

IN THE COURT OF APPEALS OF IOWA

No. 6-211 / 04-1419
Filed May 24, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNY CHRIS HEMM,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Jr., Judge.

Kenny Chris Hemm appeals his conviction and sentence for murder in the first degree and arson in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber and Douglas D. Hammerand, Assistant Attorneys General, and Mark Tremmel, County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

HUITINK, J.

Kenny Chris Hemm appeals his conviction and sentence for murder in the first degree in violation of Iowa Code section 707.2(1) (1999) and arson in the second degree in violation of section 712.3. We affirm.

I. Background Facts & Proceedings.

Hemm was found guilty of murder in the first degree and arson in the second degree in April 2001. We reversed his conviction on direct appeal and remanded to the district court for a new trial. *State v. Hemm*, No. 01-0805 (Iowa Ct. App. Feb. 12, 2003). In our opinion we described the events leading up to Hemm's arrest and conviction as follows:

The victim of this gruesome homicide was Larry Pippenger, a wheel chair bound paraplegic. Although he didn't live with Hemm, Pippenger was to have spent the night of April 16-17, 2000 in Hemm's house in Eldon, Iowa.

Authorities responded to a 911 call at 2:09 a.m. on April 17, 2000. They found Hemm's house engulfed in fire. No one was found in the home. A second 911 call at 3:11 a.m. reported a car fire at the home of Hemm's mother and stepfather in Eldon. Arriving, the officers found Hemm's car on fire and Hemm in the house.

Hemm related a rather bizarre chain of events. He said he awoke in his home and discovered the fire. He ran out of the house, noting that Pippenger, who had been sleeping on the couch in the living room, was not there, but his wheel chair was outside on the ground. Hemm saw a van driving away and he pursued it until he realized his own car was on fire. He turned around, drove past his own burning house to his mother's and stepfather's house. He apparently didn't tell them about the fires, but one of them discovered Hemm's car was burning and reported it. At various times Hemm related somewhat inconsistent versions of this scenario to different investigators.

Later that morning another car fire was reported at an abandoned house outside Eldon. Pippenger's body was found in that burning vehicle. He had been decapitated, dismembered, and his genitals had been placed in his mouth. His hands and feet were never located.

At his second trial, Hemm's motions for judgment of acquittal were denied, and the jury returned guilty verdicts on both the first-degree murder and second-degree arson counts. The trial court subsequently entered a judgment of conviction on both counts and sentenced him accordingly.

On appeal, Hemm argues "sufficient evidence did not exist to convict Hemm of either offense."

II. Standard of Review.

Challenges to the sufficiency of the evidence supporting a guilty verdict are reviewed for errors of law. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002) (citing *State v. Heard*, 636 N.W.2d 227, 229 (Iowa 2001)). If substantial evidence supports the verdict, we uphold it. *Id.* "We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record." *Id.*; *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993) (citing *State v. Robinson*, 288 N.W.2d 337, 338 (Iowa 1980)). "Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *Torres*, 495 N.W.2d at 684 (citing *Robinson*, 288 N.W.2d at 339).

We "cannot make a substantial evidence determination if [we] only consider the evidence supporting guilt," because "a rational fact finder cannot render a verdict without taking into consideration all the record evidence." *Id.* We must consider all the record evidence. *Id.*; *Webb*, 648 N.W.2d at 76 (citing *Heard*, 636 N.W.2d at 229). "The State must prove every fact necessary to constitute the crime with which the defendant is charged." *Webb*, 648 N.W.2d at 76 (citing *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976)). "The evidence

must raise a fair inference of guilt” creating more than “speculation, suspicion, or conjecture.” *Webb*, 648 N.W.2d at 76 (citing *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981)). “Admissions made by the defendant are evidence.” *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993). The conduct of the defendant subsequent to the crime can constitute an implied admission when “such conduct indicates a consciousness of guilt.” *Id.* “A false story told by the defendant to explain or deny a material fact against him is by itself an indication of guilt” and “relevant to show the defendant fabricated evidence to aid his defense.” *Id.* (citing *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982)). In other words, “inconsistent statements are probative circumstantial evidence from which the jury may infer guilt.” *State v. Turner*, 630 N.W.2d 601, 609 (Iowa 2001) (quoting *State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984)); *Cox*, 500 N.W.2d at 25; *State v. Mayberry*, 411 N.W.2d 677, 682 (Iowa 1987).

III. The Merits.

The gist of Hemm’s argument is that the evidence is insufficient as a matter of law to establish his identity as the person who murdered Pippenger and set the related arson fires. We disagree.

The State’s theory of the crime in this case is that Hemm stabbed Pippenger to death sometime during the night of April 16-17; Hemm dismembered Pippenger’s body in the bathtub of his home, using a hack saw or miter saw; Hemm set fire to his own house to destroy evidence of the murder; Hemm took Pippenger’s body to an abandoned house on River Road early in the morning of April 17; Hemm returned to Eldon and set fire to his own car to destroy other evidence of the murder; and that later on the morning of April 17

Hemm borrowed his brother's car, drove to the abandoned house on River Road, and set fire to Pippenger's remains and automobile. The State's evidence supporting this theory includes Hemm's implausible and differing explanations of Pippenger's abduction, related fires, and his actions on April 17, 2000.

Hemm was questioned by Eldon Chief of Police Charles Miller, who responded to the car fire at the home of Hemm's mother. Miller testified:

Q. While you were over in the driveway, did the defendant tell you some things? A. Yes, he did. He mentioned – we asked him what was going on with the two fires, the house fire and the car fire. He said that he had awoke to a loud noise and went downstairs; and as he went out noticed that two guys were throwing Mr. Pippenger into a van and then took off east down the alley, and that he got in his vehicle and chased after him.

Q. Did you ask the defendant to tell you what happened in front of Deputy Klodt? A. Yes.

Q. What did he tell you at that time? A. He told us he awoke to a loud noise, came downstairs and – woke up to a loud noise, came down and the house was full of smoke. He looked over and seen that Larry wasn't on the couch, went out the back door and there was Larry's wheelchair laying on the lefthand side of the porch on the ground. And he took off after Larry – went and got in his car and went to his parent's house.

Q. Did he tell you what he was wearing when he went downstairs? A. His underwear.

Q. Did he describe any of the fire downstairs? A. Just that it was heavy smoke.

Q. Did he say anything about his car when he got into it? A. Just advised that this car was on fire when he got into it.

Q. Did he say where he followed the van? A. He said he followed the van out east of town and then across the bridge over to the Eldon-Floris blacktop, and that he lost – turned around at where the blacktop ends and the gravel begins because he didn't know what to do if he was to confront them.

Q. Where did he say he went after he turned around at that point? A. He said he went to his parents' house.

Q. When you were in the porch area with the defendant and Deputy Klodt, were you able to see the defendant okay? A. Yes.

Q. Did you see any soot, black smudges or fire debris on his clothing? A. No.

Q. No? A. Not at all.

Q. Do you remember what he was wearing? A. A white T-shirt and blue jeans, I believe.

Q. Did you see any black dirt or smudges on his shirt?
A. No.

Q. How about his arms? A. Nothing on his arms, no.

Q. How about his face? A. Nothing on his face.

Q. Did the defendant smell like smoke? A. No.

Q. Did he smell or his clothes smell like smoke? A. No, not at all.

Q. How would you describe his appearance when you were out there when you saw him? A. That particular night he probably looked cleaner than I did.

In a subsequent interview Hemm told DCI Agent David Button both the front and back entry doors to his home were locked and bolted.

The record also includes Hemm's statements concerning Pippinger's abduction and related fires made to others. He told Kevin Swinscoe he saw someone carrying Pippinger out of Hemm's house. In a subsequent interview with DCI Agent Button, Hemm did not claim he saw Pippinger's abductors. Hemm told an insurance investigator that the front room of his house was engulfed in flames when he descended the stairs to investigate the noises that had awakened him. He also initially told the insurance investigator that the window to the back door was not broken when he exited the house, but in a follow-up interview, he told the same investigator it was.

Hemm's statements also indicate that he had visited and was familiar with the abandoned house where Pippinger's car and remains were discovered. Hemm also told investigators he could not remember whether he borrowed his brother's car on the morning of April 17, although it, as he said, would not have been unusual for him to do so.

The record additionally includes expert testimony indicating Hemm's version of events was at best highly improbable if not entirely impossible. Hemm's claim that the front and back doors were locked was contradicted by insurance investigator Lon Albentin's testimony indicating that there were no signs of forced entry into Hemm's home. Additionally, testimony by DCI Special Agent Mike Hiles indicated that the fires in Hemm's home and both cars were set using an accelerant. Hiles also testified it would have been impossible for Hemm to have escaped either the home or the car fire without serious injury or even death if those fires had progressed to the extent described in Hemm's statements. Additionally, Hemm's appearance when first interviewed by Officer Miller on April 17 contradicts his claim that he had been in either a smoke-filled house or car as recently as he described. Lastly, we note that Hemm's description of the distance and time he pursued Pippinger's alleged abductors is contradicted by testimony of DCI Agent Michael Berrier indicating that the actual time elapsed was at least forty-six minutes longer than necessary to travel the distances Hemm claimed.

Hemm's inconsistent and implausible statements are probative circumstantial evidence from which the jury could infer his guilt. See *Turner*, 630 N.W.2d at 609.

In addition to Hemm's inconsistent and implausible statements, the record includes physical evidence implicating Hemm in Pippinger's death and related arson fires. The following excerpt from the State's brief accurately and succinctly describes this evidence:

Investigators found three smears of blood, which contained DNA matching Pippenger's DNA, on the shower curtain in the bathroom. Fewer than one in a hundred billion people would have the same genetic profile.

In the burned car at the River Road house, investigators found cans which had apparently contained flammable liquids or gases, including one can which had held Zippo cigarette lighter fluid. Hemm used a Zippo lighter. In the car investigators found a hacksaw, a miter saw, and the head of a hammer. In Hemm's house and garage investigators found hacksaw blades but no hacksaw, a miter box but no miter saw, and no hammer at all, even though Hemm had a hammer in his possession at his house on April 16, and had used it while working on Pippenger's car. The fabric and pattern of a piece of blanket found with Pippenger's head matched the fabric and pattern of a second piece of blanket which had been used to insulate pipes at Hemm's house.

Hemm cites four alleged factual contradictions in the foregoing evidence in support of his insufficiency of the evidence claim. He notes testimony from one DCI agent that no accelerants were detected on items the agent found in Hemm's house. There is, however, other expert testimony explaining that the accelerants were consumed in the fire and that accelerants were used to start the fires in Hemm's home and car, as well as Pippenger's car.

Hemm also argues that the amount of blood found on the shower curtain was inconsistent with the State's dismemberment theory and subject to innocent explanation such as another injury or Pippenger's hemorrhoids. There is, however, evidence indicating that the evidence of dismemberment could have been destroyed by the fire or washed away by the water used to extinguish it.

Hemm further argues that there is no direct evidence that the miter or hack saw found in Pippenger's car belonged to him or that it was used to dismember Pippenger's body. Even if we disregard the State's claim concerning

these tools, the remaining evidence is still sufficient to support Hemm's conviction.

Finally, Hemm claims the State failed to establish any motive for the murder. He cites evidence indicating Hemm and Pippenger were good friends and that Pippenger's life had been threatened by others. The State's failure to establish a motive for the murder is of no consequence in this case because motive is not an element of murder. See *State v. Hoffer*, 383 N.W.2d 543, 549 (Iowa 1986); *State v. Lass*, 228 N.W.2d 758, 765 (Iowa 1975).

Contrary to Hemm's arguments on appeal, the record includes sufficient evidence supporting his convictions. We affirm.

AFFIRMED.