IN THE COURT OF APPEALS OF IOWA

No. 9-149 / 08-0533
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDREW RUSSELL JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott Rosenberg, Joel Novak, and Robert Hutchison, Judges.

Andrew Johnson appeals his conviction, following a trial to the court on a stipulated record, for murder in the second degree. **AFFIRMED.**

Gary Dickey Jr. of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

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

MILLER, J.

Andrew Johnson appeals his conviction, following a trial to the court on a stipulated record, for murder in the second degree. He contends: (1) the district court erred in finding he was competent to stand trial; (2) the court erred in denying his motion to suppress; (3) there was not sufficient evidence to support his conviction; and (4) he was the victim of selective prosecution. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Based on the evidence in the record a reasonable factfinder could find the following facts. In the early morning hours of September 3, 2006, eighteen-year-old Matthew Stegman was brutally murdered in Woodland Cemetery in Des Moines, Iowa. Stegman's death occurred as a result of a plan developed by Robert Myers and Terry Williams. Myers and Williams were assisted by three of Stegman's other roommates, defendant Johnson, Sheri Fisher, and Robert Johnston. At the time of the murder all of these individuals were living in an apartment together at 1519 Grand Avenue, not far from the cemetery. Myers and Williams developed their plan after a rumor was circulated among their group of acquaintances that Stegman was going to "bondage rape" M.D., the thirteen-year-old daughter of Myers's girlfriend.

Johnson and Stegman were also having difficulties at this time and did not get along. Stegman had told several others in the group that he was going to either kill or beat up Johnson because he believed Johnson had called the department of human services on David Flores, another person involved in the same group of acquaintances, and his girlfriend. Therefore, Myers's and

Williamson's plan was to use Johnson as "bait" to get Stegman to believe the group was going to the cemetery so that Stegman could either fight or kill Johnson, but once there they would instead kill Stegman.

After Stegman left work in the early morning hours of September 3, 2006, he went back to the apartment at 1519 Grand. Myers, Williams, Johnson, Fisher, Johnston, Alexandra Habeck, Habeck's boyfriend, and Thomas Ransom were all at the apartment waiting for him. After playing some music and "meditating" two groups left separately for the cemetery, as planned by Myers and Williams. Fisher, Myers, Johnston, and Habeck left in the first group to take up positions in the cemetery and wait for the second group of Williams, Johnson, and Stegman to appear. Johnson and Williams walked with Stegman to the cemetery, climbed over a fence, and connected with the others who were waiting near a mausoleum.

Once at the cemetery, while Stegman's back was turned, Myers, who is trained in martial arts, kicked Stegman in the back of the knee taking Stegman to the ground. Myers, Williams, and Johnston then proceeded to repeatedly kick Stegman in the face and body. Fisher, Johnston, and Johnson then apparently left the cemetery, allegedly to "protect" Johnson. Williams then slit Stegman's throat and when that did not cause him to cease screaming tried to sever Stegman's spinal cord by plunging the knife into the base of his skull. When that again failed to silence Stegman, Williams handed the knife to Myers who stabbed Stegman in the chest. They kicked Stegman into unconsciousness. Myers, Williams, and Habeck then left the cemetery by a different route than they had

used when entering the cemetery and returned to the 1519 Grand apartment. There they cleaned the knife, first by soaking it in hot water and then in mouthwash in an attempt to get rid of the blood. Myers also cleaned blood from his chest and attempted to clean it from his shoes. Myers and Williams had taken their shirts off prior to the start of the beating to avoid getting blood on them and so as not to restrict their movements.

On the morning of September 3, 2006, a couple walking through Woodland Cemetery found Stegman's body and called the police. In the ensuing investigation, police learned that several people living in an apartment close by had information about the murder. The police proceeded to the 1519 Grand apartment and rounded up thirteen people who were there, including Johnson, and transported them to the police station for interviews. Two teams of two officers interviewed the witnesses beginning at 7:30 p.m. After approximately three and one-half hours, two officers interviewed Johnson. The interview lasted a little over an hour with two short breaks, during one of which Johnson was provided a soda to drink. The interview was taped on audio and video tape. During the interview Johnson provided detail about his involvement in the murder, including that he was used as "bait" to lure Stegman to the cemetery where he knew Myers and Williams were waiting with the intention of killing Stegman.

The State charged Johnson and four co-defendants, by trial information, with murder in the first degree. The charge against Johnson was severed. Johnson filed a motion to suppress the statements he made during the police

interview on the day of the murder. He also filed an application for a competency hearing, claiming he was not competent to stand trial. Following a lengthy hearing on each, the district court found Johnson competent to stand trial and denied his suppression motion.

Johnson filed a written waiver of jury trial, and pursuant to an agreement with the State agreed to waive any defense of diminished responsibility and to submit the case to the court on a stipulated record consisting of the minutes of evidence, Johnson's videotaped interview with the police, and the transcript of the interview. The State agreed to amend the charge to the lesser included offense of murder in the second degree, in violation of Iowa code sections 707.1 and 707.3 (2005). The court found Johnson guilty as charged and sentenced him to a term of imprisonment not to exceed fifty years, with a mandatory minimum of seventy percent.

Johnson appeals, contending: (1) the district court erred in finding he was competent to stand trial; (2) the court erred in denying his motion to suppress; (3) there was not sufficient evidence to support his conviction; and (4) he was the victim of selective prosecution.

II. MERITS.

A. Competency to Stand Trial.

Johnson first challenges the district court's determination that he was competent to stand trial. He asserts our scope of review is de novo. The State asserts it is for correction of errors at law.

> Contrary to defendant's assertion, we do not review the evidence de novo where a determination of competency has been

> made below. That is the case only where no hearing is held below and we are examining the propriety of trial court's determination that no hearing was necessary. Rather, the question of competency is for the trier of fact where there is a conflict in the testimony at the competency hearing and defendant challenges that determination on appeal. . . . Our inquiry is limited to whether there is support in the record for the competency finding.

State v. Jackson, 305 N.W.2d 420, 425 (Iowa 1981) (citations omitted). A more recent case involving a competency determination is to the same effect.

> Our scope of review is for the correction of errors at law. We are bound by the district court's findings of fact if they are supported by substantial evidence. We do not review the evidence de novo where a determination of competency has been made by the district court. Therefore, our inquiry is limited to whether there is support in the record for the competency finding. We only review the record de novo where no competency hearing is held below, and we are examining the propriety of the district court's determination that no hearing was necessary.

State v. Rieflin, 558 N.W.2d 149, 151-52 (Iowa 1996) (citations omitted). We conclude that where, as here, the district court has made a determination of competency after a thorough and meaningful competency hearing our scope of review is for correction of errors at law.

The conviction of an accused person while he or she is legally incompetent violates due process. *State v. Rhode,* 503 N.W.2d 27, 32 (Iowa Ct. App. 1993). A defendant is initially presumed to be competent. *State v. Pedersen*, 309 N.W.2d 490, 496 (Iowa 1981). The burden of proving incompetency to stand trial, by a preponderance of the evidence, is on the defendant. *Id*. Johnson can only overcome this presumption by proving that he "is suffering from a mental disorder which prevents [him] from appreciating the charge, understanding the proceedings, or assisting effectively in the defense."

Iowa Code § 812.5(2). If evidence at the competency hearing "is in equipoise the presumption [of competency] should prevail." *Pedersen*, 309 N.W.2d at 496.

Johnson contends he was incompetent to stand trial, based solely on the contention he could not effectively assist in his defense, tacitly admitting he could appreciate the nature of the charge and understand the proceedings. Further, his own expert found Johnson did appreciate the charge against him and understood the proceedings. Therefore, we review only the narrow issue of whether the district court's determination that Johnson could effectively assist in his defense is supported by the record.

In support of his contention, Johnson relies heavily on his history of mental illness and the conclusions of his expert witness Dr. Jeffrey Kline. Kline is a forensic psychologist who opined that Johnson's diagnosis of borderline personality disorder interfered with his ability to focus on relevant information and effectively consult with his counsel. Dr. Kline testified he spent over one hundred hours on Johnson's case, including interviewing Johnson and reviewing reports from Johnson's prior hospitalization as well as other documents. Kline initially concluded Johnson was competent to stand trial when he first interviewed him in January 2007. However, he testified at the competency hearing that Johnson's increasing dissatisfaction with and paranoia about his counsel had changed his initial opinion. After interviewing him again in October 2007, Dr. Kline concluded Johnson was not competent to stand trial because he could not effectively assist in his defense.

The State's expert was Dr. James Dennert, a psychiatrist who is medical director at Mercy Franklin's adult mental health unit. It is undisputed that Dr. Dennert spent less time reviewing reports and documents and interviewing and evaluating Johnson than did Dr. Kline. However, he did review several pertinent documents, interviewed Johnson for several hours, viewed the videotape of Johnson's interview with police, and examined Dr. Kline's reports. Dr. Dennert concluded to "a reasonable degree of medical certainty" that Johnson was competent to stand trial, he was not delusional or psychotic, and that he was capable of assisting his lawyers in his defense. More specifically, he testified that much of what Johnson said to him was just parroting terms Johnson had picked up either in his own reading or from Dr. Kline's report, and that Johnson's comments about not trusting his attorneys were "best interpreted as being self-serving." Dr. Dennert opined that

> [Johnson is] perfectly capable of assisting his attorneys effectively. Whether he chooses to do so or whether some of the things he does may not be the sorts of things that his attorneys would like is another question. But he certainly chooses to do those things. He acts out of choice. He's not compelled. He is not psychotic. He's not so disordered that he's unable to choose what he does. He does choose his behaviors.

In concluding Johnson was competent to stand trial the district court noted the opinions of the doctors were obviously at odds. It further recognized that Dr. Kline had spent more time, administered more tests, and reviewed more documents in this case than Dr. Dennert had, but determined that based on Dennert's background and training he had "considerable expertise in addition to being a doctor of psychiatry." The court also based its conclusion on its own

observations of Johnson during the competency hearing, portions of which were held on two separate days, four days apart. It observed that at no time during the hearing did Johnson have any outbursts or visible emotional overreactions, and that he appeared to effectively confer with his counsel at the hearing. Thus, the court concluded Johnson did not show by a preponderance of the evidence he was incompetent to stand trial under section 812.3.

Upon our review of the evidence, we conclude there is support in the record for the district court's competency determination. Johnson did not overcome the presumption that he was competent to proceed with the charges against him. We agree with the district court that Johnson did not establish, by a preponderance of the evidence, that he was not competent to stand trial.

B. Motion to Suppress.

Johnson next contends the district court erred in denying his motion to suppress, because his inculpatory statements to the police were involuntary. As set forth above, Johnson filed a pretrial motion to suppress seeking to exclude the statements he made to the police. The district court denied the motion, concluding in relevant part that Johnson voluntarily answered questions asked of him by the investigating officers and his statements to them were "the product of essentially free and unconstrained choice, made by the defendant whose will was not overborne or whose capacity for self-determination was not critically impaired." Thus, the court concluded Johnson's statements to the officers were made voluntarily, knowingly, and intelligently.

As agreed by the parties our review of this issue is de novo. We review de novo the ultimate conclusion reached by the district court in ruling on a motion to suppress. *State v. Heminover*, 619 N.W.2d 353, 356 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001). We independently evaluate the totality of the circumstances shown by the entire record. *State v. Turner,* 630 N.W.2d 601, 606 (Iowa 2001). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *Id*.

"The test for determining the admissibility of confessions or inculpatory statements is voluntariness." *State v. Munro*, 295 N.W.2d 437, 440 (Iowa 1980).

> In order to establish the voluntariness of a defendant's inculpatory statements, the State must demonstrate from the totality of circumstances that the statements were the product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired.

State v. Hodges, 326 N.W.2d 345, 347 (Iowa 1982) (quoting *State v. Cullison*, 227 N.W.2d 121, 127 (Iowa 1975)).

> Many factors bear on the issue of voluntariness. These include the defendant's knowledge and waiver of his *Miranda* rights; the defendant's age, experience, prior record, level of education and intelligence; the length of time defendant is detained and interrogated; whether physical punishment was used, including the deprivation of food or sleep; defendant's ability to understand the questions; the defendant's physical and emotional condition and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admissions; [and] any mental weakness the defendant may possess.

Id. at 348 (internal citations omitted). No one factor is determinative of voluntariness; the inquiry focuses on the "impetus for the inculpatory statement."

Id. The State bears the burden of proving voluntariness by a preponderance of the evidence. *State v. Countryman,* 572 N.W.2d 553, 558 (Iowa 1997).

After having reviewed the entire record, including Johnson's videotaped interview and its transcript, with the factors set forth above in mind, for the following reasons we conclude the totality of the circumstances demonstrates Johnson's inculpatory statements to the police were made voluntarily.

The interview occurred in a room at the Des Moines police station that contained a table and chairs. A roll of toilet paper sat on the table. Johnson was dressed in shorts and a t-shirt. The two detectives who did the questioning were in plain clothes and no weapons or handcuffs were readily apparent on their persons. Johnson knew his address and social security number. During the entire interview all three remained seated and talked in calm, conversational tones. No one spoke in a raised or angry voice. Throughout the interview Johnson appeared alert, spoke coherently, and gave responsive answers.

Prior to any questioning, other than acquiring basic identifying information about Johnson, one of the detectives read each of the *Miranda* rights to Johnson and Johnson acknowledged he understood those rights and then signed a written waiver of those rights. Thus, he had knowledge of and gave a valid waiver of his *Miranda* rights. Johnson was twenty-two years of age at the time of the questioning and indicated he was familiar with "detective rooms" as he had been previously interrogated regarding a rape. Johnson had attended high school, although the record is not entirely clear as to whether he graduated. Dr. Kline found in his report that Johnson was of average intellect and his IQ was in the

"average range." Johnson does not allege, nor does the record demonstrate, that any deception was used, promises of leniency were made, or threats were made by the detectives in order to elicit the inculpatory statements from Johnson. Johnson was not deprived of sleep, food, drink, or the use of a restroom. In fact one of the detectives asked him if he wanted something to drink at the start of the interview and then got a soda for him during one of the breaks in the interview.

Johnson did have to wait at the police station for three and one-half hours before he was interviewed. However, there is no indication this in any way wore Johnson down physically or mentally such that it would affect the voluntariness of his inculpatory statements. During the pre-interview wait, Johnson was seated with the other witnesses first in an area that contained couches and a television set. Later they were moved to benches in the hallway, where a water fountain and bathrooms were available. Johnson sat with the other witnesses and apparently was not restricted from conversing with them. He was not isolated in any way during the wait. He was not in handcuffs or in any other way restrained during the wait, nor did he ask to see a lawyer, to use the telephone, or to have food. The interview itself lasted one hour and eight minutes with two breaks. During the second break Johnson accepted the detective's offer of a can of soda and drank it. Accordingly, we do not find the length of time Johnson was detained and interrogated to have been so excessive or unreasonable as to have rendered his confession involuntary.

Johnson's challenge to the voluntariness of his inculpatory statements relies almost entirely on the testimony of Dr. Kline regarding the results of a

"suggestibility" test Kline conducted. Dr. Kline testified that Johnson's "extreme suggestibility" affected the reliability of Johnson's statements and made him susceptible to police pressure to make inculpatory statements. However Dr. Dennert testified at the suppression hearing that he considered the videotaped interview and accompanying transcript to be the most reliable evidence of Johnson's level of functioning during the interview. We agree. Dr. Dennert stated Johnson showed no signs of any mental disorder during his interview. He understood the questions posed by the detectives and gave appropriate answers. Further, despite Johnson's argument to the contrary, Dr. Dennert testified Johnson did not show any "suggestibility" during the interview. He pointed out that Johnson had repeatedly rebuffed the detective's insinuation that Johnson also had stabbed Stegman. Additionally, Johnson consistently repeated the same version of the crime he gave to the detectives to Dr. Kline and Dr. Dennert, a fact which undercuts Johnson's argument that his statements to the police were the product of pressure due to his "suggestibility." We conclude Johnson was able to understand the questions and that his physical, emotional, and mental condition did not affect the voluntariness of his statements. We agree with the district court that although Johnson clearly has some sort of personality disorder, any such mental disorder did not prevent him from acting voluntarily.

We conclude the State met its burden to prove by a preponderance of the evidence that Johnson's inculpatory statements to the police were given

voluntarily. The district court did not err in denying Johnson's motion to suppress on this ground.

C. Substantial Evidence.

Johnson argues his conviction for second-degree murder is not supported by substantial evidence. He does not dispute that co-defendants Myers and Williams were guilty of murder in the first degree or that they possessed malice aforethought when they carried out their premeditated plan to kill Stegman. He contends only that the record lacks sufficient evidence that he aided and abetted in Stegman's murder. He claims he "merely had knowledge of and was present at the scene of the crime. There is nothing in the minutes of testimony that he encouraged anyone to murder Stegman or that his actions equaled 'active participation.'"

Our scope of review is on assigned error. Iowa R. App. P. 6.4; *State v. Dible*, 538 N.W.2d 267, 270 (Iowa 1995). It is the same on a defendant's appeal from a criminal conviction whether the court or a jury is the factfinder. *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988). "We review a trial court's findings in a jury-waived case as we would a jury verdict: If the verdict is supported by substantial evidence we will affirm." *State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000). The standard of review in a challenge to the sufficiency of the evidence is well established. *Dible*, 538 N.W.2d at 270. "We will uphold a verdict where there is substantial evidence in the record tending to support the charge." *Id*. A trial court's finding of guilt is binding on appeal if supported by

substantial evidence. Iowa R. App. P. 6.14(6)(*a*); *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997).

> In a criminal case tried to the court, as in a civil case tried to the court at law, the court's verdict is like a jury verdict. Upon review of the sufficiency of evidence to support the verdict, we view the evidence in the light most favorable to the verdict, and we accept as established all reasonable inferences tending to support it. Findings of the trial court are to be broadly and liberally construed, rather than narrowly or technically, and, in case of ambiguity, we will construe findings to uphold, rather than defeat, the judgment. Direct and circumstantial evidence are equally probative so long as the evidence raises a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture. It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt.

Dible, 538 N.W.2d at 270 (internal quotations and citations omitted). The trial court, as factfinder, is to determine witness credibility and the weight of the evidence as a whole. *See State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999).

To support a conviction based on the theory of aiding and abetting, the record must contain substantial evidence the defendant "assented to or lent countenance and approval to the criminal act either by active participation in it or in some manner encouraging it prior to or at the time of its commission." *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984). While mere presence at the scene of a crime by itself is insufficient to prove aiding and abetting, it "need not be shown by direct proof. It may be inferred from circumstantial evidence including presence, companionship and conduct before and after the offense is committed." *Fryer v. State*, 325 N.W.2d 400, 406 (Iowa 1982). The guilt of the person accused of aiding and abetting must be determined by the facts showing

his role in the crime, not based on another's guilt. *See State v. Lockheart,* 410 N.W.2d 688, 693 (Iowa Ct. App. 1987).

During his interview with the police, Johnson admitted he was the "bait" used to lure Stegman to his death in the cemetery. He further admitted he knew Myers and Williams intended to kill Stegman after they lured him to the cemetery, and knew of this several hours before they actually did so. By luring Stegman to the cemetery according to a prearranged plan, under false pretenses, and knowing that Myers and Williams intended to kill him once there, Johnson actively encouraged and participated in Stegman's murder as an aider and abettor. Accordingly, we conclude there was sufficient evidence in the record for a rational factfinder to find beyond a reasonable doubt that Johnson was guilty of murder in the second as an aider and abettor.

D. Selective Prosecution.

Finally, Johnson contends he is the victim of selective prosecution because the prosecutor did not charge another participant in Stegman's death with murder. A claim of selective prosecution implicates the equal protection guarantee as applied to the states under the Fourteenth Amendment. *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 506, 7 L. Ed. 2d 446, 452 (1962). An equal protection claim is reviewed de novo. *State v. Kotlers,* 589 N.W.2d 736, 738 (Iowa 1999). Selectivity in prosecution is not a constitutional violation unless the decision was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler*, 368 U.S. at 456, 82 S. Ct. at 506, 7 L. Ed.2d at 453.

First, as Johnson concedes, he did not preserve error on this issue because it was not raised in the trial court. *DeVoss v. State,* 648 N.W.2d 56, 63 (Iowa 2002). However, Johnson asks that we preserve this issue for a possible postconviction proceeding so that a proper record can be made. However, Johnson does not specify which, if any, impermissible classification the prosecutor allegedly based the charging decision on, nor does he make any other specific argument with regard to this issue. He merely states that to date Habeck has not been charged with anything and "[b]ased on these facts, the county attorney has some explaining to do."

We conclude this claim is too general in nature to allow us to either address it or preserve it for a possible postconviction proceeding. *See State v. Wagner*, 410 N.W.2d 207, 215 (Iowa 1987) (holding that we will not preserve an issue for a postconviction proceeding unless defendant makes "some minimal showing from which this court can assess the potential viability of his or her claim.")[1].

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[1] A question that occurs is whether a vague and general claim of ineffective assistance of counsel, wholly lacking a showing of breach of duty, resulting prejudice, or both, raised on direct appeal, should be preserved for a possible postconviction proceeding. A statute now provides that a claim of ineffective assistance of counsel need not be raised on direct appeal from the criminal proceedings and if so raised the court may decide the claim if the record is adequate or may choose to preserve the claim for a postconviction proceeding. *See* Iowa Code § 814.7 (2007). This statute went into effect July 1, 2004. *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007). *State v. Alloway*, 707 N.W.2d 582 (Iowa 2007) was a case such as this in that it involved a claim of ineffective assistance of counsel in a direct appeal from a criminal proceeding. *Id.* at 584. The claim of ineffective assistance related to a July 2, 2004 sentencing, a date after the effective date of section 814.7. Our Supreme Court stated,

> Claims of ineffective assistance of counsel on direct appeal are preserved for postconviction relief only if the defendant makes a minimal showing of the potential viability of the claim. This requires the defendant to show the need to develop a further record, and to explain why the

III. CONCLUSION.

For the reasons set forth above, we conclude there is support in the record for the district court's competency determination. Johnson did not overcome the presumption that he was competent to proceed with the charges against him. We further conclude the court did not err in denying Johnson's motion to suppress the inculpatory statements he made during his police interview, because such statements were made voluntarily. In addition, we conclude the evidence in the record was sufficient for a rational factfinder to find Johnson guilty of murder in the second degree beyond a reasonable doubt. Finally, Johnson's selective prosecution claim is too vague and general for us to either address or preserve for a possible postconviction proceeding.

AFFIRMED.

> actions of counsel were ineffective and how those actions resulted in prejudice. A bald assertion is insufficient.

Id. at 587. The court concluded that Alloway had failed to sufficiently articulate the prejudice prong of his ineffective assistance claim and did not preserve it for a possible postconviction proceeding. The reasoning and result in *Alloway* leads us to the same result in this case.