



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	Filed August 30, 1983
	)	
vs.	)	
	)	
LAWRENCE DUANE HARTMAN,	)	<u>2-472</u>
	)	67794
Defendant-Appellant.	)	

Appeal from Black Hawk District Court on change of venue from Grundy -
L. D. Lybbert, Judge.

Defendant appeals from his conviction for murder in the second degree in violation of Iowa Code § 707.3 (1981), asserting: (1) that the withholding of certain allegedly exculpatory evidence denied him due process and that a new trial based upon the evidence should have been granted; (2) that there was no factual basis for submitting to the jury the lesser included offenses of voluntary manslaughter and murder in the second degree; and (3) that the evidence was insufficient to support the jury's verdict of guilty. AFFIRMED.

Thomas J. Levis and Lawrence F. Scalise of Scalise, Scism, Gentry, Brick & Brick, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Michael K. Jordan, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant, Lawrence Hartman, appeals from his conviction for murder in the second degree in violation of Iowa Code § 707.3 (1981), asserting: (1) that the withholding of certain allegedly exculpatory evidence denied him due process and that a new trial based upon the evidence should have been granted; (2) that there was no factual basis for submitting to the jury the lesser included offenses of voluntary manslaughter and murder in the second degree; and (3) that the evidence was insufficient to support the jury's verdict of guilty. We affirm.

Our scope of review is on assigned errors at law. Iowa R. App. P. 4.

I.

At about 3:15 A.M. on September 20, 1980, defendant Lawrence Hartman summoned an ambulance to his home because he believed his wife to be dead. Defendant indicated that he found his wife's body at the foot of the basement stairs, apparently the victim of an accidental fall. The first doctor on the scene suspected that the victim's apparent injuries were not consistent with an accidental fall and requested that an autopsy be performed. The autopsy was performed by a different doctor who testified that the injuries would be consistent with a fall down the stairs. Other doctors who later examined the autopsy reports and photographs differed in their opinions as to whether the victim's injuries could have resulted from a fall down the stairs.

Defendant was charged with murder in the first degree under Iowa Code § 707.2 (1979). Although there was evidence that defendant had kicked his wife on one previous occasion, there was no evidence that he beat her on the night she died. The time of death was estimated to be around 11:00 P.M. Defendant testified that from about 9:00 the evening of the 19th until about 2:00 the following morning, he was in the company of a Cedar Falls woman with whom he was having an affair. His paramour and her daughter confirmed that defendant had

been with them, but three of the State's witnesses contradicted defendant's alibi.

At the close of the evidence, the court overruled defendant's motion for acquittal. The trial court submitted to the jury the lesser included offenses of voluntary manslaughter and murder in the second degree over defendant's objection that no factual basis for such a submission existed. The jury returned a verdict of guilty on the latter charge. After unsuccessfully moving for new trial, defendant instituted this appeal.

II.

Defendant contends that the court erred in overruling his motion for a new trial. Defendant urged two grounds in support of his motion, the first of which was the claim that the State withheld exculpatory evidence.

During the course of trial, the State discovered a witness, Marley Knock, who testified that he saw defendant in a Parkersburg bar between midnight and 1:00 A.M. The defendant had testified that he was in the bar at about 5:00 that evening but was in Cedar Falls between midnight and 1:00 A.M. The evidence which formed the basis of defendant's motion consisted of statements made by the bartender of the Parkersburg bar, Gaylen Timmer, who had been interviewed by a police officer after Knock came forward with information that he had seen defendant. The results of that interview were not disclosed to the defense during trial. Defendant alleged that the bartender's evidence constituted exculpatory evidence wrongfully withheld and newly discovered evidence.

At a hearing on the motion, the bartender testified that the State's witness, Knock, had been in the bar since about 5:00 P.M. He further testified that he didn't remember defendant being in the bar later. When asked on cross-examination whether he remembered the State's witness Knock being there, the bartender responded, "I couldn't positively say yes or no. My memory isn't that well." He also stated that it was possible that defendant could have been there;

that he didn't know for sure if defendant was there at twelve or one o'clock. The bartender did say that it would be pretty hard for someone to be in the bar without being seen by him and that "[t]o my best recollection I did not see him (defendant)."

Defendant claims that they needed Timmer's testimony to refute Knock's statement that he saw defendant in the bar around midnight. They assert that Timmer's testimony would also impeach Knock since Timmer stated that Knock was probably drinking quite a few drinks that evening. By failing to inform defendant of Timmer's testimony, defendant now claims that the State violated its duty to inform him of exculpatory evidence and, therefore, denied him of his constitutional right to a fair trial. We disagree.

The Iowa Supreme Court recently set forth the legal standards governing this issue as follows:

Issues of suppression of exculpatory evidence are governed by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). In Brady, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218.

* * *

The standard of materiality where a general request for exculpatory evidence has been made is:

if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. at 112-13, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355.

State v. Beeman, 315 N.W.2d 770, 777-78 (Iowa 1982)(emphasis added). In addition, we note that defendant has the burden of demonstrating that the omitted evidence creates a reasonable doubt which does not otherwise exist. State v. Love, 302 N.W.2d 115, 123 (Iowa 1981).

The only evidence that the prosecution possessed in the instant case was that given it by Officer Penning. That evidence consisted of no written statements, but only Officer Penning's impression or understanding that Timmer did not remember whether the defendant was there. See State v. Hummell, 228 N.W.2d 77, 81 (Iowa 1975)(no exculpatory evidence suppressed where, among other things, witness' statement had not been reduced to writing and adopted by witness). Moreover, we fail to find that the statements made to Officer Penning were material to the guilt of the defendant. We do not believe disclosure to him of such statements would create a reasonable doubt. On cross-examination, Officer Penning testified regarding the content of his interview with Timmer:

A. I wanted to converse with him just to confirm if Mr. Hartman had been in his tavern on the night in question, and he just related that he couldn't recall and couldn't say one way or the other.

Q. That he couldn't say one way or other? A. That it was too long a time, that he wouldn't remember.

Q. That pretty much the extent of your conversation? A. I think the only other part would have been if I had asked him if there was any bartender so I could check with them.

Q. Do you recall what he said? A. And I thought he was the only one working that evening.

MR. KIVI: That's all. Thank you.

We must agree with the trial court that the report made by Officer Penning to prosecutors did not rise to the level of exculpatory or impeaching evidence; it only represented Penning's understanding that the bartender couldn't say whether defendant was in the bar at midnight or 1:00. See State v. Hall, 249 N.W.2d 843,

846 (Iowa 1977)(testimony which is not material but only potentially helpful need not be disclosed).

We also find the court did not abuse its discretion in overruling defendant's motion for a new trial based on newly-discovered evidence. Our rules put the burden on the defendant to show:

"(1) the evidence was discovered after trial and before judgment; (2) it could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted."

State v. Gilroy, 313 N.W.2d 513, 521-22 (Iowa 1981)(quoting State v. Farley, 226 N.W.2d 1, 3 (Iowa 1971)). The trial judge has broad discretion to determine whether there was other extensive evidence to support the guilty verdict such that it would not be likely that the new evidence would change the result. Gilroy, 313 N.W.2d at 522.

The bartender's testimony here was not clearly exculpatory as it is clear that he could not say for sure whether or not defendant was present around midnight. In addition, the statements that the State's witness, Knock, usually drinks quite a few drinks does not prove that Knock was, in fact, drunk on the evening of the 19th. Timmer did not recall whether Knock was drunk on the night in question; his statements are based only on his past observance of Knock. Further, the fact that Knock may have drank to excess in the past would only serve to impeach his statements and would not be material to the issue sufficient to warrant a new trial. Id. at 3. Accordingly, we find the defendant's first contention to be without merit.

III.

Defendant also claims the court erred in submitting the lesser included offenses of voluntary manslaughter and murder in the second degree on the ground that no factual basis existed to support these charges. To support submitting the

lesser included offenses, there must have been sufficient evidence adduced at trial which would support the conviction of such charge. State v. Reese, 259 N.W.2d 771, 778 (Iowa 1977)(setting forth two-step test to determine appropriateness of submitting lesser included offense).

Murder in the second degree is distinguished from murder in the first degree in that specific intent to kill is not necessary in order to prove murder in the second degree. Id. Specifically, section 707.3 provides: "A person commits murder in the second degree when he or she commits murder which is not in the first degree." Voluntary manslaughter requires proof that the person acted solely as the result of sudden, violent, and irresistible passion resulting "from serious provocation sufficient to excite such passion in a reasonable person." State v. Inger, 292 N.W.2d 119, 122 (Iowa 1980); Iowa Code § 707.4 (1979); see Iowa Code § 707.4 (1979); see Iowa Code § 707.4 (1979).

Having examined the record in detail, we believe the lesser included offenses were properly submitted. The defendant and the victim were experiencing marital problems and, on one previous occasion, the defendant used physical violence toward her when he was angry about her handling of financial matters. The defendant was having an affair with another woman and lied to his wife about having ended it. There is also evidence that defendant made statements after her death to the effect that he "didn't intend this to happen," that he "didn't want this to happen." We review this evidence in greater detail in the following division since the facts supporting our belief that the lesser included charges were properly submitted also support our finding that the evidence is sufficient to support the jury's verdict.

IV.

Defendant's final contention is that there is insufficient evidence from which a rational jury could find beyond a reasonable doubt that the defendant

committed murder in the second degree. The review governing this type of challenge was recently articulated in State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981), as follows:

When sufficiency of the evidence is challenged, as it was here by a motion for directed verdict, we review the evidence in the light most favorable to the state. The evidence must be such that, when considered as a whole, a reasonable person could find guilt beyond a reasonable doubt. State v. Welton, 300 N.W.2d 157, 159-60 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). All legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). A jury verdict is binding on us if there is substantial evidence to support it. By "substantial evidence" we mean evidence which could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. Id.

In Mulder the defendant challenged the sufficiency of the evidence supporting his conviction for first degree murder. There, as in the instant case, the State's case was entirely circumstantial. In affirming the conviction the court noted that "circumstantial evidence is as probative and convincing as direct evidence." Id. Additionally, we note that the credibility of witnesses is a matter for the factfinder. State v. Robinson, 288 N.W.2d at 341. With these general rules in mind, we set forth the facts the jury could have found beyond a reasonable doubt establish defendant's guilt, although some of them were sharply contested.

Defendant claims that he found his wife, Esther, at the bottom of the basement stairs and that he attempted to resuscitate her by blowing into her mouth and pushing on her chest. The time of her death was estimated to be approximately 11:00 P.M. Defendant asserted, as an alibi defense, that he had arrived at the Cedar Falls home of the woman with whom he was having an affair at about 9:00 P.M. and was with her until about 1:30 the following morning. Both the woman and her daughter testified, confirming defendant's presence with them.

However, the State offered witnesses whose testimony contradicted defendant's alibi. A high school student testified that she saw defendant at a

convenience store in the area of defendant's home at about 10:30 P.M. that evening. A guest at a party being given by defendant's son testified that he saw a truck that he believed to be defendant's drive by sometime between 11:00 P.M. and midnight. The son giving the party testified that he was sure he saw his father drive by the party. Another witness testified that he saw defendant in a Parkersburg bar between midnight and 1:00 A.M. While the convenience store cashier didn't recall seeing the defendant or the high school girl, we believe the jury could reasonably find that defendant lied about his activities and was in the vicinity of his home around the estimated time of the victim's death.

The defendant admitted to having marital problems with Esther for the approximate two and one-half years preceding Esther's death. He admitted that, at the time of the death, he had been lying to both Esther and his paramour. There was testimony indicating that defendant was frustrated by the way that Esther handled the family's finances. He did not have access to the family funds since Esther controlled the family resources; she obviously kept defendant on a tight budget, giving him money when he needed it for gas and necessities. On the evening of her death she had given defendant \$3.00 for gas. There is also evidence that defendant was providing financial assistance to his paramour. He leased a car for her and also bought her a diamond ring. The jury could have concluded that defendant was angered by the fact that Esther would not give him free access to the family money and that this anger may have motivated defendant to use physical violence toward Esther. This scenario had taken place in the past.

On one occasion, defendant became angry about the way that Esther handled their finances and kicked her. Defendant's son was angered that his father had hurt his mother and warned him never to use physical force toward her again. The son testified that defendant then responded that he would "do as he pleased."

On the morning that Esther's death became known, various persons went to

the house including the ambulance drivers, family, medical personnel, and police officers. Their testimony at trial reveals that defendant was crying and very upset. One witness said she heard defendant say, "God, I didn't want our marriage to end like this. I didn't want something like this to happen." Another witness, an officer, testified to the following:

A. Some of the things he said was, oh, such that I couldn't understand, there was a mumbling, and he rocked back and forth with his face in his hands, and he would ask me just in a clear voice with no problems if he could see Esther and I said no, and he'd ask me why, and I said he was told to remain there. And at one of the periods when he was rocking back and forth I heard him say, I didn't mean to do this, Esther, I didn't want to do this, Esther.

Q. You heard him clearly say this? A. Yes.

From this evidence we believe the jury could reasonably find that defendant did not willfully, deliberately, or with premeditation intend to kill his wife. However, the jury could also reasonably find that defendant did cause the injuries that resulted in Esther's death. His statements could be interpreted by a jury as expressions of guilt. At one point, defendant asked if Esther had died from a skull fracture because of the apparent injuries to the head. It may also have been significant that defendant's descriptions of the sequence of events were conflicting; he told different persons different things regarding the time he arrived home and the sequence of events once he allegedly found his wife's body.

The expert medical opinions introduced at trial were also somewhat conflicting. The attending medical examiner and four other medical doctors testified at trial. Only the medical examiner and the doctor who performed the autopsy actually examined the body; the other doctors testified after examining the autopsy protocol, pictures of the body, and pictures of the scene. The doctors' opinions regarding the cause of the injuries differed. Some said that the injuries were inconsistent with a fall down the stairs, and opined that there also must have been some type of assault on the victim. Dr. Latendresse, who examined the body

at the scene, expected "foul play" because the injuries were to the upper part of the body. He opined that if she had fallen down the stairs she should have displayed more injuries to the lower part of the body. Dr. Eckhart opined that the injuries would not have been consistent with a fall down the stairs because of the multiple areas of injury. He explained to the jury that the injuries on the head and back of the hands were "defensive" injuries; defensive injuries are apparently those suffered when an object is moved to hit the person injured in a defensive posture rather than having the person move or fall against an immobile object. Dr. Stein's testimony was to this effect as well. Two doctors opined that the injuries would be consistent with a fall down the stairs and with the manner in which defendant had attempted to resuscitate the victim. However, on cross-examination, all of the doctors testified that they could not definitely rule out either a fall or a beating as the cause of the injuries.

The medical evidence introduced was extensive. There were also many pictures of the victim and of the basement stairway. Defendant argues that based on this evidence the conclusion that the victim's injuries were inflicted and not accidental is tenuous at best. We believe, however, that this is precisely the type of question which should be left to the jury. While we may not reach the same conclusion, we believe the jury could reasonably find that the victim's injuries were inflicted in an assault type situation and that it was defendant who did so. After viewing the pictures themselves, the jury could have found the testimony of Doctors Latendresse, Stein and Eckart to be more credible. This conclusion is within their province.

There are many inconsistencies in the testimony, all of which present disputed fact questions for the jury. Here the jury resolved them against the defendant. Following the rule that we must view the record in the light most favorable to the State, Robinson, 288 N.W.2d at 340, we conclude there is

sufficient circumstantial evidence to support the jury's verdict of guilty.

Having found no reversible error, we affirm the conviction.

AFFIRMED.