IN THE COURT OF APPEALS OF IOWA

No. 0-418 / 09-0739
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALLEN KILLINGS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Allen Killings appeals his conviction for first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds and Thomas Gaul, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor (until withdrawal), Martha E. Trout, and Thomas Tauber, Assistant Attorneys General, John P. Sarcone, County Attorney, and Jeffrey Noble and Frank Severino, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

DOYLE, J.

Defendant Allen Killings appeals his conviction for first-degree murder. He contends there was insufficient evidence to support submission of a sexual assault jury instruction as an element of felony-murder. Should we find his claim was not preserved, Killings argues his counsel was ineffective in failing to object to that jury instruction. We affirm.

***I. Background Facts and Proceedings*.**

On July 9, 2007, a motorist and her passenger were driving on Martin Luther King Drive in Des Moines when the motorist thought she saw a dead body. They went to the porch of the house to get a closer look and found a body, later identified by police as Margaret Gottschalk. They then called the police.

Policemen and firemen responded to the call and found the victim's beaten body lying on the porch in an "unnatural position." The victim was wearing only a bra, some jewelry, and a pair of shoes. She was lying on her back, and her legs were splayed open, with her knees slightly raised above the surface of the porch and her ankles crossed. Some sort of liquid had been poured on the victim's body.

Extensive photos of the crime scene were taken, and items of evidence were seized by the police, including two t-shirts found beside the victim and cigarette butts found in the front and backyards of the house. An alternative light source test performed at the scene found no semen or saliva on the victim. The medical examiner arrived at the scene and took anal, vaginal, and oral swabs of the victim as part of a sexual assault exam.

Police canvassed the neighborhood and spoke with persons in the area, including Otis Killings, the defendant's brother. Police learned Otis had previously lived at the address where the victim's body was found. Based on information given by other individuals in the area, police went to a nearby bridge where they discovered various items, including a blood-spattered pair of women's shorts, a pair of women's underwear, and a checkbook register that was ultimately connected to the victim.

The medical examiner performed an autopsy upon the victim. He documented thirty-eight separate external wound areas, including abrasions and bruises, in addition to many internal injuries. He opined that the victim died as a result of blunt impact to the head. The medical examiner performed a sexual assault exam during the autopsy, and he found no signs of a sexual injury of any type, including injuries to the victim's genitals or rectum, nor any evidence of digital penetration.

The evidence seized by police was sent to the Iowa Department of Criminal Investigation for DNA and fingerprint testing. A criminologist found blood on the shorts and underwear discovered on the bridge. The blood from the shorts and underwear matched the DNA profiles of both the victim and the defendant.[1] Seminal fluid was found in the underwear, but no sperm was discovered, and no DNA profile could be developed from the seminal fluid. The victim's blood was found on both t-shirts discovered near her body, and a blood sample from one of the t-shirts matched the defendant's DNA profile. A cigarette

[1] The defendant worked in construction, and testimony was presented from one of his coworkers that he had sustained a cut on one of his index fingers shortly before the time of the victim's murder.

butt found in the front yard contained a mixture of DNA from both the victim and the defendant. No fingerprints could be retrieved from any of the objects at the crime scene. The defendant was interviewed. Although he consistently denied involvement in the victim's death, at one point he admitted he might have had sex with her. Later, he denied that.

Thereafter, the State filed a trial information charging the defendant with first-degree murder in violation of Iowa Code sections 707.1, 707.2(1), and 707.2(2) (2007). The State alleged the defendant, with malice aforethought, killed the victim deliberately and with premeditation and/or killed the victim while participating in a forcible felony. As one of its theories of the murder, the State asserted that the defendant killed the victim while committing an assault with intent to commit sexual abuse.

A jury trial commenced on March 2, 2009. At the close of evidence, the defendant moved for a directed verdict, asserting the State's evidence was insufficient to submit the case to the jury. Among other things, the defendant argued no evidence was presented that there was any attempt of a sexual assault. In response, the State argued the removal of the victim's clothing and the unnatural positioning of her body alone supported an inference of intent to commit sexual abuse. The court denied the defendant's motion, finding a prima facie case for submission of felony murder with an underlying felony of assault with intent to commit sexual abuse. At the close of the evidence, the defendant made a motion for judgment of acquittal incorporating the grounds raised in his motion for directed verdict. The court overruled the motion.

The district court submitted proposed jury instructions to the parties. One instruction stated:

> The State must prove all of the following elements of murder in the first degree:
>
> 1. On or about July 9, 2007, the defendant beat or strangled [the victim].
> 2. [The victim] died as a result of being beaten or strangled.
> 3. The defendant acted with malice aforethought.
> 4. Either:
>
>   a. The defendant acted willfully, deliberately, premeditatedly, and with specific intent to kill [the victim]; or
>
>   b. [The d]efendant was participating in either the forcible felony of robbery or assault with intent to commit sexual abuse.
>
> If the State has proved all of the elements, the defendant is guilty of murder in the first degree. If the State has failed to prove any one of the elements, you will then consider the charge of murder in the second degree . . . .

A separate instruction set forth the elements of assault with intent to commit sexual abuse, instructing:

> A defendant commits assault with intent to commit sexual abuse when he assaults another with the specific intent to commit a sex act by force or against the will of the other and the assault causes bodily injury to the other.
>
> "Sex act" means any sexual contact
>
> 1. By penetration of the penis into the vagina or anus.
> 2. Between the mouth of one person and the genitals of another.
> 3. Between the genitals of one person and the genitals or anus of another.
> 4. Between the finger or hand of one person and the genitals or anus of another person.
> 5. By a person's use of an artificial sex organ or a substitute for a sexual organ in contact with the genitals or anus of another.

When asked by the court if there were "[a]ny objections, exceptions, deletions, or corrections to [the proposed jury] instructions on behalf of the defendant," the defendant's counsel answered, "No, your honor." The instructions were included in the instructions submitted to the jury.

The jury found the defendant guilty of murder in the first degree. Thereafter, the defendant made a motion for new trial, citing instruction errors and sufficiency of the evidence to sustain the verdict. The court denied the defendant's motion. The defendant was sentenced to life in prison.

The defendant now appeals.

II. Discussion.

On appeal, the defendant contends there was insufficient evidence to support submission of a sexual assault jury instruction as an element of felony-murder. The State argues the defendant failed to preserve the issue for review, as the defendant did not specifically object to the jury instruction. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) ("We have repeatedly held that timely objection to jury instructions in criminal prosecutions is necessary in order to preserve any error thereon for appellate review."). Nonetheless, we will assume without deciding that this omission does not pose an obstacle to review under the particular circumstances presented, and we will proceed to the merits of the defendant's claim.[2] *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

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[2] We note that this court has held, in a sufficiency of the evidence challenge:

> [T]he question of whether an issue should have been submitted to the jury is preserved by a motion for directed verdict. Where the district court overrules a motion for directed verdict, a party does not waive error by agreeing to jury instructions which correctly state the law. By agreeing to the jury instructions, defendants are not agreeing there was a case for the jury.

Bergquist v. Mackay Engines, Inc., 538 N.W.2d 655, 658 (Iowa Ct. App. 1995) (citations omitted). Here, the defendant raised a similar sufficiency of the evidence claim in his motion for directed verdict, which the district court overruled. The instruction given correctly stated the law. The basis of the defendant's argument on appeal is not legal error in the instruction, but factual insufficiency. Thus, it would seem to follow that the defendant did not waive error in failing to object to the instruction on factual insufficiency grounds. Since neither party raised or argued the error preservation/waiver issue on a *Bergquist* basis, we do not decide it today.

Review of challenges to jury instructions is for the correction of errors at law. *State v. Carey*, 709 N.W.2d 547, 551 (Iowa 2006). "We review jury instructions to decide if they are correct statements of the law and are supported by substantial evidence." *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996) (citation omitted). "When reviewing a claim that an instruction was not supported by substantial evidence, we view the evidence in the light most favorable to the party seeking the instruction." *State v. Mott*, 759 N.W.2d 140, 149 (Iowa Ct. App. 2008). "Error in giving an instruction does not merit reversal unless it results in prejudice to the defendant." *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

The defendant asserts that because "the State repeatedly failed to show that the victim . . . was sexually assaulted," the court erred in submitting the instruction because it was not supported by substantial evidence. We disagree.

"A 'forcible felony' is any felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, arson in the first degree, or burglary in the first degree." Iowa Code § 702.11. In this case, the State submitted the felony murder charge to the jury under the dual theories of underlying felonious robbery and, at issue here, assault.

> A person commits an assault when, without justification, the person does any of the following:
>
> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> 2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act. . . .

Id. § 708.1. Furthermore,

> Any person who commits an assault, as defined in section 708.1, with the intent to commit sexual abuse is guilty of a class "C" felony if the person thereby causes serious injury to any person and guilty of a class "D" felony if the person thereby causes any person a bodily injury other than a serious injury.

Id. § 709.11.

Here, there is no doubt the crime of assault actually occurred, supported by the medical examiner's finding of extensive external and internal wounds to the victim. Thus, the State was only required to prove, under this theory, that the defendant assaulted the victim with an *intent* to sexually abuse the victim; no proof that the victim was, in fact, sexual abused was required. *See* 75 C.J.S. *Rape* § 40, at 346 (2002) (stating "[i]t is not necessary for the act of rape to have actually been consummated" to constitute an assault with intent to rape).

> Intent is a state of mind difficult of proof by direct evidence. It may, however, be established by circumstantial evidence and by inferences reasonably to be drawn from the conduct of the defendant and from all the attendant circumstances in the light of human behavior and experience.

State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992). "'[A defendant] will generally not admit later to having the intention which the crime requires . . . his thoughts must be gathered from his words (if any) and actions in light of surrounding circumstances.'" *State v. Radeke*, 444 N.W.2d 476, 478-79 (Iowa 1989) (quoting W. La Fave & A. Scott, *Handbook on Criminal Law* § 3.5(f), at 226 (2d ed. 1986) (brackets in original)).

In the case before us, the victim was savagely beaten. Her shorts, underwear, and shirt were removed. Her body was placed in an unnatural position with her legs spread apart. The defendant's blood was found upon the victim's shorts and underwear. We agree with the district court that these facts

raise a reasonable inference that the defendant assaulted the victim with the intent to commit sexual abuse sufficient to submit the question to the jury. *See id.* at 467-68 (finding that although a defendant did not touch the victim in a sexually suggestive manner, he lied to the victim, then attacked the victim while his pants were around his ankles and grabbed at the victim's clothing, circumstantially demonstrating that the defendant had sexual intent when he assaulted the victim). We note that courts in other jurisdictions have similarly concluded. *See*, *e.g.*, *State v. Ortiz*, 766 So.2d 1137, 1142-143 (Fla. Dist. Ct. App. 2000) (holding the State presented sufficient evidence in support of the attempted sexual battery charge against the defendant, where the victim was found beaten and virtually nude in an isolated wooded area of a park with her shirt pulled up around her head and her shorts down around her ankles); *People v. Bonner*, 229 N.E.2d 527, 533 (Ill. 1967) (finding that a violent assault made by the defendant on a woman during which the victim was thrown to the ground, the defendant reached under her clothing to pull down her slip, tore her blouse, and tried to remove her skirt was sufficient to establish attempt rape even though there had been no exposure of the genitals and no words manifesting the intent to rape); *Dawson v. State*, 734 P.2d 221, 222 (Nev. 1987) (holding that "[e]ven though no physical evidence of rape was discovered, the victim's body was found nude from the shoulders down," supporting that Dawson attempted to assault the victim sexually); *State v. Menter*, 680 A.2d 800, 806 (N.J. 1995) (holding there was enough evidence to present an attempted aggravated sexual assault count to the jury where the victim was found lying on her back with her legs spread apart, with her shorts and panties pulled down around her left ankle, exposing

her genitalia, a blood stained shirt pushed up partially revealing her breasts, and forensic tests revealed no evidence of a completed assault); *State v. Carter*, 451 S.E.2d 157, 176 (N.C. 1994) (finding there was sufficient evidence to support the aggravating circumstance that the murder was committed during an attempted rape where murder victim's left pant leg was pulled off, her panties were down, and her bra was above her breasts and there was no trauma to the vagina or genitalia and no physical evidence of a completed sexual assault); *State v. Scudder*, 643 N.E.2d 524, 533 (Ohio 1994) (finding sufficient evidence to conclude Scudder attempted to rape the victim where the victim was found with her pants at her ankles and her panties at mid-thigh, and bloody hand marks were found on the victim's thighs, indicating that the killer had tried to force her legs apart, and Scudder's blood was found on the victim's body and clothing); *State v. Gentry*, 888 P.2d 1105, 1124-125 (Wash. 1995) (finding that the decedent was the victim of an attempted sexual assault where the decedent's body was found behind a very large log, with her sweatshirt pulled up, partially over her head, and her t-shirt pulled up to the middle of the breast area, and her jeans and underpants pulled down around her thighs). The defendant was free to argue the facts did not prove sexual intent; however, the question was for the jury to decide. *See State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003).

We conclude the district court did not err in submitting the instruction to the jury. Accordingly, we affirm the defendant's judgment and sentence.

AFFIRMED.