

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 29 1986

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed January 29, 1986

vs.

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362

JERRY BERT SUMPTER, JR.,

)

5-507

Defendant-Appellant.

)

84-1754

Appeal from the Iowa District Court for Marshall County - Carl E. Peterson,
Judge.

Defendant appeals his conviction of first degree sexual abuse and first
degree murder. **AFFIRMED.**

Theodore R. Hoglan and Barry S. Kaplan of Fairall, Fairall & Kaplan,
Marshalltown, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Rebecca L. Claypool, Assistant
Attorney General; and Phillip L. Krejci, Marshall County Attorney; for plaintiff-
appellee.

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

SCHLEGEL, J.

Defendant appeals his conviction of first degree sexual abuse and first degree murder. He also appeals his two consecutive life sentences. We affirm.

Defendant was charged with the first degree sexual abuse and murder of a girl at a convenience store in Marshalltown, Iowa, on February 5, 1984. Defendant initially denied having anything to do with the crimes, and in fact, reported the crime to the police. After the police arrived at the crime scene, they transported defendant to the police department where they read him his constitutional rights and then began interrogating him. Defendant was questioned first by police officers, and then by an agent of the Department of Criminal Investigation for a total of approximately six and one-half hours. As a result of this interrogation, search warrants for defendant's home were issued where a pair of defendant's blood-stained gloves were seized along with a jar of money.

Defendant eventually recanted his denial of involvement with the victim and confessed to having sexual intercourse with her but denied intentionally hurting or murdering her. He confessed only after his wife arrived at the police station and told him that she would not leave him because of the charges.

Defendant filed two motions to suppress, one relating to his oral statements made to the police and the DCI agent during the interrogation, and one relating to the searches and seizures conducted by the police as a result of these oral statements. The motions were overruled, however. Defendant then filed a notice of defense of intoxication by drugs and/or alcohol and/or diminished responsibility. The jury found defendant guilty on both charges and the court sentenced defendant to life imprisonment on each count and ordered them to run consecutively.

On appeal defendant raises numerous issues. Specifically, he alleges the trial court erred in: (1) failing to sustain defendant's motions to suppress the

oral statements and the evidence seized as a result of those statements; (2) overruling defendant's objections relating to the introduction of various photographs into evidence; (3) failing to sustain defendant's objections to his wife's testimony during trial; (4) failing to sustain defendant's motion for a directed verdict of acquittal; (5) failing to give defendant's proposed instructions relating to intoxication or willful injury; (6) failing to sustain defendant's motion for a mistrial based upon the State's closing argument; (7) resolving the issue of merger and double jeopardy against defendant; (8) failing to sustain defendant's motion for a new trial and motion in arrest of judgment; and (9) sentencing defendant to two consecutive life sentences.

I. Motion to Suppress. Defendant based his motions to suppress upon the argument that he did not voluntarily and effectively waive his Miranda rights. He asserts that his confession was involuntary because of promises of leniency, low intelligence, the length of the interrogation, and psychological coercion.

Once the statements of a defendant are challenged upon proper motion, the State must assume the burden of proving by a preponderance of evidence that the statements received were made by the defendant after an effective waiver of his Miranda rights and that the confession was made voluntarily. State v. Jump, 269 N.W.2d 417, 424 (Iowa 1978). "[T]he State must demonstrate from the totality of circumstances that the statements were 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." State v. Whitsel, 339 N.W.2d 149, 153 (Iowa 1983).

Many factors are to be considered under the totality of the circumstances test but no one factor is determinative. Id. These factors include:

The defendant's knowledge and waiver of his Miranda rights, the defendant's age, experience, prior record, level of education and intelligence, the length of time defendant is detained and interrogated, whether physical punishment was used, including the deprivation of food or sleep, defendant's ability to understand the questions, defendant's physical and emotional condition and his reaction to the interrogation, whether any deceit or improper promises were used in gaining the admissions, and any mental weakness the defendant may possess.

Id.

Since the defendant invokes federal constitutional issues, our review of the trial court's ruling is de novo, requiring an independent evaluation of the totality of the relevant circumstances. Id.

The record shows that defendant was advised of his Miranda rights at approximately 7:57 a.m. on the day of the murder, upon his arrival at the police station. The police officer who administered the rights testified that he read each specific right and ascertained that defendant understood it before proceeding with the next right. Defendant said that he understood his rights and did not request an attorney. He was again advised of his constitutional rights at 12:30 p.m. when the DCI agent arrived to interview defendant. At this time the Statement of Rights was read to defendant and he signed it. We are convinced that defendant understood his rights and validly waived them.

Defendant also asserts that his low intelligence and the length of the interrogation rendered his confession involuntary. We cannot agree. Defendant's I.Q. is 89, which is in the high dull normal/low average level of overall intelligence. The supreme court has upheld other confessions based on lower intelligence levels and lesser educational achievement than that of this defendant. See State v. Conner, 241 N.W.2d 447, 453 (Iowa 1976); State v. Fetters, 202 N.W.2d 84, 88 (Iowa 1972); State v. Holderness, 191 N.W.2d 642, 644, 645 (Iowa 1971). The record also indicates that defendant held down a job, and responded

to the questions posed to him by the police and the DCI agent. Nothing before us contradicts the trial court's finding that defendant had sufficient mental capacity to understand the meaning and effect of his confession.

We must also disagree with defendant that the length of interrogation rendered his confession invalid. Defendant was interviewed by the police from approximately 7:30 a.m. until around noon. The DCI agent then began his interrogation at about 12:40 p.m. and ended it at 3:30 p.m. During the interview defendant was periodically given coffee, allowed to use the restroom, and given cigarettes. Defendant was asked several times if he wished to continue the interrogation, and each time he said that he wished to talk to get things straightened out.

Defendant also alleges that the DCI agent implied promises of leniency if he would be truthful, suggested possibilities of alcohol treatment, and guaranteed that his wife would not leave him, thus making his confession involuntary. We agree with defendant that "[t]o be admissible a confession . . . , must not be extracted . . . , nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Brady v. United States, 397 U.S. 742, 753, 90 S. Ct. 1463, 1471-72, 25 L. Ed. 2d 747, 759 (1970); State v. Kase, 344 N.W.2d 223, 225 (Iowa 1984). However, it is also clear that "an officer can tell a suspect it is better to tell the truth." State v. Hodges, 326 N.W.2d 345, 349 (Iowa 1982). In addition, the Iowa Supreme Court has held in State v. Whitsel, 339 N.W.2d 149, 153 (Iowa 1983), that neither an offer to recommend psychiatric help nor an offer to inform the prosecutor of defendant's cooperation was tantamount to a promise of leniency. See also State v. Hodges, 326 N.W.2d at 349.

"The question of the voluntariness [of a confession] is a matter of sorting out the impetus for the inculpatory statement." State v. Hodges, at 348. The

record shows that the impetus for defendant's confession was the arrival of his wife at the interrogation room and her statement that she would not leave him because of the charges against him. We conclude, therefore, that the totality of the circumstances reveals no improper questioning or methods used by the interrogators, nor was there any other fact or circumstance that would invalidate defendant's confession.

II. Photographs. The trial court allowed the State to introduce into evidence, a series of photographs taken during the autopsy of the victim. The court also allowed to be admitted a graduation picture of the victim approximately eleven and one-half by fourteen inches in size. Defendant objected to the introduction of all of these pictures into evidence on the grounds that they were irrelevant and immaterial and highly prejudicial against him. He argues that the photographs of the autopsy were intended to demonstrate the ferociousness of the attack and that because there is no premeditation or deliberation required in a felony murder prosecution, the pictures were irrelevant.

Trial courts have considerable discretion as to the admission of photographs of homicide victims. State v. Aswegan, 331 N.W.2d 93, 97 (Iowa 1983). The basic test is one of relevancy; the trial court must decide whether the probative value outweighs potential prejudice. State v. Hickman, 337 N.W.2d 512, 515 (Iowa 1983). The trial court's determination to admit photographs into evidence will not be reversed on appeal except when an abuse of discretion is shown. State v. Aswegan, 331 N.W.2d at 97.

We hold the admission of the graduation picture was not an abuse of the trial court's discretion. We also hold that the autopsy pictures were properly admitted. Defendant's argument that the autopsy pictures were emotionally prejudicial against him does not render them inadmissible. The mere fact that the autopsy picture was capable of invoking emotional response on the part

of the jury does not render it inadmissible. See State v. Aswegan, 331 N.W.2d 93, 97 (Iowa 1983). Death pictures are not ordinarily excluded because they are gruesome, for murder is by nature a gruesome business. State v. Hickman, 337 N.W.2d 512, 515-16 (Iowa 1983).

We cannot agree with defendant that the autopsy pictures were irrelevant because they showed premeditation. The photographs rather, went to the issue of malice aforethought and in particular, to show that the victim did not die from the defendant pushing her down, but instead from a brutal beating. In a felony murder prosecution, the State is still required to prove the defendant acted with malice aforethought. Iowa Code § 707.1 (1983); see State v. Oliver, 341 N.W.2d 744, 747 (Iowa 1983). We hold, therefore, that the trial court did not err in admitting the photographs of the autopsy and the graduation photo of the victim.

III. Testimony of Wife. Defendant's wife testified at the trial that she and defendant had an argument the night before the murder which ended in their having sexual intercourse. She also testified that at 4:30 a.m. defendant wanted to continue but that she refused and went to bed alone.

It is unclear from his brief, whether defendant bases his argument upon the husband/wife privilege pursuant to Iowa Code section 622.9 (1983), or on the grounds of relevancy and materiality. But after reviewing the record, it appears defendant objected to the testimony relating to his argument with his wife and their subsequent lovemaking on relevancy and privilege grounds. We note that basic facts surrounding defendant's marital activity just prior to the murder were provided by the testimony of the police officers who interviewed defendant at the police station. In fact, defendant brought up the argument himself during the questioning. The trial court ruled that the officer's testimony was relevant at that point, and we agree with that decision. The testimony

of defendant's wife therefore was cumulative and did not prejudice defendant. Any error in admitting her testimony was harmless. State v. Smith, 309 N.W.2d 454, 455-56 (Iowa 1981).

IV. Failure to Sustain Directed Verdict for Acquittal. Defendant contends that the trial court erred in failing to sustain his motion for a directed verdict in favor of his acquittal.

A trial court's refusal to direct a verdict for defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980).

Defendant's contention on this issue is without merit. The record is replete with substantial evidence supporting the trial court's refusal to direct a verdict for defendant.

V. Jury Instructions. Defendant argues on appeal that the trial court erred in failing to give the instructions proposed by defendant as to willful injury and intoxication. He argues that the jury should have been instructed that defendant's intoxicated state could be considered in deciding whether or not defendant formed the requisite malice aforethought for murder. While malice aforethought is the specific state of mind necessary to convict of murder, it is far different from the specific intent which is a necessary element of murder in the first degree. It may be express or implied from the acts and conduct of the defendant. State v. Gramenz, 256 Iowa 134, 142-43, 126 N.W.2d 285, 290 (1964). Malice aforethought has been defined as:

[A] fixed purpose or design to do some physical harm to another existing prior to the act complied of; it need not be shown to have existed for any length of time before,

but only requires such deliberation as makes a person appreciate and understand at the time the act is committed its nature and probable consequences as distinguished from an act in the heat of passion. [Emphasis ours.]

State v. Hofer, 238 Iowa 820, 833, 28 N.W.2d 475, 482 (1947).

Our case law reveals that the issue of intoxication, as it affects the existence of malice aforethought, may be submitted to the jury only when the defendant claims that he was provoked into acting as he did and intoxication affected his response to that provocation. In State v. Hall, 214 N.W.2d 205, 210 (Iowa 1974), the supreme court said:

In those cases in which an accused claims that sudden provocation reduces the homicide to manslaughter, State v. Pierce Wilson does permit intoxication to be considered on whether the defendant did in fact kill in the passion of anger brought on by provocation which would be sufficient if acted on by a sober man. We do not have such a case here.

Nor do we here. No possible interpretation of the facts could support any theory of sufficient provocation on the part of defendant to inflict the injuries and sexual assault suffered by the victim in the case before us. The trial court was correct in refusing defendant's instruction on intoxication.

Defendant's contention that the trial court should have instructed the jury on willful injury is also without merit. The trial court submitted instructions on first degree murder, second degree murder, and involuntary manslaughter. A verdict was returned of first degree murder. Because the jury found defendant guilty of first degree murder, prejudice does not arise if a lesser-included offense was not submitted to the jury. See State v. Drosos, 253 Iowa 1152, 1164-65, 114 N.W.2d 526, 533 (1962).

VI. Closing Argument. During closing argument the prosecutor reviewed both explanations given by the defendant of his involvement in the crime, and then argued how the evidence contradicted them. After describing defendant's

version that the victim had solicited him to perform sexual intercourse after which he accidentally pushed her down and she died, the prosecutor said, "You find him not guilty of everything and turn him on to the streets, if you think that is what happened."

In response to this comment, defense moved for a mistrial. The trial court denied the motion, however, after considering the fact that it was an isolated comment within the entire closing argument.

The trial court has wide discretion to determine the propriety of jury arguments and whether any prosecutorial misconduct warrants reversal. State v. Lass, 228 N.W.2d 758, 770 (Iowa 1975). Such latitude of discretion is appropriate because the trial court has the opportunity to observe the matters complained of and to ascertain their effect, if any, on the jury. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977). The appellate court will intervene only when it is demonstrated that the trial court's discretion has been abused. State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976). In reviewing a claim of prosecutorial misconduct in final argument, the appellate court must determine whether the claimed improper argument was so prejudicial to the defendant that he was denied a fair trial. State v. Lyons, 210 N.W.2d 543, 548 (Iowa 1973).

We find no abuse of discretion in denying defendant's motion and therefore affirm the trial court on this issue.

VII. Merger and Double Jeopardy. Defendant asserts that under the doctrine of merger, lesser included offenses and the double jeopardy clause of the fifth amendment, the charge of sexual abuse in the first degree is subsumed in the charge of first degree murder. We disagree.

Defendant was found guilty of committing murder while committing sexual abuse which is a forcible felony. See Iowa Code § 702.11 (1983). This act

constitutes first degree murder. See Iowa Code § 702.2(2) (1983). A forcible felony also includes felonious assault. Iowa Code § 702.11 (1983).

In State v. Beeman, 315 N.W.2d 770, 776-77 (Iowa 1982), the supreme court rejected the argument used here by defendant that the principle of merger prevents the use of a felonious assault as a felony underlying a felony-murder instruction. We therefore hold the trial court was correct in refusing to direct a verdict on this issue as well as not giving defendant's proposed instructions.

VIII. Motion for New Trial and Arrest of Judgment. Defendant argues the trial court erred in denying his motion for a new trial and his motion in arrest of judgment. A trial court enjoys considerable discretion in ruling on new trial motions, and to overturn such a ruling an abuse of discretion must be shown. State v. Baldwin, 291 N.W.2d 337, 339 (Iowa 1980). Because we find no abuse of discretion, we uphold the trial court's ruling on this issue.

IX. Consecutive Sentences. On appeal, defendant urges that the imposition of consecutive sentences was in violation of Iowa Code section 901.8 (1983) because the sexual abuse and murder offenses were not truly separate offenses. In this he relies upon the success of his felony-merger argument. Because we have held contrary to his felony-merger argument, we need not repeat the rationale at this point. We point out that defendant was found guilty of two class "A" felonies, first degree sexual abuse and first degree murder. See Iowa Code §§ 709.1, .2, and 707.1, .2 (1983), respectively. Conviction of a class "A" felony requires a life sentence. See Iowa Code § 902.1 (1983). Iowa Code section 901.8 gives the trial court statutory authority to impose consecutive sentences on multiple counts. We hold, therefore, that the trial court was correct in imposing consecutive sentences in this case.

Because we uphold the trial court on all of the issues raised before us on appeal, we affirm the judgment and sentence.

AFFIRMED.