IN THE COURT OF APPEALS OF IOWA

No. 9-743 / 08-1864
Filed November 12, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN ALLEN ROBUCK,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, Dale Hagen, Judge.

Defendant appeals his conviction for murder in the second degree. **AFFIRMED.**

Maria Ruhtenberg, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Steve Johnson, County Attorney, Michael Jacobsen and Scott Nicholson, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Miller, S.J.*

Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Justin Robuck appeals his conviction for murder in the second degree in violation of Iowa Code sections 707.1 and 707.3 (2007). Because we find the district court did not err in excluding Robuck's expert witness or in refusing to give an instruction on Robuck's right to arm himself, we affirm.

I. Background Facts and Proceedings

Robuck was found guilty of second-degree murder following the stabbing death of Jerry Pittman II in October 2007. Given the testimony presented, the jury could have found the following facts pertinent to the issues raised on this appeal. On the night of Friday, October 5, 2007, Robuck and a group of friends, including Tyler Oberhart, Ray Travis, Courtney Hummel, and Mishana Cornejo, spent the evening partying together. Earlier that evening, Oberhart gave Pittman some Xanax pills in exchange for marijuana, and Oberhart later discovered that the marijuana he received was actually lawnmower clippings. Around 3:00 a.m., October 6, Robuck, Oberhart, Travis, Hummel, and Cornejo, went to Pittman's house in order to "punk him out," or scare him into giving them their marijuana or money back. When they arrived at Pittman's, Robuck, Oberhart, and Travis exited the car, all carrying a knife or other weapon. After summoning Pittman to come out of the house, they discovered he was in the backyard wielding a knife. Threats were exchanged, and Pittman lunged at Oberhart. Pittman then went into the garage, purportedly to get the marijuana, but instead came out of the garage swinging a PVC pipe and struck Oberhart. After wrestling the pipe away from Pittman, Oberhart told Pittman, "You better run." Pittman began running, chased by Oberhart and Robuck, both armed with knives, and Travis, armed with

a rock-like weapon. Upon catching him, Oberhart held him to the ground by sitting on his upper body and Robuck sat on Pittman's legs. Both Oberhart and Robuck repeatedly stabbed Pittman. A later autopsy would reveal Pittman suffered twenty-nine stab wounds. Immediately after the stabbing, the three returned to the car with Robuck exclaiming, "I killed him. I killed him. I killed him. . . . I stabbed him at least 30 times." He also said, "He is dead. He is dead. He is fricking dead."

During the altercation, Robuck's hand was injured. When he later sought medical treatment at a hospital, he informed the doctor he threw a knife into the air, and as it came back down, the knife stabbed him in the hand. Suspicious of the explanation, the doctor contacted the police. Robuck told the police a different story as to how his injury occurred. Following an investigation, Robuck and Oberhart were charged with first-degree murder. On December 11, 2007, Robuck filed a notice of intent to rely on self defense. He also filed a designation of witnesses, including Dr. Jerome Fialkov, who had evaluated Robuck and prepared a psychiatric report as to his findings. Dr. Fialkov concluded (1) "Robuck did not form specific intent at the time of the alleged crime because of his tendency to act impulsively and without foresight;" and (2) "it was not in [Robuck's] nature or character to perpetrate an act of violence," but that he was acting as a "Good Samaritan." The State then filed a motion in limine to exclude Dr. Fialkov's testimony and report. Accepting the State's arguments, the district court granted the motion. Following his conviction for murder in the second degree, Robuck appeals.

II. Scope of Review

The admissibility of opinion evidence falls squarely within the trial court's sound discretion. *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992). Reversal is justified only when that discretion is abused; that is, when the court's decision rests on clearly untenable grounds. *Id.* We review challenges to jury instructions for correction of errors at law. *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006).

III. Expert Testimony

Robuck argues the district court erred in excluding Dr. Fialkov as a defense expert offered to prove he lacked specific intent to kill Pittman. We agree with the State that Robuck failed to plead either insanity or diminished responsibility, both of which implicate a person's ability to form specific intent to do an act. *State v. McVey*, 376 N.W.2d 585, 587 (Iowa 1985) (stating that the insanity defense is available for any crime in which specific intent is an element); *State v. Collins*, 305 N.W.2d 434, 436, 437 (Iowa 1981) ("The diminished responsibility defense allows a defendant to negate the specific intent element of a crime by demonstrating due to some mental defect she did not have the capacity to form that specific intent."). Under our rules of criminal procedure, such a defense must be timely pleaded or the defendant is precluded from asserting the defense. Iowa R. Crim. P. 2.11(11)(*b*)(1) and (*d*). Moreover, because Robuck was convicted of second-degree murder, a crime that does not require a showing of specific intent to kill, any possible error in excluding the testimony was harmless. Iowa Code § 707.3; *See State v. Traywick*, 468 N.W.2d

452, 454-55 (Iowa 1991) (stating any error in excluding testimony is harmless if the rights of the complaining party have not been injuriously affected).

Robuck also argues it was error to exclude Dr. Fialkov's testimony, as he had concluded that Robuck's character was nonviolent. Robuck moved to admit this evidence under Iowa Rule of Evidence 5.702, which allows a witness qualified as an expert to testify in the form of an opinion, if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Opinion evidence garnered by an expert through the use of psychological testing and offered to show a defendant's own good character for the purpose of proving it unlikely that he committed the crimes charged has been rejected in Iowa. *See State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992) (holding expert psychological evidence may not be used to merely bolster a witness's credibility). Under Iowa Rule of Evidence 5.404(*a*)(1), evidence of a pertinent character or a character trait of the accused may be offered by an accused, or by the prosecution to rebut the same. However, this type of evidence is ordinarily offered through the testimony of laypersons in the community who are aware of the defendant's "real" character, either by direct knowledge or reputation of the accused before the commission of the offenses. *Hulbert*, 481 N.W.2d at 332-33. Several witnesses did so testify as to Robuck's peaceful or nonviolent character. Since Robuck claimed he acted in self-defense, it was then up to the jury to determine the veracity of this claim. *Id.* ("Assessment of a witness's credibility is uniquely within a lay jury's common understanding."). Where evidence is in conflict, the issue of whether the defendant acted in self-defense should be submitted to the jury. *See State v. Beyer*, 258 N.W.2d 353, 357 (Iowa 1977). We find the district

court did not abuse its discretion in excluding the testimony of Dr. Fialkov. In addition, other evidence was appropriately admitted under Iowa Rule of Evidence 5.404(*a*) for the jury to assess Robuck's character.

IV. Jury Instruction

Robuck next assets the district court erred in refusing to instruct the jury that he had a right to arm himself. As the testimony unfolded, Robuck's assertion of self-defense expanded to include a claim he was acting in defense of another. Robuck's requested language is as follows:

> Any act or acts by Justin Robuck which merely afforded an opportunity for a conflict with Jerry Pittman, or which did not proximately contribute to the conflict will not deprive the Defendant of the defense of justification of another. If a person reasonably believed that he or another is to be attacked or an injury is to be inflicted on himself or another, he has the right to arm himself.
>
> Thereafter, before the person can be said to have provoked the attack or conflict so as to preclude self-defense or justification, he must have willfully and knowingly done some act after the [sic] meeting the other person which reasonably led to the conflict, resulting in death. Unless it is shown that Justin Robuck did an act, after arrival at the Pittman residence, which a reasonable person would find to have been clearly calculated and intended to lead to the conflict resulting in death, the right of defense of another is not precluded, even though Justin Robuck armed himself and went to meet Jerry Pittman for the purpose of a conflict.

We agree with the district court, Robuck's proposed instruction is not a correct statement of the law. The district court instead instructed the jury as to defense of another:

> Justin Alan Robuck claims he acted in defense of a third person. A person is justified in using reasonable force if he reasonably believes the force is necessary to defend another from any imminent use of unlawful force. If the State has proved any one of the following elements, then the defendant was not justified:

1. The defendant knew the person he helped had started or continued the incident, or the defendant himself started or continued the incident which resulted in death.
2. An alternative course of action was available to the defendant.
3. The defendant did not believe the person he helped was in imminent danger of death or injury and the use of force was not necessary to save the person.
4. The defendant did not have reasonable grounds for the belief.
5. The force used by the defendant was unreasonable.

The question is not whether the court erred in rejecting Robuck's instruction on his right to arm himself, but whether the court properly instructed the jury on the evidence presented. The facts presented to the jury included that Robuck was carrying his opened knife when he, Oberhart, and Travis approached Pittman's backdoor; that Pittman was initially armed with a knife, then a PVC pipe; that Robuck, Oberhart and Travis then chased after an unarmed Pittman; and finally, when Pittman had been tackled to the ground, he remained unarmed as Robuck and Oberhart sat on him and stabbed him twenty-nine times. The fact that Robuck was armed did not preclude the district court from instructing the jury on defense of another. *See State v. Ebelsheiser*, 242 Iowa 49, 59, 43 N.W.2d 706, 712 (Iowa 1950), (explaining that in a case involving an assertion of self-defense, "The fact that either or each party armed himself beforehand is only a circumstance bearing on prior intentions. It is not a question of the right to arm but of the evidentiary significance attaching to the fact that the party did arm. The reasonableness of any fear or anticipation of danger is not so important as is the honesty or good faith of such fear or anticipation, as bearing on the party's intention either merely to defend or to become the aggressor.").

The district court was correct in denying Robuck's requested jury instruction, as Robuck's right to arm himself would only bear on his intention to defend or become the aggressor. *Ebelsheiser*, 242 Iowa at 59, 43 N.W.2d at 712. In convicting Robuck of second-degree murder, the jury necessarily rejected Robuck's assertions he was acting either in defense of another, or as he originally asserted, self-defense.

Having considered all of Robuck's arguments on appeal, we affirm Robuck's conviction.[1]

AFFIRMED.

[1] The testimony was difficult to follow in the appendix, as each witness's name was not designated at the top of each page where the witness's testimony appears. Although not applicable to this appeal, effective January 1, 2009, the rules of appellate procedure require the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(*c*) (2009).