

IN THE COURT OF APPEALS OF IOWA

No. 6-522 / 05-0527
Filed December 13, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRENT LEE SANER,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John G. Linn, motion to suppress, and William L. Dowell, jury trial, Judges.

The defendant appeals from his conviction and sentence for first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden and Scott Brown, Assistant Attorneys General, Patrick C. Jackson, County Attorney, and Ty Rogers, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

VOGEL, J.

Brent Saner appeals his conviction and sentence for first-degree murder, under to Iowa Code sections 707.1 and 707.2 (2003). We find no error by the district court in overruling the motion to suppress or in the jury instructions as given and therefore affirm.

I. Background Facts and Proceedings.

A reasonable juror could find the following facts from the record in this case. On February 10, 2004, William Lucas, Debbie Gentry, and Brent Saner were at the apartment Saner shared with his half-brother, Bobby Callen. Almost daily for about a month before this, Lucas and Saner had expressed how upset they were with Michael Harper, Jr. (Mikey), because they believed he intended to or had already implicated them in the theft of a paintball gun. Saner was particularly concerned about this because of the possibility that his present probation could be revoked if he were implicated in the theft. Lucas, Saner, and Debbie Gentry, who was Saner's girlfriend, agreed that Gentry would lure Harper to a place where Saner and Lucas could confront him about the paintball gun or beat him up.

Harper, who later joined the group at Saner's apartment, eventually left with another acquaintance, Matthew Boughton. Gentry left a short time later and caught up with Harper and Boughton. She asked Harper to walk her home and asked Boughton to leave them to walk alone with each other. Gentry walked with Harper, approaching a wooded area in Burlington. As previously planned, Lucas and Saner were waiting at that location dressed in dark clothing. Lucas and Saner had planned to jump out and beat Harper up or otherwise confront him

about the paintball gun issue. Instead, after Gentry and Harper walked past them, they revealed themselves and began to talk with Harper. Saner suggested they go into the woods to show Harper where Lucas and Saner were going to build a new fort. Lucas walked into the woods with Harper; Saner and Gentry followed. As they were walking, Harper spoke with his girlfriend, Nicole Duttweiler, on his cell phone using a hands-free earpiece. Harper told Duttweiler he was walking with Lucas, Saner, and Gentry. Saner and Gentry stopped before a footbridge already crossed by Lucas and Harper, when Saner relayed to Gentry that Lucas had said “once he started to hit Mikey [Harper], he wouldn’t be able to stop.”

While Harper was still on his cell phone, Lucas walked back to Gentry and Saner and revealed a knife with the blade out and handle concealed up Lucas’s sleeve. Gentry recognized the knife as Saner’s. She believed Lucas was going to injure Harper, but was too scared to warn him as she also believed Lucas may harm her. Lucas and Harper walked into the woods. Saner left three different times to go to where Harper and Lucas were. Each time Saner returned, he told Gentry details about Lucas attacking Harper. The first time Saner returned after being absent for about five minutes, he reported Lucas was sitting on top of Harper. The second time Saner left Gentry, she heard Harper’s cell phone ring and Harper say “let me go” or “let me live.” When Saner returned, he reported Harper had taken off running, and Lucas had run after him, catching him only when he tripped and fell. Saner left Gentry a third time and was gone longer than the first two times. Harper’s phone was set to answer automatically, so when Duttweiler called back, she heard “a lot of shuffling around and wrestling,”

so she hung up. When she immediately called back, she heard Harper screaming, "let me go, don't touch me, get off me," and "stay away from me." When Duttweiler attempted to call Harper again, her call was directed straight to Harper's phone mail, and she concluded Harper's cell phone battery must have died.

Saner and Lucas came out of the woods alone and began walking back to Saner's apartment. After Saner said something about paint on Lucas's face Gentry saw Lucas with blood all over his face, and he went into the bathroom for a time. She also saw Saner wrap a knife in some kind of white cloth. Gentry, Saner, and Lucas later conjured up a story as to what happened, should they be questioned about Harper. They all agreed to tell the police that they were walking down the street when they saw Harper, talked briefly with him, but then parted ways as Harper headed to a party at Midtown Garden Apartments.

The next day when Duttweiler was unable to reach Harper on his cell phone, she called Harper's mother, Barbara Cerra, and relayed what she had overheard the previous night. Cerra called the police the evening of February 11, reported her son missing, and an investigation began. Upon learning Harper had been at Saner's residence, a Burlington Police officer visited Saner's apartment. Officer Rodney Fogle spoke with both Saner and Lucas at the apartment, who both stated they had last seen Harper the day before. Officer Fogle left the apartment but within a few minutes received a call from Harper's father, Michael Harper, Sr. Harper, Sr. told the officer he thought his son had been beaten up and that Lucas had something to do with it. Officer Fogle went back to speak with Lucas in Saner's apartment, asking "if Mikey [Harper] had gotten beat up or

if he beat up Mikey.” Lucas indicated that he and Harper were playing around and that Harper told Lucas to watch out for the police because Harper was “on the run” as a runaway minor. Harper, Sr. found his son's body lying in the snow in the wooded area late the next afternoon. The medical examiner that performed the autopsy testified that Harper's body had 111 knife wounds, with the hyoid bone fractured as well as thyroid and cricoid cartilage structures in his neck. The medical examiner opined Harper died from multiple stab wounds and strangulation.

After Harper's body was found, police began to investigate further, including speaking with people that had recently seen Harper. The evening of February 12, two officers went to Saner's residence to interview Saner and Lucas because they had been seen with Harper the day before. Saner and Lucas voluntarily went to the Burlington Police Department, where they were interviewed individually. Saner eventually admitted to being present when Harper was killed, but claimed Lucas committed the murder while Saner held Harper down, for ten to twenty minutes. As the investigation unfolded, several items belonging to Saner or in his possession had Harper's blood and/or DNA on them: (1) one of Saner's shoes; (2) a jacket Saner borrowed from his brother and wore on the night of the murder; (3) a knife belonging to Saner found wrapped in a sock and stuffed in a speaker box in his bedroom; (4) Saner's hat; and (5) a pair of black pants. In addition, Harper's cell phone was also found hidden in the speaker box at Saner's apartment.

On February 23, 2004, the State filed a trial information formally charging Lucas and Saner with murder in the first degree. As discussed below, Saner

eventually admitted to being present for Harper's murder, but claimed he only held Harper down while Lucas stabbed and choked him to death. While in jail, waiting trial, Saner shared details of the murder with a fellow prisoner Steven Freeman. At trial Freeman testified that Saner had told him that as the stabbing occurred, he took over for Lucas when Lucas got tired and out of breath. Saner took the knife, switched positions with Lucas, and began stabbing Harper while Lucas sat on Harper's legs. According to Freeman, Saner also verified many other details surrounding the murder, including Saner borrowing and wearing his brother's jacket, Saner's attempt to clean and hide the knife, and Lucas having something on his face and taking a shower at Saner's apartment after the murder.

Saner proceeded to trial on February 1, 2005, and the jury returned a guilty verdict to first-degree murder. Saner was later sentenced to life in prison and now appeals.

II. Motion to Suppress.

Prior to trial, Saner filed a motion to suppress, with later amendments, as to the statements he made to law enforcement officers prior to his arrest. The district court denied the motions after finding Saner was not in custody at the time the statements were made. Saner contends this was error. When assessing alleged violations of constitutional rights, our standard of review is *de novo*. *State v. Washburne*, 574 N.W.2d 261, 263 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello*, 602 N.W.2d 190, 195 (Iowa Ct. App. 1999). In reviewing the district court's ruling on a motion to suppress, we consider both the

evidence presented during the suppression hearing and that introduced at trial. *State v. Orozco*, 573 N.W.2d 22, 24 (Iowa 1997). An adverse ruling on a motion to suppress will preserve error for our review. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court stated that a citizen's privilege against self-incrimination "is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" The Court further noted that because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant can truly be the product of his free choice[.]" unless adequate protective measures are employed. Thus, the Court held that before an individual who is in custody can be subjected to any interrogation, he must be advised of his constitutional rights to remain silent and to have appointed counsel present prior to any questioning. The requirements of *Miranda* are not triggered "unless there is both custody and interrogation." The Court stated in *Miranda* that custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

State v. Turner, 630 N.W.2d 601, 607 (Iowa 2001).

In regards to custody, we use an objective test where the inquiry is how a reasonable person in the suspect's position would have understood the situation. In making this determination, we may consider "the language used to summon the individual, the purpose, place and manner of the interrogation, the extent to which the defendant is confronted with evidence of his guilt, and whether the defendant is free to leave the place of questioning."

State v. Simmons, 714 N.W.2d 264, 274-275 (Iowa 2006) (citations omitted).

The first interview. Saner was interviewed twice, just hours apart. In reviewing the circumstances surrounding the police interviews, there are some indications that could lead a reasonable person to conclude he was in custody, and other factors would lead to the opposite conclusion.

During the evening of February 12, investigators determined both Lucas

and Saner should be interviewed because they had been seen with Harper the day he disappeared. Dressed in plain clothes, Burlington Police Detective Adam Schaefer and Des Moines County Sherriff's Deputy Mark McIntyre drove in an unmarked police car to Saner's home around 8:00 p.m. Saner's half-brother, Bobby Callen answered the door. The officers identified themselves and asked to speak to Saner. Callen called Saner to the doorway, and the officers again identified themselves and told him they wanted to speak to him about Harper's disappearance. Saner agreed to talk with them. Neither officer displayed a badge or identification. Because there was no seating on the first floor room, Saner led the officers upstairs to a bedroom where they could talk. Another man was sitting upstairs and identified himself as William Lucas, one of the two persons the officers were assigned to locate. Soon the officers realized that they had three persons to interview, not only Saner and Lucas but also Callen, as he stated that he had also seen Harper on February 10.

Now faced with three interviews to be conducted in the one bedroom, Detective Schaefer suggested that they go to the police station for separate interviews. The three men all agreed. When asked if they needed a ride, Callen spoke up and offered to drive Lucas and Saner himself. The officers then left in their vehicle and the three men followed in Callen's car to the Burlington Police Station. There were no restrictions placed on the men, as to speaking with each other or placing phone calls before or during their drive to the station.

Upon arriving at the station, the men were led to a conference room away from the public area as they wanted to avoid any contact with Harper's family, who were thought to still be present. A uniformed police officer was stationed in

the conference room to secure access of non-public locations. The room was equipped with cable television and a telephone. Detective Schaefer and Deputy McIntyre left the room to confer with other investigating officers. Saner, Lucas, and Callen were not told they were not free to leave, nor were there any restrictions placed on them as far as their ability to converse with each other, or use the telephone. As the interviews began, one at a time, the two men not being interviewed were allowed to converse freely in the conference room.

The interviews took place on the second floor, which was access-limited by a keyed entrance. Exiting the floor was unrestricted. Saner was interviewed first, without *Miranda* warnings, for about one hour and forty-five minutes. In the unrecorded interview, Saner told police that he saw Harper the evening of February 10 at Saner's apartment and then later when he left Gentry's residence. Police asked Saner at the end of the interview whether he owned any knives. Saner said he did and suggested they go back to his apartment if they wanted to look at the knives. Saner then left for his apartment, accompanied by two officers. While at his residence, Saner's mother called him and spoke with him, unrestricted by the officers. Later, Saner returned to the police station with the officers and to the same conference room with the cable television and telephone, where he waited prior to his interview.

While some of the foregoing circumstances could lead one to conclude Saner was in custody, more factors lean towards the district court's conclusion that Saner was not in custody during the first interview. As the district court noted, Saner and the others voluntarily went to the police station in one of their own vehicles. Once at the station, they were not restrained or discouraged from

talking to each other, although there was a police officer in the room with the men. While one was being interviewed, the other two sat and watched television. The interview occurred early in the investigation, and Saner was not confronted with evidence of his guilt. Even if the factors assessing a custodial situation were in equipoise, all doubt of whether Saner was in custody vanished as Saner himself testified at trial, "Well, we [were] free to leave anytime we wanted to." We therefore affirm the district court's conclusion Saner was not in custody when the initial interview took place.

The second interview. After Saner returned from showing officers the knives at his apartment, he was escorted to the same conference waiting room where all three men started the evening. Lucas was also in the conference room at that time, and conversation between the two men was not restricted. Again, there was both cable television and a telephone available, but an officer was also present. Saner only stayed in that room for about ten minutes before the officers decided to question him again. Before this second questioning began, Saner was given a proper *Miranda* warning. It was during the second interview when he admitted to police that he was present when Harper was murdered, holding down his feet while Lucas stabbed him. Saner was arrested at the end of the second interview.

Saner asserts that if the information secured during the first interview is not suppressed, the second interview should have been, relying on *Missouri v. Siebert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). The United States Supreme Court in *Siebert*, by a plurality, disapproved of a two-stage interrogation technique by which police intentionally fail to give *Miranda* warning

prior to eliciting a custodial statement from a suspect, give the warnings, obtain a waiver from the suspect, and have the suspect repeat the confession in the continuous second interview. The State argues that *Siebert* is inapplicable to Saner's initial interview because he was not in custody at the time, thereby foregoing the constitutional requirement of *Miranda* warnings. Because we agree with the district court's conclusion that Saner was not in custody during the first interview, the dictates of *Missouri v. Siebert* regarding a dual, continuous custodial interrogation are inapplicable to this case. We affirm the ruling rejecting Saner's motion to suppress.

III. Felony Murder Jury Instruction.

Saner next argues that the district court erred by submitting the felony murder instruction to the jury as a basis for first-degree murder. Our review of challenges to jury instructions is for correction of errors at law. *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006).¹ Saner claims that the felony-murder theory of the State's case was a surprise and that he did not receive adequate notice of this ground for first-degree murder from the trial information. A trial information is required to be a plain, concise, and definite statement of the offense charged against the accused, including the name and degree of offense identifying by number the statutory provision alleged to have been violated. See Iowa Rs. Crim. P. 2.4(7)(b); 2.5(5). The alleged error is that the State failed to

¹ To the extent defendant relies on *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), our supreme court has ruled that "The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court." *Id.* at 558. Saner did not raise such an objection before the district court, and we therefore do not address the impact of *Heemstra*.

charge Saner specifically enough under the trial information, which reads:

COMES NOW the State of Iowa through its Prosecuting Attorneys, and in the name and by the authority of the State of Iowa accuses BRENT LEE SANER of the crime of MURDER in the FIRST DEGREE committed as follows:

The said Brent Lee Saner on or about the 10th day of February 2004 in the county of Des Moines and State of Iowa did, acting in concert with William George Lucas, Jr., murder Michael Allen Harper in violation of section 707.1 and 707.2 of the Iowa Criminal Code.

Our supreme court has recently addressed the specificity required for charging by trial information when more than one subsection or paragraph is contained in the violated statute.

Dalton claims [the trial information] inadequately specified the crime for which he was charged. In support of his claim, Dalton alleges the trial information only references Iowa Code section 707.6A and does not specify the subsection under which Dalton was ultimately convicted. . . . The Iowa Rules of Criminal Procedure, however, do not explicitly require the State to charge the defendant with a specific paragraph. Our concern is whether the defendant was “alert[ed] ... generally to the source and nature of the evidence against him.” Employing a case-by-case analysis, we must determine whether the trial information and minutes of testimony are specific enough to afford the defendant a “full and fair statement” of a witness’ expected testimony; the State “need not detail each circumstance of the testimony.” Taking into consideration the minutes of testimony, we hold the trial information is sufficient. When read in conjunction with the minutes of testimony, the trial information clearly indicated which paragraph was involved.

State v. Dalton, 674 N.W.2d 111, 119-120 (Iowa 2004) (citations omitted).

When read in conjunction with the minutes of testimony, it is clear that the charges against Saner included acts resulting in first-degree murder either as a principal or an aider and abettor to Lucas. Clearly enumerated in the subsections of Iowa Code section 707.2 is the ground of felony murder, when the commission of a forcible felony results in a death. At the time of Saner’s trial,

willful injury that resulted in a death was categorized as felony murder under Iowa Code section 707.2(2). See *State v. Beeman*, 315 N.W.2d 770, 776-77 (Iowa 1982). Willful injury consists of “an act which is not justified and which is intended to cause serious injury to another” that actually causes serious injury or bodily injury. Iowa Code § 708.4 (2003). There was evidence that either Saner or Lucas or both men participated in the assault and murder of Michael Harper, Jr. by beating, stabbing, and strangulation. Under the requirements of *Dalton*, we conclude the trial information and accompanying minutes of testimony supported submission of the felony murder instructions and the district court did not err by overruling Saner’s objections. We affirm on this issue.

IV. Ineffective Assistance of Trial Counsel.

Saner argues that his trial counsel failed to adequately object to testimony regarding his prior dealings or altercations with law enforcement. Because the defendant’s claims involve his constitutional rights to counsel, our review is de novo. *State v. Watson*, 620 N.W.2d 233, 235 (Iowa 2000). When the record on appeal is inadequate for the assessment of counsel’s performance, we are normally inclined to preserve the claim for postconviction proceedings in order to allow development of the facts and circumstances surrounding the disputed issue. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). Preserving the matter for postconviction relief allows the record to be enlarged and gives the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. See *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude that this issue should be preserved for possible future postconviction relief proceedings, as it arguably calls for motivations behind trial

counsel actions. We otherwise affirm Saner's conviction.

AFFIRMED.