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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed September 9, 1977
Appellee,	)	
vs.	)	195 / 59580
STEPHEN ALLEN KENYON,	)	
Appellant.	)	

Appeal from Jones District Court - Clinton E. Shaeffer, Judge.

Defendant appeals conviction under Section 697.4 raising issues of voluntariness of statements made in a custodial hearing, meaning of "inhabited dwelling house or building" and "incendiary device" as contained in the statute. - Judgment affirmed.

James G. Thomas, of Anamosa, for Appellant.

Richard C. Turner, Attorney General of Iowa, Van Zimmer, Assistant Attorney General of Iowa, and Stephen E. Locher, Jones County Attorney, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell and Oxberger, JJ; Carter, J. takes no part.

PER CURIAM

Defendant, Stephen Allen Kenyon, appeals his conviction by jury of the crime of damage by high explosives in violation of § 697.4, The Code. On appeal, defendant contends the trial court erred in: 1) overruling his motion to suppress inculpatory statements made in a custodial interrogation and 2) overruling his motion for a directed verdict in that the State failed to show an intent to destroy or injure an "inhabited dwelling house" and that a sock filled and saturated with lighter fluid is an "explosive or incendiary device or molotov cocktail" within the meaning of § 697.4.

When a criminal defendant challenges statements made to police or state officials as involuntary, he is entitled to a separate hearing on their admissibility, Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); State v. Walton, 247 N.W.2d 736 (Iowa 1976), and the State has the burden of proving the voluntariness of the statements by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618, 627 (1972); State v. Conner, 241 N.W.2d 447, 454 (Iowa 1976); State v. Fetters, 202 N.W.2d 84, 88 (Iowa 1972). It is then the responsibility of the trial judge to determine from the totality of the circumstances whether the statements made were in fact voluntary. Boulden v. Holman, 394 U.S. 478, 480, 89 S.Ct. 1138, 22 L.Ed.2d 433, 437 (1969). It cannot depend on any one factor for determination.

If the defendant's will was overborne or if his confession was not the product of a rational intellect and a free will, his confession is inadmissible because coerced. Townsend v. Sain, 372 U.S. 293, 307, 83 S.Ct. 745, 9 L.Ed.2d 770, 782 (1963); State v. Cullison, 215 N.W.2d 309, 314 (Iowa 1974). Further, a request for counsel during a custodial interrogation renders any subsequent responses by the accused subject to constitutional proscription. State v. Hilpipre, 242 N.W.2d 306 (Iowa 1976); State v. Moon, 183 N.W.2d 644 (Iowa 1971). Additionally, any inculpatory statements in response to threats of punishment or offers of leniency are similarly involuntary and inadmissible. See **Hilpipre**, supra.

Since this assignment of error presents federal constitutional issues, we make

an independent evaluation of the evidence from which the assertions of unconstitutionality arise. Our review is de novo. State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976); State v. Conner, 241 N.W.2d 447, 453 (Iowa 1976). Defendant was in a custodial interrogation by virtue of his presence in the Men's Reformatory; accordingly, the **Miranda** rights attached. Our focus is whether defendant with a full knowledge of his legal rights knowingly, voluntarily, freely and intelligently relinquished those rights. State v. Cooper, 217 N.W.2d 589, 597 (Iowa 1974). See also **Hilpipre**, supra; State v. Franks, 239 N.W.2d 588 (Iowa 1976).

From a review of the record we find the State sustained its burden of proving voluntariness by a preponderance of the evidence and that the trial court was correct in overruling defendant's motion to suppress. It was in the best position to view the witnesses and assess their credibility. Once the trial court determined the admissibility of the incriminating statements, the weight to be given those statements was for the finder of fact. Defendant then exercised the opportunity to introduce evidence of surrounding circumstances in an effort to persuade the jury. State v. Holland, 258 Iowa 206, 215, 138 N.W.2d 86, 91 (1965). See also **Fetters**, supra.

The second contention of defendant is that the trial court erred in overruling his motion for directed verdict. In making a determination as to the propriety of the trial court's ruling on a motion for directed verdict in a criminal case, this court views the evidence in the light most favorable to the state regardless of whether it is contradicted and every legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). In light of this principle, the cause in a criminal action should be submitted to the jury and the court should not direct a verdict of acquittal if there is any substantial evidence reasonably tending to support the charge. **Overstreet**, supra.

Defendant's first assertion is that the state failed to show by substantial evidence that cell 1046 was an inhabited dwelling house and thus failed to establish an essential element of the crime charged—"an intent to destroy or injure any inhabited dwelling house or building." Section 697.4, The Code. Evidence showed that cell 1046 contained a bed, stool, desk, sink, cabinet and shelf; it also showed

that damage was done to the bed as well as the back wall of the cell itself. The residents of the reformatory are locked in at night and they frequently refer to the cells as their "house". Whether a building is a dwelling house has been determined by whether it is used regularly as a place to sleep. See Herbert v. Maryland, 31 Md. App. 48, 354 A.2d 449 (1976); Poff v. State, 4 Md. App. 186, 241 A.2d 898 (1968). The question was one of fact properly submitted to the jury. State v. House, 223 N.W.2d 195, 196 (Iowa 1974). There was also substantial evidence for jury determination of whether the State had established intent to destroy or injure a building under the statute.

The second assertion is that the state failed to prove the sock filled with lighter fluid came within the definition of "explosive or incendiary device" as defined by §697.10(1) and (2), The Code. Defendant asserts proof was not established by expert testimony or lay opinion that lighter fluid and a ball of socks is an inflammable or combustible material. The question raised by defendant is essentially the same question decided by the Supreme Court in State v. Manning, 224 N.W.2d 232, 236 (Iowa 1974).

The court there was faced with the definition of an incendiary device under §697.10(2). The Court stated jurors do not abandon their common knowledge about the affairs of the world when they enter the jury box and that for all practical purposes, the material in question could be called gasoline or diesel fuel. It then held that a jury may reasonably find without expert testimony that the effects of those inflammable materials result primarily from combustion rather than from explosion. In the instant case, there was sufficient evidence and testimony concerning the use of lighter fluid for a similar conclusion. The chemical effects of lighter fluid are well within the common knowledge of the jury. The trial court did not err in overruling defendant's motion for a directed verdict based on the sufficiency of the evidence.

Affirmed.