IN THE COURT OF APPEALS OF IOWA

No. 2-111 / 89-1803

FILED
JUN 25 1992
CLERK SUPREME COURT
1250

STATE OF IOWA,

Appellee,

vs.

DENNIS E. SIEVERT,

Appellant.

Appeal from the Iowa District Court for Scott County, L.D. Carstensen, Judge.

Sievert appeals from his conviction, following a jury trial, for murder in the first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, William E. Davis, County Attorney, and James D. Hoffman, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden, J, and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

Dennis Sievert was accused of the stabbing death of his live-in girlfriend, Virginia Liendo. A jury found Sievert guilty of murder in the first degree and he has appealed from the resulting conviction. We affirm the conviction.

On March 29, 1989, Sievert, Liendo, Reuben Anderson and Doug Pendegosh were drinking beer at the New Diamond Tap . At about 2:00 p.m. Sievert bought two twelve-packs of beer and a bottle of wine. The four left the bar and proceeded to Liendo's apartment. They continued to drink, and at some point Sievert passed out. Liendo, Anderson and Pendegosh left the apartment, taking the alcoholic beverages with them. Eventually they returned to the New Diamond Tap where they drank more beer. It is unclear from the testimony the precise time Liendo returned to the apartment.

Liendo's body was discovered in the apartment on the afternoon of March 30, 1989. Medical evidence indicated Liendo probably died that day at about 5:00 a.m., although she could have died as early as 11:00 p.m. March 29 or as late as 11:00 a.m. on March 30. Her body had multiple stab wounds. Most of these wounds were quite shallow and would not have been fatal, although one wound to the right front shoulder caused quite a bit of bleeding. The fatal stab wound was made to Liendo's heart.

There were no signs anyone had broken into the apartment or of an altercation in the apartment. Liendo's body did not apparently have any defensive wounds, wounds made when a person is trying to defend herself against an attack. Her blood alcohol content was .14 percent.

Several items taken from the crime scene had Liendo's blood on them. A pillow case and the bathroom door frame had Sievert's blood on them. A sheet and comforter had blood from both Sievert and Liendo. A shirt identified as Sievert's had blood stains from both Sievert and Liendo. Furthermore, a knife found by Liendo's body had Sievert's bloody palm print on it.

There is no evidence concerning Sievert's whereabouts until the afternoon of March 30, when Sievert met Ray Post. At that time Sievert said he had not seen Liendo for two or three days. The two went to a bar and had a few drinks. Then Post took Sievert home and washed his clothes for him. Sievert spent the night at Post's home.

On March 31, 1989, Post bought Sievert a bottle of vodka. Apparently Sievert drank from the bottle until he fell asleep or passed out. That evening, between 6:00 and 6:30, the police went to Post's home. Sievert was sleeping when the police arrived. After shaking Sievert and yelling at him, the police finally woke Sievert by pouring cold water on his face. Sievert voluntarily accompanied the police to the station.

Sievert was given a Miranda warning at the police station. He allowed officers to take his clothes and was given a jumpsuit to wear. (The test of his clothes showed a spot of Liendo's blood on the back of his belt.) Officers noted Sievert had a small cut on his face and another one on his arm. During the interview Sievert stated that on March 29, he woke up after Liendo, Anderson and Pendegosh left Liendo's apartment and found they had taken the alcoholic beverages, which made him mad. He said Liendo came home soon after that and she was bloody. He said she fell on the kitchen floor and asked for help, but he refused because he was mad at her. He then left. He denied killing Liendo. Sievert answered questions for about thirty or forty minutes and then exercised his right to remain silent. He also asked for an attorney. Sievert's statements after this were suppressed by the district court. Sievert was returned to Post's home at about 11:00 p.m.

On April 1, 1989, at about 11:30 a.m., officers picked Sievert up and asked him to consent to a blood test. Tests showed he had a blood alcohol content of .464 percent.

On April 4, 1989, Sievert came to the police station to show officers a bump on his head in an attempt to factually establish an alibi. Although earlier he had told the officers he was awake when Liendo returned to the apartment, this time he said when he woke up Liendo was

already in the kitchen bleeding to death. Sievert was interviewed again on April 5, 1989. He was given a Miranda warning at both of these interviews. At the conclusion of the last interview, Sievert was arrested.

Prior to trial, Sievert filed a motion to suppress his statements made during these interviews on the ground that he was so intoxicated that he was not competent to waive his Miranda rights, to give a voluntary statement or to voluntarily relinquish his clothes. The court suppressed Sievert's statements made on March 31 after Sievert invoked his right to remain silent. The court denied the remainder of Sievert's motion.

Sievert's theory during the trial was that Liendo had committed suicide. He presented expert medical testimony to show her wounds could have been self-inflicted. He also presented evidence to show she had threatened suicide in the past. Sievert's motion for judgment of acquittal was overruled. The case went to the jury and Sievert was convicted of first-degree murder.

I. Sievert contends the district court should have granted his motion to suppress all of his statements and the physical evidence of his clothes. Sievert alleges he was unable to validly waive his Miranda rights at any of the interviews because he was intoxicated and was in poor physical condition due to the fact he had been on a drinking binge for three months. See Miranda v. Arizona,

384 U.S. 436, 865 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In the alternative, he argues that if a constitutional violation is found only as to the March 31, 1989, interview, his subsequent statements should be suppressed because they are the fruit of a poisonous tree.

Our scope of review on this issue is to examine the totality of the circumstances to determine the voluntariness of defendant's statements. See Van Hoff v. State, 447 N.W.2d 665, 673 (Iowa App. 1989).

A. Since Miranda, we have a dual test in determining the admissibility of inculpatory statements by a criminal defendant. State v. Davis, 446 N.W.2d 785, 788 (Iowa 1989). First, we ascertain whether or not Miranda warnings are required and if so, whether they were properly given. Id. Second, we determine whether the statement is voluntary and satisfies due process. Id. There is a difference between voluntary waivers of Miranda rights and voluntary statements. Id.

The State has a heavy burden of proving that defendant voluntarily, knowingly and intelligently waived his Miranda rights. State v. Rhiner, 352 N.W.2d 258, 261 (Iowa 1984). An express written waiver is usually strong proof of the validity of that waiver. Fryer v. State, 325 N.W.2d 400, 409 (Iowa 1982). The question is whether the defendant was capable of understanding and knowingly waiving his rights. Id.

We find Sievert's waiver of his rights was knowing, voluntary and intelligent. He signed a written waiver of his rights. He voluntarily appeared at the police station. The police officers who were present testified Sievert appeared alert and ready to answer questions. Furthermore, Sievert was clearly able to invoke his right to remain silent and his right to counsel when he wished to do so, as evidenced at the March 31, 1989, interview. We also find no evidence of coercive police activity. We conclude Sievert voluntarily waived his Miranda rights.

B. We next determine whether Sievert's statements were voluntary. The test for voluntariness is whether the totality of circumstances demonstrates that the statement was 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. Vincik, 398 N.W.2d 788, 790 (Iowa 1989). The test for voluntariness encompasses the characteristics of the accused and the details of the interrogation process. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975). Coercive police activity is a necessary predicate to a finding that a confession is not voluntary within the meaning of the due process clause. Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473, 484 (1986); State v. Davis, 446 N.W.2d 785, 789 (Iowa 1989).

Intoxication to the point of incoherence or mania may be grounds for exclusion either on the basis of involuntariness or unreliability. State v. Youngbear, 229 N.W.2d 728, 736 (Iowa 1975); Van Hoff v. State, 447 N.W.2d 665, 673 (Iowa App. 1989). Generally, intoxication, standing alone, does not render inculpatory statements involuntary. State v. Edman, 452 N.W.2d 169, 170 (Iowa 1990). A defendant's insobriety is merely one factor to be considered in the totality of the circumstances. Id. A defendant must show his insobriety undermined his will so as to compel him to respond to questions which he would not otherwise have freely answered. Id. at 171.

There is no evidence in this case Sievert was intoxicated to the point of incoherence or mania during any of his interviews with the police. Thus, his intoxication is merely one factor to be considered in the totality of the circumstances. We conclude Sievert's s ements were voluntary for the reasons discussed above concerning Sievert's waiver of his Miranda rights.

C. Sievert also claims he did not voluntarily relinquish his clothes to the police officers. The State has the burden to establish the voluntariness of a defendant's consent by a preponderance of the evidence. State v. Garcia, 461 N.W.2d 460, 462 (Iowa 1990). A consent may be involuntary where a defendant is so intoxicated his faculties are impaired to the point he is

disabled from consenting to the search. See State v. Erickson, 362 N.W.2d 528, 531 (Iowa 1985).

We conclude Sievert voluntarily consented to the search of his clothes, and for the same reasons we have discussed above in this section.

II. Sievert's second argument is that the State failed to prove beyond a reasonable doubt that he committed murder in the first degree. He points out that the State did not show that the knife with his palm print was the murder weapon. The palm print showed the knife was held in such a manner that the sharp edge of the blade was toward the outside of the hand. The State's theory was that Sievert stood behind Liendo as he stabbed her. Sievert argues this theory is inconsistent with the evidence that Liendo was immobilized, since she had no defensive wounds. However, there were no marks to show she had been bound. Sievert states he and Liendo were about the same size and he was weak from his drinking binge, therefore, he would be unable to hold Liendo immobile with his arm while he stabbed her.

Sievert also points out evidence given by John Rhodes, a transient who lived on the railroad tracks in Davenport, that Reuben Anderson wrote him a note which said, "Don't ever leave me, or I'll kill you like I killed her." Anderson subsequently burned the note.

Our scope of review on this issue is for the correction of errors of law. State v. Allen, 348 N.W.2d 243, 247

(Iowa 1984). We will affirm the verdict of the jury if it is supported by substantial evidence. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984). Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988).

We find there is substantial evidence in the record to support the verdict. While there is conflicting evidence in this case, it was up to the jury to determine which evidence was most credible. We conclude Sievert's motion for judgment of acquittal was properly denied.

III. Sievert contends the district court erred in submitting the case on the theory of felony murder when the felony alleged was willful injury. These contentions are answered in the decisions of State v. Ragland, 420 N.W.2d 791 (Iowa 1988) and State v. Beeman, 315 N.W.2d 770 (Iowa 1982), which hold that willful injury may serve as the basis of a felony murder charge.

IV. Finally, Sievert contends he was denied the effective assistance of counsel at his trial. Our review of the record shows that it does not contain sufficient facts to evaluate counsel's performance. See Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Sievert may raise this issue in an action for postconviction relief.

V. We have examined all of the issues raised by the defendant Sievert and affirm the district court.

AFFIRMED.