

**IN THE COURT OF APPEALS OF IOWA**

No. 0-936 / 09-1730  
Filed February 23, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**STEVEN DEAN MCGINNIS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Marion County, Martha Mertz,  
Judge.

Defendant appeals his conviction for first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines and Thomas H. Miller,  
Assistant Attorneys General, and Terry E. Rachels, County Attorney, for  
appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J.,  
takes no part.

**EISENHAUER, P.J.**

Steven McGinnis appeals his conviction for first-degree murder. McGinnis argues the evidence is insufficient to support his conviction and the court erred in (1) denying his motion to suppress evidence; (2) denying his motion for a new trial; and (3) denying his claim of professional confidence privilege. We affirm.

**I. Background Facts and Proceedings.**

Rob Ohl and Steven McGinnis, friends for ten years, were both military veterans suffering from posttraumatic stress disorder (PTSD). McGinnis dated Robin, an employee of the veteran's medical center (VA) in Des Moines where McGinnis received treatment. Robert Schnug, a friend of McGinnis, volunteered at the VA and testified patients were not supposed to have romantic contact with the staff. McGinnis and Robin did not keep their relationship secret from Schnug and told him "somebody had called the VA and reported them as being an item." Around March 2008, McGinnis told Schnug he suspected Ohl was the person who had reported his relationship with Robin.

On Sunday, September 21, 2008, McGinnis called Ohl and invited him to visit his camper located on twenty acres of land south of Knoxville. Shortly after 5:00 p.m. that day, McGinnis called Schnug and told him Ohl was coming out to his residence. Schnug testified:

[McGinnis] said, "I want you to do something for me." I said, "What's that?" [McGinnis] said, "I want you to take care of Robin for me." And I said, "You want what?" [McGinnis] said, "I want you to take care of Robin for me." I said, "What for?" [McGinnis] said, "Just promise me you'll take care of Robin." I said, "Well, not a problem." He asked me that same question a year before when he went to California to the PTSD counseling.

Additionally, McGinnis asked Schnug not to tell Robin about the conversation.

Deborah Danielson was a nurse counselor at the VA and worked with McGinnis on his PTSD “treatment, therapy issues.” Danielson changed jobs at the VA and, in early 2008, she had a final appointment with McGinnis “to tell him I was no longer his counselor.”

On September 21, 2008, Danielson was in Kansas when she received a phone call from McGinnis around 5:15 p.m. The reception was bad so she called McGinnis back. Danielson understood McGinnis was leaving town and he was concerned about some information he received: “Something to do with he found out information about who was having an affair with his ex-wife.” Upon reflection, Danielson thought it was unusual for McGinnis to call her on a Sunday night, so she called the VA to have local authorities go to the McGinnis residence to do a health and welfare check.

Ohl’s wife Rhonda eventually agreed to go with him to see McGinnis and the couple left their home between 5:20 and 5:30 p.m. on September 21, 2008. After McGinnis showed them the camper, Rhonda returned home. When she left, McGinnis and Ohl were sitting in lawn chairs outside the camper. Rhonda testified no one was intoxicated at the time she left and both men were “getting along just fine like they always do. They were laughing. They were . . . just talking and having a good time.” Rhonda did not see any guns at the McGinnis residence. Rhonda talked to Ohl by phone around 6:20 when she arrived home.

Danielson also testified at trial about a later phone call with McGinnis while he was driving in his car:

Q. And tell us about that. Approximately when would that have been? A. That would have been quite some time later between 6:00 and 6:30, 6:45. My phone rang and it was Jana Overholtzer, the Administrative Officer of the Day and she informed me that she had [McGinnis] on the line, he would like to speak to me. And I said, yes, and she patched the call through.

Q. Is that the phone call where [Overholtzer] stayed on the line, is that correct? A. That's correct.

Q. And what is it [McGinnis] told you in that phone call? A. During that phone call he said to me, "Deb, I did it."

Q. Did you ask for an explanation? A. I said, "What do you mean?" And he said, "I shot him."

Q. Did you give him directions as to what to do? A. He was asking me to help him. And I said, "You need to turn yourself in." And he said he was scared to do that. He didn't know what to do. And we had questions regarding that and he said, "I'm scared to turn myself in. Can you help me, Deb?" And I said, "What if you would come to the VA and turn yourself in there?" And he agreed to do that.

Danielson also testified about McGinnis's demeanor during the phone conversations:

Q. How was his voice? A. During those first two phone calls I had with him, it was normal, neutral, not loud, not pressured or fast speech.

Q. You had a phone conversation that was sometime between 6:20 and 6:30 that same evening? A. To my recollection, that's the time, yes.

Q. Whichever it was, he indicated three shots with the locations being to the head and the gut? A. That's correct.

Q. And during this conversation how was his voice? A. His tone was louder, faster.

Q. Was he slurring his speech? A. He was not slurring his speech.

Q. Was there anything about his voice that made you think that he was out of it? A. No.

Q. Or not in his right mind? A. I didn't hear any of that type of conversation or tone of voice.

Jana Overholtzer testified at trial that she patched McGinnis through to Danielson on September 21, 2008, “by way of a conference call.” During the conference call she heard McGinnis state he shot someone. Overholtzer testified:

Q. Do you have any idea about how many phone calls you received from [McGinnis] that evening while he was [driving] to the VA? A. Guessing – I would guess maybe five, but I don’t know the exact number.

Q. What was his apparent mood? A. Sometimes he seemed calm, but he mostly seemed very scared. He mentioned several times he didn’t want to die. He asked me one time if we had police at there. And I said, “Steve, you know we always have police at the VA. It’s the same ones that work here all the time.”

He asked me if they were going to shoot him. He was afraid they would shoot him. Another time he said several times: “I didn’t mean to do anything wrong. I just did what I had to do. I found out who slept with my wife years ago. I just did what I had to do.”

Q. Was [McGinnis’s] mood constant throughout these phone calls or did it vacillate? A. The very first phone call when he asked to talk to Deb, he sounded calm when he asked to talk to her and when he told me that she was at the golf tournament with her girls. Of course, on into the conversation when I joined him, he was hysterical and crying, but he wasn’t crying every time I talked to him.

At 7:16 p.m., McGinnis arrived at the VA hospital and turned himself in. McGinnis was crying and visibly upset. David Wall, a VA police officer testified McGinnis stated: “I didn’t mean to do it. I did what I had to do.” McGinnis asked if he was under arrest and, upon hearing the Des Moines police sirens approaching, asked: “They are going to kill me, aren’t they?” Gene Bone, a VA police officer, testified when they approached the McGinnis car, McGinnis “placed his hands out the window. He did not want to be shot. He said, ‘Don’t shoot me.’” McGinnis was “edgy, jumpy, but he was cooperative.” Further, “I

remember he said, 'I didn't mean to do it.' That was one statement. And several times he said, 'I only did what I had to do.' He said that approximately two or three times."

When other police officers arrived at the McGinnis camper, they discovered Ohl dead, seated in a lawn chair. A .12 gauge shotgun was leaning up against the stairs to the camper and a .22 caliber handgun was in the yard east of the camper.

At 9:35 p.m., McGinnis was interviewed by a DCI agent and by a deputy sheriff. Neither detected an odor of alcohol on McGinnis. McGinnis volunteered, "[t]his will be my second DUI" and stated he had "probably nineteen, twenty" beers that day. At first McGinnis stated he didn't know Ohl was hurt. Later, McGinnis claimed: "What happened was that he did life bad and he got justification for it;" "[h]e got all the punishment he needed;" and also "he got what he deserved." Further:

[McGinnis] I was there.

[DCI] You were there. . . . Now, we're reaching out, we're giving you the opportunity to tell us what happened. . . .

. . . .

[DCI] I'm trying to find your side of the . . .

[McGinnis] You're trying . . .

[DCI] No, just wait.

[McGinnis] . . . to determine if it was premeditated or not, right?

[DCI] Steve, you're reading into it a little bit more. What I'm trying to do . . .

[McGinnis] No.

[DCI] Okay.

[McGinnis] That's your job.

[DCI] No, my job is to find out the truth.

[McGinnis] No . . . .

Eventually, McGinnis told the interviewers he didn't argue with Ohl, but he shot Ohl. McGinnis explained:

Q. Yeah. What happened after you shot him? I mean, did you call Deb right away while you were still there? A. I left.

Q. Okay. And he was sitting where? A. In a lawn chair.

. . . .

Q. . . . Did he get up after you shot him? A. No.

Q. Okay. Did he have a gun? A. Not that I know of.

. . . . A. I keep my guns loaded, but not chambered.

At the end of the questioning, McGinnis submitted a urine sample for chemical analysis.

On September 29, 2008, the State filed a trial information charging McGinnis with first-degree murder. On February 19, 2009, McGinnis filed a motion to exclude the testimony of Danielson and Overholtzer. McGinnis claimed the conversations were privileged conversations with counselors/therapists. In July 2009, the court denied the motion.

In April 2009, McGinnis filed a motion to suppress the statements he made during his interrogation on the evening of the shooting. McGinnis argued his statements were involuntary due to a combination of his intoxication and prescription drug usage. At the July 2009 hearing on the motion, the deputy sheriff testified McGinnis did not exhibit any signs of being under the influence of alcohol. Further, when he accompanied McGinnis out of the interview room on his numerous trips to the restroom, McGinnis walked normally. The DCI agent also testified he saw no indication of any kind that McGinnis was intoxicated. In August 2009, the court denied the defense motion.

On August 25, 2009, the jury trial commenced. Dr. Catellier testified Ohl was shot three times with a shotgun at a close range, once in the head and twice in the stomach. Dr. Catellier's analysis of Ohl's blood showed the presence of caffeine, but not alcohol.

The State's firearm expert explained the process of shooting the McGinnis shotgun and reloading it. The expert demonstrated this task required purposeful action by the shooter.

Dr. Bethel, a VA psychiatrist, treated McGinnis and testified his diagnosis of PTSD continued through the fall of 2008. Dr. Hagemoser, a VA clinical psychologist, testified he last treated McGinnis in 2007, and characterized McGinnis's PTSD as moderate. Dr. Dennert, a VA psychiatrist, characterized McGinnis's PTSD as mild to moderate. Dr. Dennert had no professional opinion as to the state of mind of McGinnis at the time of the shooting, but testified:

Q. Does [PTSD] necessarily render a person incapable of forming a specific intent? A. No.

Q. Does it characteristically render a person incapable of understanding the nature of their behavior? A. That's not a necessary part of the illness, no.

.....

Q. And does it characteristically cause a person to be incapable of distinguishing right from wrong in relation to their behavior? A. No.

Defense expert, Michael Rehberg, a forensic toxicologist, reviewed the DCI reports on the McGinnis urine sample. Rehberg explained the reports showed the presence of two drugs: a pain killer and a tranquilizer. Rehberg also took the early morning alcohol concentration results (.097) and calculated/extrapolated the McGinnis alcohol concentration would have been ".18

and .19” earlier in the evening at 6:00 p.m., assuming “there was no drinking between the time of the incident and the time of the sample.” Rehberg explained the drugs shown in the reports “would create enhanced intoxication effects. They would both add to his intoxication and would make him more sedated, more intoxicated, more affected by the chemicals.”

State rebuttal witness, psychiatrist Dr. Taylor, reviewed the list of seventeen medications (both prescription and over-the-counter) that McGinnis was taking in the jail and opined:

[The regimen of medication] was quite appropriate. It certainly was not excessive. And given the amount of sleep disturbance that [McGinnis] continued to report, he may have been getting a little bit less medication than he should have, but again, it certainly was not excessive.

Dr. Taylor had interviewed McGinnis and had reviewed his videotaped interrogation. Dr. Taylor diagnosed McGinnis with PTSD. Additionally, Dr. Taylor opined that at the time of the shooting McGinnis was “fully capable of forming . . . an intent to kill.” Dr. Taylor testified “whatever alcohol [McGinnis] had in his system did not have any impact on his ability to form the intent as you described it (premeditated, deliberate, specific intent to kill).” Additionally:

Q. . . . [H]ave you formed a professional opinion to a reasonable degree of medical certainty as to whether [McGinnis], at the time of this shooting, was suffering from a mental disease or disorder such as would have rendered him incapable of understanding the nature and quality of his acts? . . . A. He was not so impaired and he was capable of understanding the nature and quality of his acts.

Q. . . . [H]ave you formed a professional opinion to a reasonable degree of medical certainty as to whether [McGinnis] at the time of this shooting . . . was suffering from a mental disease or disorder to such a degree as would have rendered him incapable of distinguishing right from wrong in connection with his acts? . . . A.

He was not so impaired by any mental disease or defect and he was fully capable of distinguishing right from wrong.

Defense counsel argued McGinnis was having a PTSD episode at the time of the shooting. On September 4, 2009, the jury returned a verdict of guilty of first-degree murder. The trial court overruled the McGinnis post-trial motions and this appeal followed.

## **II. Insufficient Evidence.**

McGinnis contends there is “ample evidence” showing he “was diagnosed with post traumatic stress disorder and had been receiving treatment for it for several years.” Therefore, McGinnis argues the State’s evidence of premeditation and malice was insufficient to support his conviction for first-degree murder.

“[F]irst-degree murder requires proof of deliberation and premeditation in addition to malice aforethought.” *State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 2001). “Our first-degree murder cases have long held that the use of a deadly weapon supports an inference of malice, and when accompanied by an opportunity to deliberate, also supports an inference of deliberation and premeditation.” *Id.*

We review sufficiency of the evidence issues for correction of errors at law. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). The jury’s verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. *Fenske v. State*, 592 N.W.2d 333, 343 (Iowa 1999). The jury is “free to reject certain evidence and credit other evidence.” *State v. Nitchee*, 720 N.W.2d 547, 559 (Iowa 2006). “Substantial evidence is

evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt.” *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We “view the evidence in the light most favorable to the State.” *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

When viewing the evidence in the light most favorable to the State, we conclude a rational trier of fact could have found McGinnis guilty of first-degree murder. McGinnis believed Ohl had called the VA to report his relationship with Robin and believed Ohl had an affair with McGinnis’s ex-wife. The 5:00 to 5:30 McGinnis phone calls to Schnug and Danielson indicate McGinnis had a plan. McGinnis spoke in a normal manner during these phone calls. The jury could easily infer McGinnis formed the intent to shoot Ohl before he invited Ohl to his camper. McGinnis stood close enough to Ohl to insure his multiple shots would be both accurate and fatal. Further, Dr. Dennert’s testimony and Dr. Taylor’s testimony support the specific intent, deliberation, and premeditation requirements. Accordingly, substantial evidence supports the jury’s verdict.

### **III. Motion to Suppress.**

McGinnis argues the trial court erred in denying his motion to suppress the statements he made during his interrogation. McGinnis claims the combination of alcohol, medications, and fear of the Des Moines police rendered his statements involuntary.

The State’s use of an involuntary statement in a criminal trial is a denial of due process. *State v. Davis*, 446 N.W.2d 785, 788-89 (Iowa 1989). We review this constitutional issue de novo. *Id.* at 787. After reviewing the record,

particularly the recording and transcript of the interview of McGinnis, we agree with and adopt the district court's resolution of this issue:

The court concludes the confession is admissible based on the evidence. Here, the court has the benefit of a taped interview. Although the quality of the sound leaves much to be desired, the defendant's demeanor, speech, and responses to questions show no indication of intoxication. Both the transcript of the interview and the recording do not indicate impairment or any other factor that might render his statements involuntary.

#### **IV. Motion for New Trial.**

McGinnis argues the court erred in denying his motion for new trial. In addition to the evidence discussed above, McGinnis points to the testimony of a jailer who observed McGinnis acting strangely at the jail as though he was in Desert Storm. McGinnis asserts the greater weight of the evidence shows he was suffering from PTSD and, therefore, unable to act with premeditation and malice. The State argues "although the evidence showed that it is possible PTSD could cause a person to be unable to form specific intent, none of the experts testified that it did."

Under the "weight of the evidence standard," the trial court weighs the evidence and considers credibility as it determines whether "a greater amount of credible evidence supports one side of an issue . . . than the other." *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). While trial courts have wide discretion in deciding motions for new trial, such discretion must be exercised "carefully and sparingly" to insure the court does not "lessen the role of the jury as the principal trier of the facts." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa

1998). The trial court grants a new trial only in the “exceptional case” where “a miscarriage of justice may have resulted.” *Reeves*, 670 N.W.2d at 202.

Our appellate review “is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence.” *Id.* at 203. We do not “reweigh the evidence” nor “judge the credibility of the witnesses.” *Id.* Rather, we determine whether the district court’s ruling “is a clear and manifest abuse of discretion.” *Id.*

The trial court explained its denial of McGinnis’s motion for new trial:

And I have actually given this a great deal of thought, because there is evidence that could be interpreted in more than one way.

However, the Court believes that the witnesses that were called by both the State and by the defense were all reasonably credible. The Court doesn’t find that they actually testified inconsistently.

The Court, in weighing the evidence, finds that there was evidence of premeditation or malice aforethought and that the verdict in this case is not contrary to the evidence taking into consideration the credibility of the witnesses.

Now, all the witnesses didn’t testify identically the same. That rarely occurs in trials, even when they are called by the same party.

The Court believes the evidence in this case supports a verdict of murder in the first degree beyond a reasonable doubt. And having considered the weight of the evidence, the Court believes that weight supports the verdict the jury reached.

. . . [J]ust because the evidence may be interpreted more than one way, does not mean that the weight of the evidence does not support the verdict and the Court so finds, and the Court weighing the evidence in its own mind also finds that a verdict of murder in the first degree is supported by the evidence presented in this case.

After our review of the record, we conclude the district court properly applied the weight-of-the-evidence standard and gave sufficient reasons for its denial of a new trial. We conclude the court acted well within its discretion.

## V. Professional Confidence Privilege.

McGinnis argues the court abused its discretion in failing to exclude the testimony of Danielson and Overholtzer due to the professional communications privilege. See Iowa Code § 622.10(1) (2007). McGinnis claims both witnesses “were acting as mental health professionals in their conversations” with him.

We review “standard claims of error in admission of evidence for an abuse of discretion.” *State v. Stone*, 764 N.W.2d 545, 548 (Iowa 2009). The professional confidence privilege requires: (1) the existence of a professional relationship, (2) the acquisition of the information during the relationship, and (3) the necessity of the information to enable the professional to treat the patient skillfully. *State v. Deases*, 518 N.W.2d 784, 787 (Iowa 1994).

At the hearing on the motion, Danielson explained McGinnis was assigned to a different mental health counselor in early 2008 when she changed jobs to staff nurse. Danielson stopped being a mental health counselor, not only for McGinnis, but for all patients at the VA. Danielson testified in the first two phone calls with McGinnis “[h]is mood was – his tone was calm, neutral in tone.”

Further:

Q. All right. So on the 21st of September, do you remember about what time in the afternoon you got the first call from [McGinnis]? A. Somewhere between 5:15, 5:30.

Q. This was the call in the grocery store that had bad reception? A. Correct.

....  
Q. Was there anything in this conversation where [McGinnis] was seeking any type of treatment or counseling from you? A. No.

Q. He was just advising you that he was leaving. A. Correct.

....

Q. Do you make an attempt to call [McGinnis] back? A. I do.

....  
Q. Tell the court specifically what you remember about that particular conversation. A. I asked him to explain what he said before. That I didn't understand. And he said, "I need to leave the area. I found out who did my wife."

We find no abuse of discretion. We agree with and adopt the trial court's ruling: "Here, the facts do not establish McGinnis and Danielson had a counseling relationship at the time of this incident. Further, the information obtained by Danielson from the defendant did not relate to his treatment." Additionally, there is no evidence Overholzer had ever acted as a mental health professional for McGinnis.

**AFFIRMED.**