IN THE COURT OF APPEALS OF IOWA

No. 3-165 / 91-2001

FILED
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CLERK SUPREME COURT

000733

STATE OF IOWA,

Appellee,

vs.

MICHAEL BICKELL,

Appellant.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Defendant appeals his conviction and sentence, after a jury trial, for the crimes of murder in the first degree and terrorism. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, John Sarcone, County Attorney, and James W. Ramey, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J. 000734

The defendant, Michael Bickell, appeals from his convictions and consequent judgments and sentences of terrorism contrary to Iowa Code Section 708.6 and murder in the first-degree in violation of Iowa Code Sections 707.1 and 707.2 We affirm.

Clint Allen formerly attended Southeast Polk High School in Runnells, Iowa, but moved to Michigan in 1990 with his parents. However, he kept in contact with his girlfriend, Angela Howard, and other friends in Iowa.

In February 1991, Clint and his brother drove their parents' car, a Taurus station wagon, from Michigan to Iowa for a weekend visit with Angela staying with her parents over the weekend.

On Sunday, February 17, 1991, Clint and Angela decided to go to Valley West Mall in West Des Moines with a group including Mick Birkenholz, Stanton Sean Saunders, Shane Roberts, and Tony Pinegar. They went in the Taurus station wagon, with Clint driving.

At about 3:00 p.m. as they were leaving the mall, they drove quite close to a white van parked near an entrance on the east side of the mall. The defendant, Michael Bickell, who was then nineteen years old, and Alan Bickell, who was then seventeen years old, were walking out to the van at the time. Michael believed the Taurus had purposely swerved toward them and became very mad and screamed an obscenity. The Taurus then stopped and the group looked back. Pinegar made a rude gesture at Michael.

Michael became more outraged. He got into the van and pulled out his Mossberg 12-gauge shotgun, which he then pointed at the Taurus. The Taurus attempted to leave the mall area. The Bickells got into the van and gave pursuit. Alan drove the van. At various times Michael would lean out the window and point the gun at the Taurus.

After driving around the mall parking lot, the Taurus turned on to University Avenue. The Bickells were still in pursuit. At this time, Michael remembered he had one Remington 12-gauge deer shell in his pocket. He loaded the gun.

As the Taurus was turning right onto 31st Street, Michael shot the gun. The deer slug hit the rim of the rear passenger window and then traveled through the open window into the car. The slug went through Clint's neck and then out the front driver's side window, shattering the glass. The slug came to rest near some apartments on 31st Street. Clint died within a few minutes from his injuries. No one else in the car was injured.

The Bickells did not stop the van, but drove on by. Alan surrendered himself to the police that same day. He admitted he had been driving the van and stated that Michael had fired the shot. The shotgun was found in the apartment of Michael's girlfriend, Desiree Johnson.

Michael was captured on February 19, 1991, after he led police officers in a high-speed chase on I-235. Michael admitted he had shot the gun, but stated he had shot at the ground and did not intend to hit anyone.

000736

After the juvenile court waived its jurisdiction over Alan, the State jointly charged Michael and Alan with terrorism and murder in the first degree. The case was tried before a jury.

The State presented the testimony of its expert, Robert Harvey of the Iowa Division of Criminal Investigation. Harvey testified a shotgun slug found near the scene had been fired from the shotgun owned by Michael. The slug had some embedded glass or sand in it. He stated a piece of wadding from the shotgun shell had been found in the back seat of the Taurus. Harvey testified that wadding does not ricochet in the same manner as a slug, and that if the gun had been shot at the street, the wadding most probably would have fallen on the street. He testified that the fact that the wadding was found in the back seat tended to show that gun had been shot towards the car, not towards the street.

Michael presented the testimony of his expert, Charles Soderquist, a private investigator. Soderquist testified that he had tested the ricochet effect of slugs. He stated that the wadding could have been caught in the bottom of the slug, and thus could have ricocheted with the slug from the street into the car. Soderquist testified that where the slug hit the rear passenger window rim it caused a crease, and this crease showed the slug was moving

000737

upwards. He testified he believed the evidence tended to show the gun had been shot towards the street and the slug had then ricocheted upwards and into the car.

The jury returned a verdict finding Michael guilty of terrorism and murder in the first degree. The court denied his motion for new trial. The court entered judgments on the verdicts and sentenced Michael to life imprisonment.

I. Defendant first contends the State failed to prove beyond a reasonable doubt that he committed murder in the first degree and that the State did not sufficiently show malice or intent to kill. He believes the evidence supports his claim he was aiming the gun at the ground when he shot, and that he therefore did not intend to kill anyone.

Our scope of review on this question is for the correction of errors of law. Iowa R. App. P. 4. When a criminal defendant challenges the sufficiency of the evidence to support a conviction, we review all of the evidence in the record in a light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). The jury's verdict is binding on us if supported by substantial evidence, together with all legitimate inferences arising reasonably and fairly from the evidence. State v. Garr, 461 N.W.2d 171, 173 (Iowa 1990). Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty of the

000738

charged crime beyond a reasonable doubt. State v. Frake, 450 N.W.2d 817, 818 (Iowa 1990). Direct and circumstantial evidence are equally probative. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

The jury is free to believe or disbelieve the testimony of the witnesses as it sees fit and is not required to believe a defendant's account of the events in issue. Garr, 461 N.W.2d at 174. The very function of the fact-finder is to sort out the evidence presented and place credibility where it belongs, and is at liberty to believe or disbelieve the testimony of witnesses as it chooses. State v. Trammel, 458 N.W.2d 862 (Iowa App. 1990).

Here the jury chose not to believe defendant's statement that he had pointed the gun toward the ground when he shot. The jury also apparently chose not to believe the defendant's expert, but to believe the State's expert, concerning the ricochet effect of the slug. We find there is substantial evidence in the record to support the verdicts of the jury.

The defendant asserts that Harvey had stated there was sand embedded in the slug and from this argues the sand could only have gotten in the slug if it hit the pavement. However, other evidence showed the substance embedded in the slug could have been glass. The slug could have picked up some bits of glass when it shattered the front driver's window of the Taurus. Also, the slug was found on the

ground, and could have picked up sand after it passed through the car.

Defendant also points to the crease on the car door near the rear passenger window. He believes the crease shows the slug was moving upwards at the time it hit the car. The State points out, however, that 31st Street is on an incline in that area and that the car was turning a corner. Both of these factors could affect the angle of the crease.

Defendant asks us to note the fact that the slug exited Clint's neck at a point about one and one-half inches above the entrance point. Again, the State points out that we have no information about the position of Clint's body at the time of the injury. Therefore, the path of the wound through his body does not prove anything about the path of the slug with respect to the ground.

On the other hand, Michael admitted he was angry with the occupants of the car at the time he fired the shot. There is also the evidence of the wadding found in the back seat of the car, which tends to show the shot was fired at the car.

We conclude there was substantial evidence in the record to support the jury's verdict. We affirm the district court on this issue.

II. Defendant also contends the district court abused its discretion in limiting the testimony of his expert witness on the basis that the witness was not qualified to

render an opinion. During the trial Michael's counsel asked Soderquist:

> Based upon your experiments you conducted and your own experience with slugs, did the slug that made that crease--would that crease of the contact between the door and the slug have created the degree of irregularity that you see in the autopsy entry wound?

The State objected on the ground that Soderquist did not have the expertise to answer the question. The district court ruled the evidence was inadmissible because it was too speculative.

The district court has broad discretion in ruling on the admissibility of expert testimony. State v. Brown, 470 N.W.2d 30, 32 (Iowa 1991). We will reverse only if we find the district court abused its discretion and the defendant suffered prejudice. Id. Abuse of discretion exists only when the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Barrett, 445 N.W.2d 749, 750 (Iowa 1989).

It is unclear whether the court excluded Soderquist's testimony because he was unqualified to give it or because it would be speculative, and therefore unreliable. Testimony may be properly excluded on either of these grounds. Brown, 470 N.W.2d at 32; State v. Gartin, 271 N.W.2d 902, 912 (Iowa 1979). It may be that the ruling rested on both of these grounds. In any event, we may affirm the ruling of the district court on any proper basis

000741

which appears in the record, even if it was not relied upon below. See State v. Vincik, 436 N.W.2d 350, 354 (Iowa 1989).

We first determine the district court did not abuse its discretion in finding Soderquist lacked the necessary expertise to testify concerning the shape of the object which had created Clint's wounds. The district court has discretion to determine whether a witness has sufficient special training, experience, or knowledge to give an expert opinion. Gartin, 271 N.W.2d at 912. There was no evidence Soderquist was qualified as a forensic pathologist. There was also no evidence Soderquist had personally examined Clint's wounds.

We also determine the district court did not abuse its discretion in finding any testimony by Soderquist concerning the shape of the slug after it ricocheted off the car door would be too speculative. Testimony which is merely speculative must be excluded because it is unreliable, and thus, it cannot assist the trier of fact. Brown, 470 N.W.2d at 32. Here, Soderquist could only have guessed concerning the degree the slug became deformed after it hit the car door.

We also determine Michael has not shown any prejudice due to the district court's decision to exclude this testimony. Michael was obviously seeking to introduce evidence that the slug had become so deformed that it must have ricocheted off two objects before hitting Clint.

000742

However, we conclude Michael was fully able to inform the jury of his position that the slug hit the pavement before entering the car. We affirm the decision of the district court on this issue.

After examining all issues raised by defendant, we affirm his conviction in district court on the charges of terrorism and murder in the first degree.

AFFIRMED.