IN THE COURT OF APPEALS OF IOWA

No. 3-297 / 12-1114
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS J. PETERSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Butler County, Christopher C. Foy, Judge.

A defendant appeals his judgment and sentence for first degree murder, contending (1) the record lacks sufficient evidence to support the jury's finding of guilt and (2) several evidentiary rulings require reversal. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller and Douglas Hammerand, Assistant Attorneys General, Gregory M. Lievens, County Attorney, and Martin Peterson, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITEHSWARAN, J.

Thomas Petersen appeals his judgment and sentence for first degree murder. He contends (1) the record lacks sufficient evidence to support the jury's finding of guilt and (2) several evidentiary rulings require reversal.

I. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following:

> 1. On or about June 4, 2011, Defendant stabbed Judy Renee Petersen.
> 2. Judy Renee Petersen died as a result of being stabbed.
> 3. Defendant acted with malice aforethought.
> 4. Defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Judy Renee Petersen.

Petersen contends there was insufficient evidence to establish he acted with "malice aforethought" and "with a specific intent" to kill Judy. These terms were defined for the jury as follows:

> The term "malice aforethought" means a fixed purpose or design to do some physical harm to another which exists before the act is committed. It does not have to exist for any particular length of time. Malice aforethought may be inferred from the use of a dangerous weapon.
>
> The term "specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.
>
> Because determining the specific intent of Defendant requires you to decide what he was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine the specific intent of Defendant. You may, but are not required to, conclude a person intends the natural results of his acts.

Our review of the record is for substantial evidence. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

A reasonable juror could have found the following facts. Thomas Petersen lived in a home with his wife, their two children, and his wife's teenage son from a prior relationship. Petersen and his wife began arguing on June 4, 2011, and he ultimately stabbed or cut her 129 times with three knives.

When Petersen's stepson returned home, he discovered bent and blood-soaked knives, a pile of Petersen's bloodied clothing, and his mother lying in a pool of blood. He attempted to resuscitate her without success.

The following day, authorities learned that Petersen was in South Dakota with his young son. They engaged him in a high-speed chase and eventually apprehended him.

Petersen does not deny that he was the person who stabbed his wife to death. His sole defense is one of intoxication. He contends he consumed at least eighteen beers before the stabbing and his inebriation prevented him from forming malice aforethought and specific intent.

A reasonable juror could have found otherwise based on Petersen's use of three deadly weapons, the multiple stabbings, and Petersen's subsequent flight. *See State v*. *Wilkens*, 346 N.W.2d 16, 20–21 (Iowa 1984) ("The effect of defendant's heavy drinking on formation of the requisite specific intent to kill was for the jury to determine."); *State v*. *Winfun*, 261 N.W.2d 484, 486 (Iowa 1978) (noting that the defendant's alleged intoxication is a proper matter for the fact-finder to consider in determining whether the elements of first-degree murder are present). A reasonable juror also could have considered Petersen's own testimony about the events surrounding the stabbing and the deliberation that

testimony revealed. In sum, substantial evidence supports the jury's finding of guilt.

II. Evidentiary Rulings

A. Call Relating to Prior Altercation

Petersen contends the district court abused its discretion in overruling his objection to a deputy sheriff's testimony relating to a prior domestic altercation at the Petersen home. He argues the evidence constituted inadmissible propensity evidence. *See* Iowa R. Evid. 5.404(b).[1]

The Iowa Supreme Court affirmed the admission of similar evidence in *State v*. *Taylor*, 689 N.W.2d 116, 128 (Iowa 2004) ("The defendant's prior acts of violence toward his wife, while certainly illustrative of a propensity to use violence, also reflect his emotional relationship with his wife, which as our discussion shows, is a circumstance relevant to his motive and intent on the day in question."), and *State v*. *Rodriguez*, 636 N.W.2d 234, 242–44 (Iowa 2001) (concluding evidence of prior assaults by the defendant was admissible in case involving multiple criminal convictions arising out of a domestic abuse incident). We discern no basis for distinguishing those opinions. If anything, the prejudicial effect of the prior acts evidence was greater in those cases than it is here because the acts were similar to the acts underlying the charged crime. *See State v*. *Sullivan*, 679 N.W.2d 19, 30 (Iowa 2004) ("When jurors hear that a

[1] The rule states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. Evid. 5.404(b).

defendant, on earlier occasions, has committed essentially the same bad acts for which the defendant is on trial, 'the information unquestionably has a powerful and prejudicial impact.'") (citation omitted)).

B. Text Message

Petersen next argues that the district court erred in admitting hearsay testimony in the form of text messages sent by Petersen's wife Judy to her sister. *See State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009) (stating review of hearsay rulings is for correction of errors at law). The exchange was as follows:

> [Judy:] I talked to our parents about what happened this weekend. He was making threats toward himself and me. Anyway……. Yall stay safe and we r so excited about seeing yall in May. I made car reservations yesterday. The kids talk about it on a daily basis.
>
> [Kelly Svebek:] Threats…such as? In general? Specific?
>
> [Judy:] Hinted at killing himself if the divorce papers dont say joint cost of the kids. He said he had to make a decision when he got arrested….kill two sheriffs or play it cool then planned on attending a funeral in two weeks and it wasn't his. When I asked him what he meant…he just said u know what I mean. When I asked if he was threatening me he told me to figure it out. He pulled all of his stuff out of the closet and put it on the bed. Woke up kris and jake—told them he loved them and didn't know if he would ever see them again. Then said I had won and that he was done. I told him we r not playing a game and there is no winning. Then he said I won again and that the kids would grow up without a father.

The State concedes the exchange was hearsay but argues it was admissible under the residual exception to the hearsay rule. That exception states:

> A statement not specifically covered by any of the exceptions in rules 5.803 or 5.804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the

> interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Iowa R. Evid. 5.807. The exception has five parts: "trustworthiness, materiality, necessity, service of the interests of justice, and notice." *State v. Neitzel*, 801 N.W.2d 612, 623 (Iowa Ct. App. 2011) (quotation marks and citation omitted). Petersen does not contest the notice factor. That leaves the remaining four factors for consideration.

We agree with the State that the text messages had "sufficient circumstantial guarantees of trustworthiness." *See State v. Rojas*, 524 N.W.2d 659, 663 (Iowa 1994). Like the videotape analyzed in *Rojas*, which the court characterized as "more reliable than many other forms of hearsay because the trier of fact could observe for itself how the questions were asked, what the declarant said, and the declarant's demeanor," the text messages could be seen and evaluated by the trier of fact. *Id*.

The materiality element has been equated with relevance. *See* 7 Laurie Kratky Doré, *Iowa Practice Series*, Evidence § 5.807:1, at 958 (2011) ("Although the cases have not yet fully explored the meaning of this requirement, materiality probably requires only a relevance to prove a non-trivial fact."). The text messages addressed violence directed by Petersen towards his wife, evidence that, as discussed earlier, has been deemed relevant to intent. *See Taylor*, 689 N.W.2d at 125 (stating that defendant's history of assaults with the victim can be

relevant to the issue of intent in a murder case). Based on this precedent, we conclude the text messages were material.

The third element, necessity, requires a showing that the statement "is more probative on the point for which it is offered than any other evidence reasonably available to the proponent." Doré, *Iowa Practice Series*, Evidence § 5.807:1, at 958 ("The statement must be necessary in the sense that it is more probative on the point for which it is offered than any other evidence reasonably available to the proponent."). Because the statement came from the person who Petersen admitted stabbing, we are convinced it was the State's most probative testimony on the question of Petersen's specific intent. *See Neitzel*, 801 N.W.2d at 623.

The final contested factor, "interests of justice," is considered with the other factors. *See* Doré, *Iowa Practice Series*, Evidence § 5.807:1, at 958–59; *see also Rojas*, 524 N.W.2d at 663 (considering factor along with reliability and necessity of evidence). Based on our consideration of the other contested factors, we conclude the interests of justice were served by the admission of the text messages. Accordingly, the district court did not err in admitting the messages.

C. Application to Purchase Firearm

Finally, Petersen takes issue with the district court's admission of evidence concerning his application for a firearms permit. He argues that the evidence was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice. *See* Iowa Rs. Evid. 5.403, 404(b). We need not reach this argument because the challenged evidence was substantially similar

to evidence that entered the record without objection. *State v*. *Hood*, 346 N.W.2d 481, 484 (Iowa 1984) ("[N]o prejudice issues from admission of evidence where substantially the same evidence is elsewhere in the record without objection.").

III. Disposition

We affirm Petersen's judgment and sentence for first-degree murder.

AFFIRMED.