

IN THE COURT OF APPEALS OF IOWA

No. 2-977 / 12-0869
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN JAMES SELLERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

The defendant appeals the judgment and sentence entered by the district court, following a trial to the court on the minutes of evidence, resulting in his conviction for attempted murder and two counts of willful injury causing serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, John Sarcone, County Attorney, and Celene Gogerty and Mark
Sandon, Assistant County Attorneys, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Kevin James Sellers appeals the trial court's judgment and sentence finding him guilty, after a trial to the court on the minutes, of one count of attempted murder and two counts of willful injury causing serious injury. For the reasons stated below we find there was sufficient evidence to support the trial court's verdict. The trial court's judgment and sentence are affirmed.

I. BACKGROUND AND PROCEEDINGS.

On December 15, 2011, Sellers was charged with second degree murder. Sellers entered a plea of not guilty and as a result of negotiations the trial information was amended on May 2, 2012, to charge Sellers with attempted murder in violation of Iowa Code section 707.11 (2011), two counts of willful injury causing serious injury in violation of section 708.4(1), and he was alleged to be a habitual offender under section 902.8. On that same day, May 2, 2012, Sellers filed a written waiver of jury trial and appeared before the district court for a trial on the minutes. After reviewing the minutes of evidence, the district court found Sellers guilty of all three charges and adjudged him to be a habitual offender. Sellers then asked the court to proceed immediately to sentencing and waived his right to a presentence investigation report and his right to additional time to file posttrial motions. The district court sentenced Sellers to serve a maximum of twenty-five years for the attempted murder count, and fifteen years for each of the willful injury counts. The three sentences were ordered to run consecutively for a total term of fifty-five years.

The charges arose out of events that occurred in August, 2011. The minutes of evidence established a timeline of events that ultimately concluded with Laura Welch's death. Sellers and Welch resided together in a Des Moines apartment. In March of 2006, and again in April 2006, police were dispatched to the couple's apartment, and upon arrival they found the couple in the midst of a domestic dispute. On the first occasion Welch informed them that Sellers had punched her in the face, and they observed that she had a cut on her nose and one of her eyes was swollen shut. On the second occasion police could hear yelling coming from within the apartment, and after having a locksmith open the door, Welch informed them that she had called 911 and she was the person they could hear crying. At that same time, Sellers was yelling at the officers and threatening them. The minutes of evidence also include statements by a neighbor that in June, 2011, she heard loud banging noises coming from the apartment, and when she opened her apartment door she saw Welch crawling in the hallway. The next day she observed blood and hair in the hall where Welch had been crawling.

On August 25, 2011, five days before Welch's death, neighbors witnessed Welch returning home, and as she approached Sellers he kicked her in the chest with such force that Welch fell to the ground and began to cry. This event was the basis for one of the two counts of willful injury causing serious injury of which Sellers was found guilty. In a statement made to police after Welch's death, Sellers admitted to having a confrontation with Welch in which he "pushed" her with his foot. According to his statement Welch had left to purchase beer and

Sellers thought that she was taking too long. When she returned he took the sack of beer from her and pushed her with his foot for emphasis. The minutes of evidence reflect that Welch had serious injuries to her small bowel that had been inflicted in the days leading up to her death, likely the result of this push.

On August 29, 2011, Sellers and Welch were celebrating Welch's birthday. Around midnight neighbors were awakened by the sounds of an argument coming from the couple's apartment. Later, in the early hours of August 30, neighbors continued to hear arguing and the sounds of a fight, including the sound of a loud hit. At 10:18 on the morning of August 30, Sellers called 911 and reported that Welch was not breathing. When medics arrived they discovered that Welch was not breathing and did not have a pulse. She was taken to the hospital, transferred to intensive care and placed on life support. She died at 10:25 p.m. after family members made the decision to withdraw life support.

An autopsy determined that Welch had suffered a subdural hemorrhage, a hemorrhage in the subarachnoid space on the right temporal lobe, and traumatic axonal injury all within hours of her death. Welch also had a contusion on her forehead consistent with being struck with a fist. The medical examiner determined that the cause death was multiple blunt force trauma and that the manner of death was a homicide. Welch also had bruises on her arm and shoulder consistent with fingertips, numerous rib fractures, and multiple linear lacerations to her stomach all of which had occurred within hours of her death.

The injuries to her stomach and ribs were serious and the basis for the other count of willful injury causing serious injury, of which Sellers was found guilty.

The minutes of evidence contain several different versions of events as recounted by Sellers. He told the 911 dispatcher that he had no idea Welch was not breathing. He told the first responders at the scene that he and Welch had slept in the same bed and he could hear her snoring all night long and into the morning, but later she was not snoring and he could not wake her. He told police at the scene he and Welch had gotten very drunk the night before and he could not remember how the night ended, but that when he awoke in that morning at 6:00 a.m. he noticed Welch was on the floor and breathing. Later he awoke again and noticed she was not breathing, and he gave her CPR before calling 911. On the afternoon of August 31, Sellers told police a similar story.

Several months later, after the medical examiner determined that Welch's death was a homicide, Sellers was interviewed again. He admitted that he had assaulted Welch on various occasions in the past but maintained that he did not have memory of what happened the night before Welch's death. Sellers did admit that it would be pretty hard to cause Welch's injuries and that the most probable explanation was that he was responsible for them. At the conclusion of this interview Sellers was arrested.

In November and December 2011, Sellers was an inmate at the Polk County Jail and in the same pod as Larry Cox. Sellers discussed the circumstances around his arrest with Cox on two occasions. Sellers told Cox that he did remember what happened the night of August 29 and that he was not

truthful with police. Sellers told Cox that he and Welch had an argument, Sellers assaulted her and knocked her unconscious, and later, when he woke up, Welch was still unconscious on the floor, and Sellers spent the next few hours thinking of a way to explain her injuries. Sellers also stated that he had pressured Welch's family to discontinue life support for Welch out of fear that she would regain consciousness and remember what had occurred. After Sellers told these things to Cox, Cox returned to his cell, wrote down the conversation, and later provided copies to his attorney and the Des Moines Police Department. Some of the facts contained in Cox's records of the conversations were previously only known by officers involved in the investigation.

Based on the minutes of evidence, the district court found Sellers guilty of one count of attempted murder and two counts of willful injury causing serious injury. Sellers has appealed his judgment and sentence asserting the minutes of evidence do not contain sufficient evidence of his specific intent to murder Welch, and thus he cannot be guilty of attempted murder. For the reasons stated below we find there was sufficient evidence for the district court to conclude Sellers intended to kill Welch.

II. SCOPE AND STANDARD OF REVIEW.

Sufficiency of the evidence claims are reviewed for errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). A conviction on appeal is not binding unless it is supported by substantial evidence. *State v. Dalton*, 674 N.W.2d 111, 116 (Iowa 2004). "The trial court's factual findings are binding on appeal if supported by substantial evidence." *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa

2004). Substantial evidence is evidence that could convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). We review the evidence in the light most favorable to the State to determine if there is substantial evidence. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001).

III. EVIDENCE OF INTENT.

After a trial on the minutes, Sellers was found guilty of attempted murder, in violation of Iowa Code section 707.11. Attempted murder is committed when

with the intent to cause the death of another person and not under circumstances which would justify the person's actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person.

Iowa Code § 707.11. The statute requires that to be guilty of attempted murder, a person needs to have both the specific intent to cause the death of another, and to commit an overt act in furtherance of that specific intent. *State v. Young*, 686 N.W.2d 182, 185 (Iowa 2004). In the present case, the defendant asserts there was not sufficient evidence of his specific intent to cause Welch's death, especially in light of the fact that he had assaulted her before without the intent to cause her death. Sellers claims that this time was no different than previous beatings in which he only meant to injure her, except that on this occasion Welch did in fact die.

An actor's specific intent is a mental process that is seldom capable of being shown by direct evidence. *State v. Walker*, 574 N.W.2d 280, 289 (Iowa 1998). However, specific intent "may be shown by circumstantial evidence and

the reasonable inferences drawn from that evidence.” *Id.* Circumstantial evidence may be considered in determining whether a motive or intent to kill can be inferred. *State v. Clarke*, 475 N.W.2d 193, 197 (Iowa 1991). Like direct evidence, circumstantial evidence must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. *Id.*

In considering Sellers’s assertion that he did not have the specific intent to cause Welch’s death, we are aided by the maxim that “defendants will ordinarily be viewed as intending the natural and probable consequences that ordinarily follow from their voluntary acts.” *State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003). “The law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done.” *State v. True*, 190 N.W.2d 405, 407 (Iowa 1971). The district court, as a reasonable trier-of-fact, could have concluded that when Sellers set about the act of beating Welch on that night he expected to set in motion a force or chain of events which would cause or result in Welch’s death. The act of beating Welch was itself unlawful and intentional, and her death was a natural and probable consequence of that act. Thus, the district court could also have reasonably concluded that, by intentionally assaulting Welch and setting in motion a chain of events that could naturally and probably lead to her death, Sellers specifically intended to cause Welch’s death.

Sellers asserts in this appeal that because he had assaulted and beaten Welch in the past, his intent on this occasion was only to beat Welch like he had

done before, not to kill her. Thus, Sellers contends, he did not have the specific intent required to be guilty of attempted murder. This novel argument fails for a number of reasons.

First, although the record does reflect that neighbors had witnessed two previous altercations and in 2006 police had responded to two calls involving the couple, the record does not reflect any previous criminal charges for assault. Also, there is little evidence that these alleged assaults were frequent and ongoing. At most, the record evidences that on a few occasions domestic disputes between Sellers and Welch would result in violence. The minutes of evidence do not support Sellers's contention that he frequently assaulted Welch.

Second, the extent of Welch's injuries are far more serious than those she suffered as a result of previous assaults. At most, the minutes of evidence reflect that in 2006 she got a cut on her face and a swollen eye, and on August 25, 2011, she had damage to her bowel from Sellers's kick. As a result of the assault Sellers inflicted on Welch leading up to her death, she had multiple injuries to her head and brain, bruises on her arms and shoulders, fractured ribs, and linear lacerations to her stomach. The gravity of these injuries surpassed any that she had received previously. The district court could reasonably conclude that on this occasion Welch was the victim of a savage beating far worse than those suffered before.

Third, Sellers has cited no authority for the proposition that a prior history of assaultive conduct negates the intent to kill in a later altercation.¹ Indeed, it would be an absurd result to allow a criminal defendant to use his or her own history of violence to defeat the intent element required for a current offense. Sellers also asserts there is no evidence that he threatened to kill Welch or that he used a weapon, and their absence is indicative of his lack of intent. As stated above, an intent to kill will seldom be proven by direct evidence such as a threat. *Walker*, 574 N.W.2d at 289. Nothing in the laws of this state makes use of a weapon a necessary element of an attempted murder charge.

Finally, the fact-finder is free to accept and believe or disbelieve any testimony that it chooses. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). The minutes of evidence contain testimony from Larry Cox, Sellers's pod-mate in prison, to the effect that Sellers had been lying to police about what had occurred, that he had beaten Welch prior to her death, that he left her lying unconscious throughout the night, that after realizing she was still unconscious in the morning he spent several hours concocting a cover story, and that he pressured Welch's family into removing life-support out of fear she might wake

¹ In *State v. O'Donnell*, the Iowa Supreme Court reversed the defendant's conviction for first degree murder of his wife due to the fact that the defendant was known to frequently strip, beat, choke, and otherwise viciously assault his wife, and thus, the previous abuse tended to negate an inference of intent to kill on the occasion of her death. 157 N.W. 870, 872 (Iowa 1916). In that case, the Court makes frequent reference to acts of brutality committed by the defendant against his wife. *Id.* In the present case, the defendant has asserted that he frequently assaulted Welch but the record does not contain evidence of a history of ongoing and violent assaults that would rise to the level of those contained in *O'Donnell*.

up and remember what happened. Considered as a whole, these acts provide sufficient evidence of intent to kill and not merely intent to inflict a routine beating.

IV. CONCLUSION.

For the above-stated reasons, we find there is substantial evidence to support the trial court's decision to convict Sellers of attempted murder, in violation of Iowa Code section 707.11. We affirm the judgment and sentence of the district court.

AFFIRMED.