

IN THE COURT OF APPEALS OF IOWA

No. 8-554 / 07-1009
Filed October 29, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEWANN MARQUISE STONE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrorn,
Judge.

Defendant appeals from judgment and sentence entered by the district
court on a jury verdict finding him guilty of first-degree murder. **AFFIRMED.**

Christopher Kragnes of Kragnes & Associates, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney
General, John P. Sarcone, County Attorney, and Daniel C. Voogt and Stephanie
L. Cox, Assistant County Attorneys, for appellee.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

On the night of August 27, 2006, Anthony Galvan met up with friends at South Port, a bar in Des Moines. He was seen talking to several different black males there. He became drunk and somewhat disorderly, warning a friend that he anticipated an altercation later in the evening. Galvan left South Port as it was closing, around 1:40 a.m., along with roughly twenty to forty other bar patrons. He walked across the street from the bar to the parking lot of the Tavern, a pizzeria where his friend and ride home, Troy Willet, had parked his pickup truck. Galvan and Willet talked about buying some crack cocaine together.

Willet then drove Galvan across the street to the parking lot of Auto Zone, a business adjacent to South Port where many South Port patrons park. There, Willet and Galvan sat in the truck, talking with a friend, Tjuane Butts. Butts stood at the driver's side of Willet's truck talking through the open window.

A man appeared behind Butts and yelled at Galvan through Willet's open window. The State alleges that this man was defendant Dewann Stone, a black male who had been seen by several witnesses at South Port. In response to the yelling, Galvan got out of the passenger seat and walked to the rear of the truck, apparently ready to fight. Galvan was shot five times and died several hours later at the hospital. Laboratory tests confirmed that the bullets had come from a .380 automatic pistol.

Marcus Brooks, who was across the street, testified that he saw a side view of Stone firing three shots. No other eyewitness could positively identify

Stone as the shooter, though several witnesses stated that the shooter was a black male. Witnesses testified to seeing cars of varying descriptions leave following the shooting, though no witness claimed to have seen Stone get into a car.

Joshua Breeze testified that he had known Stone for two or three years. They were friends and socialized together a few times a week. In response to the prosecutor's question, he testified that he also had a business relationship with Stone. Breeze said that he and Stone sold methamphetamine together and that his role was to get people in the white community to buy the methamphetamine from Stone.

Breeze testified that Stone called him on either August 28 or 29, 2006, and asked him to come over. Breeze stated that he then went to the apartment of Joanna Wright, Stone's girlfriend, where Stone frequently stayed.¹ According to Breeze, Stone told him in the bedroom of Wright's apartment that he had shot someone in the parking lot at South Port using a .380 gun. Stone asked Breeze to help him sell drugs so that he would have money to leave town. Breeze also testified that Stone pointed out the clothes he had been wearing the night of the murder, a "black marijuana shirt, blue jeans, and some blue and white Adidas," and told Breeze that he needed to get rid of them. Those clothing items were identified by Breeze during his testimony to the jury. Video surveillance from South Port shows a patron entering the bar wearing clothing that fits this description.

¹ Stone also frequently drove Wright's vehicle, a beige Toyota Camry, which was missing a gas cap cover.

On August 31, 2006, officers arrested Stone in a parking lot near Wright's apartment. The arresting officer testified that he seized 5.29 grams of methamphetamine and a cellular telephone from Stone at the time of his arrest.

The jury convicted Stone of first-degree murder in violation of Iowa Code section 707.2 (2005). He now appeals from his judgment and sentence arguing that: (1) the district court abused its discretion and denied Stone's constitutional due process right by excluding statements about a possible suspect that was not investigated; (2) the district court abused its discretion by allowing evidence of Stone's drug dealing with Breeze; (3) the district court abused its discretion by allowing improper rebuttal testimony; (4) the jury's verdict was contrary to the evidence; and (5) his counsel was ineffective for failing to raise a claim in the motion for new trial based on Stone's claim that the cumulative effect of four significant trial errors constituted a denial of due process.

II. Exclusion of Testimony Regarding Another Possible Suspect

Stone argues that the district court erred in granting the State's motion in limine to exclude testimony from an officer that he had received information from a confidential informant that a woman named Jennifer Moore had been told by someone named Brian Miller that Miller was involved in the Galvan homicide. The district court found the testimony to be a hearsay statement, despite the defense's argument that the testimony was being offered to "call into question the thoroughness of the State's investigation."

A. Standard of Review

Stone argues that the district court violated his constitutional right to present a complete defense. See *State v. Begey*, 672 N.W.2d 747, 751 (Iowa

2003). We review due process claims de novo. *State v. Mitchell*, 670 N.W.2d 416, 418 (Iowa 2003).

B. Merits

“The right to present a defense is so fundamental and essential to a fair trial that the Supreme Court has accorded it the status of an incorporated right in the due process clause of the Fourteenth Amendment.” *State v. Fox*, 491 N.W.2d 527, 531 (Iowa 1992).

Iowa Rules of Evidence define hearsay as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Iowa R. Evid. 5.801(c). Hearsay is generally not admissible unless it fits within one of several recognized hearsay exceptions. Iowa R. Evid. 5.802.

Stone argues that his purpose in offering the testimony was to question the depth of the police investigation, not to prove the truth of the matter asserted, and, therefore, the testimony was not hearsay. We review the record to determine if the purpose asserted by Stone can reasonably be found to be the real purpose for which the testimony was offered. *State v. Hollins*, 397 N.W.2d 701, 705 (Iowa 1986). If the testimony at issue is relevant only if true, it is hearsay and inadmissible unless it fits within a hearsay exception. *Id.* at 706.

After a thorough review of the record, we find that Stone made little effort to impeach the depth of the police investigation; to the contrary, Stone’s defense was mistaken identity. Therefore, it is unreasonable to find that the evidence is relevant for the purpose that Stone asserts. The proposed testimony was relevant only if true and is therefore hearsay.

We believe that this finding is consistent with *Sowder* where the Iowa Supreme Court found that the scope of the examination went beyond mere impeachment purposes and was therefore hearsay. *State v. Sowder*, 394 N.W.2d 368, 371 (Iowa 1986). Thus, we agree with the district court that the evidence at issue was being offered to prove the truth of the matter asserted and had no reasonable relevance if it was not taken as truth.

Further, we find that the evidence does not fit within a hearsay exception. The testimony consists of multiple levels of hearsay which cannot be accommodated by hearsay exceptions. Because the evidence constituted inadmissible hearsay, the district court did not violate Stone's right to put on a full defense by excluding the evidence.

III. Other Bad Acts Evidence

Stone next argues that the district court erred in allowing the testimony of Joshua Breeze that he and Stone engaged in a drug dealing business together. The State's asserted purposes for the evidence were to show the relationship between Breeze and Stone and to complete the story of the offense.

A. Standard of Review

We review evidentiary rulings for an abuse of discretion. *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008). "An abuse of discretion occurs when the trial court 'exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable.'" *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005). Even if an abuse of discretion has occurred, reversal is not required unless prejudice is shown. *Id.*

B. Merits

“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.” Iowa R. Evid. 5.404(b). However, such evidence may be admissible for other purposes, such as showing the complete story of the crime. *Id.*; *State v. Shortridge*, 589 N.W.2d 76, 83 (Iowa Ct. App. 1998). “[T]he key to admissibility is ‘whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit a wrongful act.’” *State v. Uthe*, 542 N.W.2d 810, 814 (Iowa 1996).

In determining whether evidence of other crimes, wrongs or acts is admissible, the court uses a two-step analysis to determine: (1) whether the evidence is relevant; and (2) if the evidence is relevant, does the probative value of the evidence substantially outweigh the danger of unfair prejudice. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988); Iowa R. Evid. 5.403. Unfair prejudice could result if evidence “appeals to the jury’s sympathies . . . provokes its instinct to punish [or in any other way causes] a jury to base its decision on something other than the established propositions in the case.” *State v. Henderson*, 696 N.W.2d at 10-11.

The State argues that it offered the evidence of Breeze’s history of dealing drugs with Stone to show the relationship between the two and to explain why Stone would confide in Breeze and look to him for help. Stone argues that the State is using this evidence only to bolster Breeze’s credibility. Breeze was the State’s witness who gave the most compelling evidence against Stone—the confession. It was important to the State to show that Breeze was a person to

whom Stone might entrust a confession. One effect of the evidence by its very nature would be to bolster the credibility of Breeze's testimony, a purpose which the Iowa Supreme Court has expressly stated is not valid for the admission of other crimes evidence. *State v. Mitchell*, 633 N.W.2d 295, 299 (Iowa 2001).

We find that *Mitchell* is distinguishable from the case at hand. *Mitchell* involved a defendant who was charged with sexual abuse and indecent contact with a child, resulting from alleged contact with four different girls. *Id.* at 296-97. The court severed the counts so that only the charges involving one of the girls would be presented to any one jury. *Id.* at 297. However, at the trial, the district court denied Mitchell's motion in limine and allowed two of the other alleged victims to testify that Mitchell had abused them. *Id.* On appeal, the Iowa Supreme Court found that the district court had abused its discretion in admitting the testimony of the other two girls because the "testimony spoke to no legitimate fact besides Mitchell's propensity to abuse young girls." *Id.* at 300.

The evidence of Stone and Breeze's business relationship involving the sale of drugs is distinguishable from the other crimes evidence in *Mitchell* in that drug dealing is a different crime than the one with which Stone was charged, tending to lessen the likelihood that the jury would consider the evidence as propensity. More importantly, the evidence speaks to a legitimate, relevant, issue other than propensity. The second purpose asserted by the State is that the evidence of Breeze and Stone's drug dealing explains Stone's turning to Breeze for help in obtaining funds to leave town. We find that the evidence was relevant for that purpose.

Stone asserts that his case is similar to *State v. Liggins*, where the Iowa Supreme Court found that evidence of the defendant's drug dealing with the victim's parents was improperly admitted. *State v. Liggins*, 524 N.W.2d 181 (Iowa 1994). The Supreme Court stated that "admission of evidence of [drug] delivery and distribution is inherently prejudicial. It appealed to the jury's instinct to punish drug dealers." *Id.* at 188-89 (citations omitted). In *Liggins*, the Supreme Court found that the evidence of drug dealing was not relevant to any issue before the jury and was "wholly independent" of the murder for which the defendant was on trial. *Id.*

In contrast, the evidence of Stone's drug dealing was relevant to the issue of Stone's confession. The question is whether it was unfairly prejudicial. We agree with the Supreme Court that the admission of evidence of drug dealing is inherently prejudicial to a criminal defendant and discourage its admission unless it is highly probative in the case. Here, the State's claimed purposes for the introduction of Stone's drug dealing seem thin in hindsight, particularly considering the predictable prejudicial effect. The defense agreed to stipulate to the existence of a relationship between the two men, and the State could have proved the relationship of trust between Breeze and Stone with Breeze's testimony about their friendship. Stone's turning to Breeze for help with money is more difficult to prove without using the drug connection, however. We cannot find in the context of these facts that the district court was "clearly unreasonable" in finding that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

IV. Rebuttal Evidence

Stone argues that the district court abused its discretion by allowing improper rebuttal testimony. The State introduced witnesses to rebut evidence admitted by the defense as to the lighting conditions around Auto Zone. The defense argues that this evidence should not have been admitted because the defense did not question any witnesses about the lighting of the parking lot.

A. Standard of Review

The district court has considerable discretion in admitting rebuttal evidence, and we will disturb its finding only upon a clear showing of abuse of discretion. *State v. Johnson*, 539 N.W.2d 160, 162-63 (Iowa 1995); *State v. Webb*, 309 N.W.2d 404, 411 (Iowa 1981).

B. Merits

“Rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the opposing party.” *State v. Johnson*, 539 N.W.2d 160, 162-63 (Iowa 1995). Evidence with no direct tendency to do this is inadmissible. *Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996). Rebuttal evidence is not intended to allow the State to present their case twice, and it should not be used merely to repeat or corroborate the State’s case. *Id.*

Two defense witnesses testified regarding the lighting in the Auto Zone parking lot. Shannon Duchene, a patron at South Port the night of the homicide, testified that “I parked over in the Auto Zone over where the trees are where it’s real dark. There’s absolutely no light over there.” She also testified that a friend walked her to her vehicle at the end of the night because “it was so dark where my vehicle was at.” Sean Murphy, also a patron at South Port the night of the

homicide, testified, “Of course, over there all the lights are out. There is not lighting over in the Auto Zone.”

We find that because the defense’s witnesses testified as to the lighting conditions in the Auto Zone parking lot, the district court did not abuse its discretion in allowing the State to present rebuttal witnesses to testify regarding the lighting.

V. Motion for New Trial

Stone argues that the district court should have granted his motion for new trial as the jury’s verdict was contrary to the weight of the evidence.

A. Standard of Review

We review the district court’s ruling on a motion for new trial for an abuse of discretion. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). A verdict is contrary to the weight of the evidence where a “greater amount of credible evidence supports one side of an issue or cause than the other.” *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998). The district court is given considerable discretion in ruling on a motion for new trial and is cautioned to interfere with the jury’s role only in an extraordinary case where the evidence preponderates heavily against the verdict. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). The district court should not disturb the jury’s findings where the evidence “is nearly balanced or is such that different minds could fairly arrive at different conclusions.” *Id.*

B. Merits

The evidence presented to the jury clearly placed Stone at the scene of the murder. Several witnesses testified to seeing Stone in South Port late in the

evening on August 27, 2006. The South Port surveillance tape captured Stone entering the bar wearing a dark shirt with his hair pulled back in a bun. The cell phone records of the phone found on Stone's person at the time of his arrest place Stone in the vicinity of South Port at the time of the homicide.

Both Willet and Butts identified Stone as the person who yelled at Galvan through Willet's truck window just moments before the shooting. Butts did not see the shooting, but testified that after the shots were fired, Stone was no longer standing behind him. Angela Miller testified that she saw a black male wearing dark clothing running from Willet's truck immediately after the shooting. Brooks testified that he saw a side view of Stone as he shot Galvan, describing Stone's hair in a bun and Stone's black shirt. Stone's girlfriend owned a tan car which Stone sometimes drove. Several witnesses testified that they saw a small tan car leave the parking lot shortly after the shooting, with one witness specifying that the car was missing its gas cap cover.

Breeze testified that Stone called him shortly after the murder and asked Breeze to meet with him. Cell phone records of the phone in Stone's possession confirm this phone call. Breeze testified that Stone confessed the murder to him and asked for his help to get out of town. Breeze also testified that Stone told him that he had used a .380, although the caliber of the murder weapon had not been disclosed to the public or any of the witnesses. Breeze testified that Stone talked about needing to dispose of the clothes that he had been wearing the night of the shooting and identified clothes seized from Stone's apartment, including a black shirt, as the clothes to which Stone had referred.

There were many people outside Auto Zone at the time of the shooting. Eyewitness descriptions of the shooter's apparel, car, and appearance differed. There was evidence offered by the defense that it was raining and dark at the time of the shooting and that the scene was rather chaotic. Other witnesses testified that the Auto Zone lights may have been on at the time of the shooting.

Several eyewitnesses failed to identify Stone when presented with police lineups. There would be reason for a jury to doubt Butts's testimony as he admitted that he lies under oath and that his probation officer wanted him to cooperate in this case. A jury could also question Breeze's motivation in testifying as he was facing possible negative consequences which may have been lightened in exchange for his cooperation in this matter. We find, however, that the jury, when considering all of the evidence and the credibility of the witnesses, could fairly arrive at their guilty verdict. We cannot say that a greater amount of credible evidence supports Stone's case than supports the State's. Therefore, we find that the district court did not abuse its discretion in overruling Stone's motion for new trial.

VI. Ineffective Assistance of Counsel

Stone claims that his counsel was ineffective in failing to raise an argument that the cumulative effect of four significant trial errors so infected his trial with unfairness as to make the resulting conviction a denial of due process. Because we have determined that no individual errors occurred, we need not and do not address Stone's ineffective assistance of counsel claim

AFFIRMED.