IN THE COURT OF APPEALS OF IOWA

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No. 3-349 / 92-859

FILED
OCT 28 1993
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ROSS ANTHONY NEYENS,

Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Neyens appeals his conviction, following a jury trial, of murder in the first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Fred H. McCaw, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ. Donielson, J., takes no part.

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OXBERGER, C.J.

The State charged Ross Anthony Neyens with first-degree murder for the stabbing death of his girlfriend, Heidi True. Neyens filed a notice of intent to rely upon diminished capacity, intoxication and insanity defenses.

Neyens sought to prevent the State from introducing autopsy photographs and a murder scene videotape at trial. The district court overruled the motion but indicated it would consider specific objections at trial.

The State presented evidence that Heidi True was stabbed twenty-six times including two fatal wounds to the heart. True's daughter testified Neyens and her mother had a fight in the bathroom. She heard Neyens yell "slut" and a loud bang. She then ran to a neighbors.

Before the daughter's testimony, she was asked a number of questions to determine whether she could distinguish between the truth and a lie. The court found her competent to testify and ruled she could testify without taking an oath. Defense counsel approached the bench and apparently objected, off the record, to her testifying without an oath. The parties dispute whether the district court asked defense counsel to object "before the jury" or "on the record." The daughter testified without taking the oath.

The jury found Neyens guilty as charged. The court denied Neyens' motion for new trial, entered judgment, and sentenced Neyens to life in prison. Neyens appeals.

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I. Jury Instruction

Neyens first contends Jury Instruction 49 unconstitutionally relieved the State of its burden of proof and unduly emphasized the State's evidence concerning the murder weapon. When the defendant alleges the denial of a constitutional right, appellate review is de novo. State v. Walton, 424 N.W.2d 444, 447 (Iowa 1988).

Instruction No. 49 reads:

> Malice aforethought, deliberation, premeditation, and specific intent to kill may be inferred from the use of a dangerous weapon accompanied by an opportunity to deliberate. A dangerous weapon is an instrument or device used in such a way as to indicate an intent to inflict death or serious injury, and when used is capable of inflicting death. A knife with a blade exceeding five inches in length is a dangerous weapon.

The due process clause of the fourteenth amendment requires the State to prove every element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970). Inferences and presumptions are integral to our adversarial system. Ulster County Court v. Allen, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777, 791 (1979). The court noted:

> It is often necessary for the trier of fact to determine the existence of an element of the crime-that is, an "ultimate" or "elemental" fact-from the existence of one or more "evidentiary" or "basic" facts. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently.

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> Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. The most common evidentiary device is the entirely permissive inference or presumption, which allows-but does not require-the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant. . . . [T]his permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof . . . .

Id. at 156-57, 99 S. Ct. at 2224-25, 60 L. Ed. 2d at 791-92 (citations omitted).

Neyens encourages us to rely on the court's decision in Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed 2d (1979). In Sandstrom, a first-degree murder case which turned on the application of "purposely or knowingly," the complained-of instruction stated, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 513, 99 S. Ct. at 2453, 61 L. Ed. 2d at 44. The Court rejected the instruction, finding it may have shifted the burden of proof to the defendant and relieved the State of its burden to to prove the intent element of the offense beyond reasonable doubt. Id. at 524, 99 S. Ct. at 2459, 61 L. Ed. 2d at 51.

We distinguish the instruction given in Sandstrom from the instruction in Neyens' case. The instruction given in Sandstrom may be interpreted to require the defendant to prove he did not intend the the ordinary consequences of

his acts. See Sandstrom, 442 U.S. at 524, 99 S. Ct. at 2459, 61 L. Ed. 2d at 51. In Neyens' case, the complained of instruction merely stated that intent may be inferred from the use of a dangerous weapon.

Iowa Criminal Jury Instruction 700.8 utilizes the language "[y]ou may, but are not required to, infer . . ." This language passes constitutional muster. See State v. Elam, 328 N.W.2d 314, 318 (Iowa 1982). Thus, the question then turns on whether this language differs so greatly from the constitutionally proper language of the uniform instruction that it constitutes a denial of due process.

The examination of the constitutionality of an instruction "requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom, 442 U.S. at 514, 99 S. Ct. at 2454, 61 L. Ed. 2d at 45. Furthermore, it is "very significant" that an instruction is couched in permissive words. State v. Rinehart, 283 N.W.2d 319, 322 (Iowa 1979). In Neyens' case, the language of the instruction is clearly permissive: "may be inferred." A reasonable juror, given such language, could not have concluded the instruction required such an inference. In addition, the permissive language present with these instructions included the presumption of innocence and the State's burden of proof beyond reasonable doubt. Finally, we note the court upheld

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the use of an instruction which permitted such an inference from the use of a dangerous weapon. See Waterbury v. State, 387 N.W.2d 309, 312 (Iowa 1986).

We conclude the complained-of instruction passes constitutional muster and in no way relieved the State of its burden to prove each element beyond reasonable doubt.

Neyens next contends the instruction complained of improperly emphasized certain State's evidence, i.e., the knife. Iowa Criminal Jury Instructions 200.21 and 700.8, read together with Waterbury, 387 N.W.2d at 312, Iowa Code section 702(7) (1991) and the above discussion, establish the propriety of the instruction. We find no error.

II. Admissibility of A Crime Scene Videotape and Autopsy Photographs

Neyens next challenges the admission of a videotape of the crime scene and autopsy photographs. He claims the exhibits were gruesome and unduly prejudicial.

We review for an abuse of discretion. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984).

"[D]eath 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). The test for admitting photographs is two-fold: (1) the evidence must be relevant and (2) if so, does the probative value outweigh the prejudicial effect. State v. Brown, 397 N.W.2d 689, 700 (Iowa 1986).

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In this case, the autopsy photographs depicted the stab wounds after the body had been washed but before any autopsy incisions had been made. The videotape depicted the murder scene. We find these exhibits relevant to show the frequency and location of the wounds, the evidence and the spatial relationships at the murder scene. The medical expert testified the exhibits accurately represented the victim's injuries and extensively relied on the photographs to illustrate his testimony. Based on these factors, we conclude the complained of exhibits were relevant and the probative value was not outweighed by any prejudicial effect. We find no abuse of discretion.

III. Witness Oath Requirement

Finally, Neyens contends the district court erred in failing to administer an oath to the victim's nine-year-old daughter prior to allowing her to testify.

Failure to put a witness under oath may implicate a defendant's right to due process. See In re J.D.S., 436 N.W.2d 342, 347 (Iowa 1989). We then review de novo on the totality of the circumstances. State v. Walton, 424 N.W.2d 444, 447 (Iowa 1988).

Iowa Rule of Evidence 603 provides:

> Oath or affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

No special verbal formula is required to satisfy this rule. Fed. R. Evid. 603 (advisory committee's note).

After posing numerous questions to the witness regarding the difference between telling the truth and lying, the prosecutor asked the witness the following question:

> Q. And are you going to answer the questions that are -- people ask you today by telling the truth?

The witness replied, "Yes".

We find this question and answer, combined with the questioning regarding the difference between lying and telling the truth, sufficient to impress upon the witness her duty to tell the truth. See In re J.D.S., 436 N.W.2d 342, 347 (Iowa 1989). We affirm the decision of the district court.

We have considered Neyens' complaints on appeal and affirm the district court in all respects.

AFFIRMED.