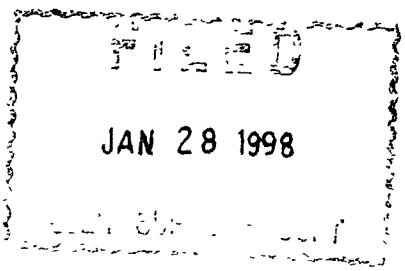
IN THE COURT OF APPEALS OF IOWA

No. 7-766 / 97-418

000397



STATE OF IOWA,
Appellee,

vs.

TRAVIS JAMES HERMAN,
Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Travis Herman appeals a judgment and sentence entered upon his conviction of second-degree murder, willful injury, extortion, and conspiracy to commit extortion, in violation of Iowa Code sections 707.3, 708.4, 711.4, and 706.1(a) and (b) (1995). **AFFIRMED IN PART; REVERSED IN PART.**

Patrick W. O'Bryan, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Sackett and Vogel, JJ.

VOGEL, J.

Travis Herman appeals a judgment and sentence entered upon his conviction of second-degree murder, willful injury, extortion, and conspiracy to commit extortion, in violation of Iowa Code sections 707.3, 708.4, 711.4, and 706.1(a) and (b) (1995). Herman contends (1) the district court abused its discretion by allowing the State to reopen its case and lay foundation for evidence concerning blood analysis; (2) the court improperly instructed the jury on the elements of willful injury; (3) there was insufficient evidence to support his convictions of extortion and conspiracy to commit extortion; and (4) the court improperly defined second-degree murder in the instructions.

Background facts. Herman and Stacy Grunder lived together in an apartment building owned by Harold Sanders. Sanders served a notice to quit on Grunder specifically referencing "another person not registered on your lease or application for occupying the premises without permission . . . . " Grunder and Herman believed Sanders wanted Herman out of the way so Sanders could continue an intimate relationship with Grunder. Herman and Grunder informed Sanders' wife of the affair in an effort to have the notice to quit rescinded. Sanders' wife refused to believe the allegation without either an admission by her husband or photographs.

On September 1, 1996, Sanders came to the couple's apartment to collect rent. Herman hid in a closet with a camera and a kitchen knife. When he heard sounds

indicating Sanders and Grunder were having sex, he emerged and took compromising photographs. Sanders tackled Herman to the floor in a struggle for the camera. Herman stabbed Sanders twice in the back with the knife as the struggle continued. Sanders eventually left the apartment, but subsequently died from his injuries.

I. Reopening of case. Herman contends the district court abused its discretion in allowing the State to reopen its case to lay the foundation for admission of samples of blood taken from Herman and Grunder. Expert testimony offered by the State in its case in chief was based in part on a comparison of the samples with blood found at the crime scene. Herman had moved to strike the testimony for lack of foundation immediately after the State had rested.

A district court's ruling allowing a party to reopen its case is discretionary and we will not reverse the ruling unless an abuse of that discretion is demonstrated. *State v. Teeters*, 487 N.W.2d 346, 348 (Iowa 1992); *see State v. Jefferson*, 545 N.W.2d 248, 250 (Iowa 1996).

We weigh the following factors in determining whether a case should be reopened to allow for additional evidence: (1) the reason for the failure to introduce the evidence; (2) the surprise or unfair prejudice inuring to the opponent that might be caused by introducing the evidence; (3) the diligence used by the proponent to secure the evidence in a timely fashion; (4) the admissibility and materiality of the evidence; (5) the stage of the trial when the motion is made; (6) the time and effort

expended upon the trial; and (7) the inconvenience reopening the case would cause to the proceeding. *Teeters*, 487 N.W.2d at 348.

The State explained that it chose to withhold the introduction of the blood specimens into evidence because of the health risk if the jury were to examine such evidence. Moreover, there was no objection to the foundation of the State's expert, Linda Sawer's, testimony concerning the blood samples. The State argued that Sawer's testimony and report in the record disposed of the need to offer the actual specimens into evidence. *See State v. Moreland*, 201 N.W.2d 713, 714-15 (1972) (holding district court did not abuse its discretion in reopening case to allow State to introduce hashish as evidence when initially the only evidence in the record was the facts of the case). We find the court did not abuse its discretion in allowing the record to be reopened for this limited purpose.

Apart from the blood evidence introduced at the reopening, there would have been evidence beyond a reasonable doubt of Herman's guilt. During the 911 call, Grunder was heard exhorting Herman to kill Sanders, and Herman was heard saying among other things to Sanders, "You're dead." Moreover, Herman admitted to police the plan to photograph Sanders in an compromising position with Grunder. Thus, the net outcome of the trial would not have changed even if we excluded the blood specimens and foundation testimony.

II. Willful injury instruction. Herman also contends the court erred in instructing the jury on the elements of willful injury. He argues the instructions used by the court were flawed in that they omitted the "justification" language found in Iowa Code section 708.4 (1995).

We find error was not preserved on this issue as no objections were lodged by counsel against Jury Instruction No. 20 or No. 22. A defendant cannot amplify or change the objection on appeal. *State v. LeCompte*, 327 N.W.2d 221, 223 (Iowa 1982).

Even if we reached the merits of this issue, the omitted statutory language concerning "justification" was included in several other instructions given to the jury. *See State v. Lindsey*, 302 N.W.2d 98, 104 (Iowa 1981) ("If the instructions when viewed as a whole adequately charge the jury on the law involved in the case . . . the verdict should not be disturbed."); *accord Clinton Land Co. v. M/S Assoc., Inc.*, 340 N.W.2d 232, 234 (Iowa 1983) ("All instructions must be read and construed together, not piecemeal or in artificial isolation."); *Sanders v. Ghrist*, 421 N.W.2d 520, 522 (Iowa 1988) (same).

While it may be more clear if "justification" were incorporated into the willful injury instruction, it does not necessarily mean that the jury could not draw on the definition of justification given elsewhere in the instructions and apply it to the willful injury instructions.

III. Sufficiency of evidence. Herman next argues there was insufficient evidence to support his convictions of extortion and conspiracy to commit extortion. He contends there was no evidence that he or Grunder threatened Sanders.

We review a denial of a motion for judgment of acquittal based on the alleged insufficiency of the evidence on a "substantial evidence" standard. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). We consider the evidence in the light most favorable to the State. *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988).

Our supreme court in *State v. Crone*, 545 N.W.2d 267, 271 (Iowa 1996), discussed the "threaten" element of "extortion." The court gave the word "threaten" its "ordinary meaning," and deemed it only necessary that the threat be definite and understandable by a reasonable person possessing ordinary intelligence. Iowa Code section 711.4 delineates several acts constituting extortion, one of which was as incorporated in Jury Instruction No. 24: "A person commits extortion if . . . [he] [t]hreatens to expose any person to hatred, contempt, or ridicule."

Herman argues he at no time threatened to expose Sanders to hatred, contempt or ridicule. He claimed the photos were taken to convince Mrs. Sanders that her husband was having an affair and some advantage would be gained by Grunder and Herman in having Mrs. Sanders aware of the situation. Mrs. Sanders testified no threats were made to her by either Herman or Grunder. Herman stated he wanted the

The State argues the jury could have found Herman intended to use the photos to undermine Sanders' good reputation in the community. That may have been Sanders' immediate fear as Herman began snapping the camera. We are, however, unable to find support for that speculation in the record. The question we must answer is whether there is substantial evidence in the record that the act of taking the photographs rose to the level of a threat. The evidence supports the photos were taken to prove to Mrs. Sanders that her husband was having an affair and ultimately to have Sanders leave Herman and Grunder alone. Perhaps threats would have come later, but as of the day the photos were actually taken, we do not find substantial evidence in the record to support extortion or conspiracy to commit extortion. Accordingly, we reverse Herman's convictions under Iowa Code section 711.4 and under 706.1.

IV. Second-degree murder instruction. Herman claims the court erred in defining second-degree murder because it did not provide a definition of "specific intent."

We find error was not preserved on this issue as counsel affirmatively stated he had no objection to Jury Instructions 16 and 34. *See State v. Hepperle*, 530 N.W.2d 735, 740 (Iowa 1995). Assuming we did reach the merits, we note Herman's claim would fail as Jury Instruction No. 13 contains a definition of "specific intent." Again, the jury was told in Jury Instruction No. 69 to "consider all of the instructions together."

Having carefully considered the arguments properly before us, we affirm Herman's convictions and sentences under Iowa Code section 707.3 and 708.4. We reverse his convictions under Iowa Code sections 711.4 and 706.1.

AFFIRMED IN PART; REVERSED IN PART.

Sackett, J., concurs; Cady, C.J., concurs in part and dissents in part.

CADY, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I dissent because I would conclude sufficient evidence exists to support the conviction for extortion and conspiracy. I otherwise concur.

A threat, under our extortion statute, has been interpreted to mean to provide punishment, reprisal, or other distress. *State v. Crone*, 545 N.W.2d 267, 271 (Iowa 1996). It does not need to be explicit, but may be made by innuendo or suggestion so a reasonable person would understand it to be a threat. *Id.*

In this case, a reasonable juror could conclude Herman's scheme and conduct in taking the compromising photographs of Sanders also constituted a threat to expose Sanders to contempt or ridicule.