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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 26, 1985

vs.)

PATRICK DWAYNE MORGAN,) 5-10
83-1454

Defendant-Appellant.)

Appeal from the Iowa District Court for Scott County - David J. Sohr, Judge.

Defendant appeals from his conviction of second-degree murder in violation of Iowa Code section 707.3. On appeal, he asserts that insufficient evidence was presented to support the jury verdict. AFFIRMED.

Charles L. Harrington, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

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

Defendant, Patrick Morgan, was charged with second-degree murder in violation of Iowa Code section 707.3, for the death of his three-month-old daughter. Testimony at trial revealed that defendant summoned emergency medical personnel to the apartment where he lived with his girlfriend and daughter. The medical personnel found the infant dead on a mattress.

The State proceeded on a theory that, in order to stop the infant from crying, defendant forced her face into a mattress, causing her to suffocate. The defense maintained that the infant was the victim of sudden infant death syndrome (SIDS).

At trial, the county medical examiner, Rollin Perkins, concluded that suffocation was the cause of the infant's death. He testified that his observations of facial lividity patterns (marks on the skin caused by blood settling in places where there is pressure on the skin) in SIDS cases indicated that children die with their heads turned to either side. He further stated that the lividity markings on the victim's face showed rings around the nose and mouth, indicating that she died face down. This physician estimated that he examined four to ten SIDS cases a year.

The pathologist who performed the autopsy also eliminated SIDS as a cause of the infant's death. He stated that during autopsies on fifteen to twenty SIDS cases, he did not observe a lividity pattern similar to that found on the alleged victim. This physician also found that the infant had healing bone fractures and severe rashes. These factors, combined with the suspicious location of the lividity pattern, led him to conclude that death was from suffocation rather than SIDS.

An assistant professor of pediatrics from the University of Iowa also testified that he did not believe that the child died from SIDS. He stated that the lividity pattern on the infant indicated that it had been restrained in the face-down position. He also gave the opinion that the child had been abused as

indicated by fractures and rashes on the child's body. This physician had previously handled between three and four SIDS cases.

A pediatric radiologist from the University of Iowa, who examined the child after she died, found evidence of fractures on the infant. In his opinion, the infant died of child abuse. Although he stated that the lividity markings on the child were consistent with the finding of suffocation, he was unable to determine the proximate cause of the infant's death.

The defense presented testimony from a physician who observes between two hundred and two hundred fifty SIDS cases annually. This physician testified that 30% to 40% of the SIDS cases she handled exhibited lividity patterns indicating that the children died face down. She stated that there was no significance to the fact that the infant died in the face-down position. This physician concluded that either SIDS or suffocation was a possible cause of the infant's death.

The manager of the apartment building where the defendant lived testified that the infant would cry for long periods of time. On one occasion the manager stated that she heard Morgan yell: "I can't stand any more. If you don't shut up I'll kill you both." Another neighbor also testified that he would hear the child crying for long periods. Two neighbors testified that on the morning of the child's death, they heard the child cry for a long period and then suddenly stop. The defendant's girlfriend testified that on several occasions she saw defendant push the infant's face into a mattress in order to stop her from crying. The defendant denied ever having held the infant's head in the mattress.

On appeal, defendant asserts that insufficient evidence was presented to support the jury verdict. Specifically, he claims that the court erred in overruling his motion for a directed verdict and motion for a new trial on the grounds that the State did not present sufficient evidence that the victim died as a result of a

criminal act and that the State did not present sufficient evidence that the defendant acted with malice aforethought.

It is a well-settled rule that a trial court's refusal to direct a verdict for a defendant will withstand challenge if there is substantial evidence to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Substantial evidence means evidence that 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).

When reviewing the sufficiency of evidence, courts consider all the evidence in the light most favorable to the State. Robinson, 288 N.W.2d at 340. All legitimate inferences which may fairly and reasonably be deducted therefrom will be accepted. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Circumstantial and direct evidence have equal probative value. The evidence, whether direct or circumstantial, must do more than create speculation, suspicion or conjecture. Schrier, 300 N.W.2d at 308.

In this case, the record clearly discloses sufficient evidence from which a jury could find that the defendant had committed the crime. Four doctors testified that there were lividity marks around the face and nose, indicating that the child died face down rather than having its head on one side or the other. These marks combined with the severe rash and fractures indicating an abused child led these doctors to conclude that the child died of suffocation rather than sudden infant death syndrome. This medical testimony combined with the testimony of the neighbors of the child's long crying bouts and of how the child suddenly stopped crying on the morning of her death, establish evidence from which a jury could find the defendant had committed the crime.

The record also contains sufficient evidence from which a rational juror could find that the defendant acted with malice aforethought.

> Malice, in homicide cases called malice aforethought, is "that condition of mind which prompts one to do a wrongful act intentionally, without legal justification or excuse." State v. McCollom, 260 Iowa 977, 988, 151 N.W.2d 519, 525 (1967). It need not exist for any specific period of time. It is sufficient if it exists any time before the killing. State v. Hofer, 238 Iowa 820, 824, 28 N.W.2d 475, 482 (1947).

State v. Love, 302 N.W.2d 115, 119 (Iowa 1981).

The acts of the defendant may be evidence of malice. E.g. Id. (evidence of use of a deadly weapon, accompanied by the opportunity to deliberate is also evidence of malice). After examining the record, we conclude there is evidence from which a rational juror could conclude that the defendant acted with malice aforethought.

The findings of the trial court are affirmed.

AFFIRMED.