Iowa 1980).

The initial element is satisfied if the affidavit used by the defendant shows objective facts. The defendant only submitted one affidavit which provided:

> [D]uring the weekend recess two of the jurors conducted experiments on their own by entering two different Volvo automobiles to investigate whether or not there was sufficient room between the two front seats for an individual sitting in the rear seat to stab a person sitting in the drivers seat. The result of the experiment which determined that the stabbing was possible was brought to the attention of the jury during deliberations on Monday morning.

This affidavit does establish objective facts as to what occurred.

The second inquiry is whether the complained of conduct exceeded tolerable bounds. The State attacks the lone affidavit as being insufficient to make this determination. While the shortcomings in the affidavit pointed out by the State are well taken, we conclude that if such an experiment did take place, that for purposes of our analysis this conduct did exceed tolerable bounds.

Thirdly, the most difficult element under those facts is to determine whether the misconduct was calculated to, and with reasonable probability did, influence the verdict. Courts have stated that this showing is not easy to satisfy because a reasonable probability is significantly different from the lower threshold of a possibility. Cullen, 357 N.W.2d at 28. The test as to whether the asserted misconduct influenced the verdict is objective rather than subjective. State v. Christianson, 337 N.W.2d at 502, 506 (citing State v. Rouse, 290 N.W.2d at 916).

The parties introduced numerous pictures of Volvos into evidence. Moreover, the common sense and experience of jurors would indicate that a person in the back seat of a Volvo could stab another person sitting in the front seat even if the Volvo had some unique configurations. We are unwilling to conclude

that the results of the unauthorized experiment influenced the verdict. The extraneous evidence in this case was not outside the common knowledge which jurors are presumed to take into jury deliberations. For these reasons, we affirm the trial court.

AFFIRMED.