IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
MARK ALLEN SMITH,)
Defendant-Appellant.)

8-189
87-264

Appeal from the Iowa District Court for Scott County (126601-01), J.L. Burns, Judge.

Defendant appeals his conviction by a jury of first-degree murder. **AFFIRMED.**

James F. Whalen, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ., but considered en banc.

HAYDEN, J.

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Defendant, Mark Allen Smith, appeals his conviction by a jury of first-degree murder. He asserts the trial court erred by refusing to submit a jury instruction on diminished capacity. Smith also contends the trial court erred in two of its evidentiary rulings. Smith's final assertion on appeal is application of the felony murder rule to his case was violative of due process and equal protection. We affirm.

On September 26, 1986, at approximately 4:00 p.m., the body of Jennifer Crompton, fifteen years old, was found by her stepfather in the family's home in Bettendorf, Iowa. She had been stabbed at least 63 times. Any one of approximately ten of these wounds would have been sufficient by itself to cause her death. At trial, Smith, Jennifer's former boyfriend, testified he had driven over to the house to discuss their relationship. He stated they began to quarrel and then Jennifer got a knife from the kitchen. He wrestled the knife from her and stabbed her. He did not remember inflicting any of the subsequent wounds.

I.

Based on this testimony and the testimony of Dr. W.D. McEchron, a psychologist, Smith sought a jury instruction on diminished capacity. The trial court refused to so instruct.

A defendant is entitled to a diminished capacity instruction if there is substantial evidence from any source that defendant was incapable, due to his mental condition, of forming specific intent. State v. Hickman, 337 N.W.2d 512, 517 (Iowa 1983); State v. Jacoby, 260 N.W.2d 828, 836 (Iowa 1977). However, the trial court commits error if it instructs on issues without substantial support in the record. State v. Wagner, 410 N.W.2d 207, 214 (Iowa 1987). Substantial evidence is that which a reasonable mind would accept as adequate to reach a conclusion. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980).

Smith's claim for a diminished capacity instruction relied principally on the testimony of Dr. McEchron. Dr. McEchron diagnosed Smith as suffering from attention deficit disorder, but not as having an antisocial personality. He initially testified he thought there was a possibility Smith's mental condition did not allow him to form specific intent to kill Jennifer. When asked whether that was a probability rather than a possibility, Dr. McEchron stated:

> I know that there are certain requirements that have to be met for your purposes, but if I talk myself through it, perhaps I will be able to answer that question directly. Based upon what information I have, I see Mark as someone who has an existing condition, an attention deficit disorder. He also had some other problems at that time, poor self-esteem, some dependency needs, things like that. There are poor verbal skills, too, which I think is an important issue here, too. You know, he's not adequately able to handle himself in a verbal confrontation. So he tends to

> maybe, with the right set of frustrations, to, you know, to rely on some other means of solving a problem.
>
> Given those set of factors, and what he described to me that occurred that day, I would see him as just having been at a point emotionally where he wasn't able to use prudent judgment. You know, that it would have been much easier for him to lose control than it would be for someone else, because of his attention deficit disorder. Because of his emotional state, I can see him having less emotional resources to control his behavior and use good judgment.
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> Probability? Within that context, yes.

On cross-examination, Dr. McEchron was again questioned about Smith's capability to form specific intent:

> Q. Can you say with certainty that this individual that you have analyzed and had the opportunity to talk with about this crime is incapable of forming specific intent necessary to do any crime? And I am not talking about a pattern or plan.
>
> A. I get you. He's capable of forming specific intent, yes, sir.

It is clear from his testimony Dr. McEchron believed Smith, at the time of Jennifer's death, was not emotionally able to use prudent judgment to control his behavior. It is not clear Dr. McEchron believed Smith's emotional inability rendered him incapable of forming the specific intent to murder Jennifer. We find Dr. McEchron's statement this was a "possibility" did not provide substantial evidence to support a jury instruction on this issue. See State v. Lucas, 368 N.W.2d 124, 127-28 (Iowa 1985) (more speculations regarding defendant's allegedly involuntary

intoxication not sufficient to warrant submission of insanity instruction). Nor are we persuaded Dr. McEchron's testimony regarding the "probability" of Smith's lack of specific intent provided the requisite substantial evidence. This testimony, couched as it was within the context of Smith's emotional inability to use "prudent judgment," did not furnish a clear indication McEchron had concluded Smith likely lacked specific intent when he killed Jennifer. Dr. McEchron's answer in the affirmative on cross-examination to the question regarding Smith's general ability to form specific intent only served to further confuse the matter. Although we view the evidence in the light most favorable to Smith in this instance, we nonetheless must look to all the evidence. We conclude the trial court did not err by refusing to instruct the jury on diminished capacity.

II.

Smith next asserts the trial court erred by allowing hearsay testimony. Melissa Nelson, a friend of Jennifer's, was permitted to testify Jennifer had told her Smith had on a previous occasion entered the Crompton home, hid in the bathroom just inside the front door, and then scared Jennifer when she entered the residence.

Generally, the erroneous admission of hearsay evidence is presumed to be prejudicial unless the contrary is affirmatively established. State v. Galvan, 297 N.W.2d

344, 348 (Iowa 1980); State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). However, the erroneous admission of hearsay evidence is not prejudicial when a multiplicity of substantially the same evidence appears in the record without objection. State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981); State v. Johnson, 272 N.W.2d 480, 482-83 (Iowa 1978).

Assuming arguendo Melissa Nelson's statements were inadmissible hearsay, we determine they were not prejudicial. Smith's knowledge of the location of the spare key to the Crompton home was already in the record without objection, as was the fact Smith had on occasion let himself into the house with a key. Furthermore, Nelson had testified without objection Smith had once let himself into the Crompton home when she was alone in Jennifer's bedroom and had scared her by grabbing her before she knew he was there. Smith had also, on another occasion, attempted to secretly follow the Cromptons when they were walking to an ice cream store. His intent in that instance was to scare the family. We conclude this evidence, which appeared in the record without objection, provided a multiplicity of substantially the same evidence provided by Nelson's allegedly hearsay testimony.

III.

Smith also asserts the trial court erred by allowing Robert Harvey, a criminalist for the State, to testify regarding in his expert opinion, where the individual who

stabbed Jennifer had entered the Crompton home and how the attack had progressed through the home. Smith contends this testimony was not a proper subject for expert opinion.

Expert opinion testimony is allowed if it will aid the jury and is based on special training, experience, or knowledge. State v. Taylor, 336 N.W.2d 721, 726 (Iowa 1983); Iowa R. Evid. 702. In ruling on the admissibility of expert testimony, the trial court is vested with broad discretion. State v. Hall, 297 N.W.2d 80, 88 (Iowa 1980), cert. denied, 450 U.S. 927 (1981). Generally, the trial court has not abused its discretion so long as the witness is qualified to advance an opinion in the area in question and there is sufficient factual basis for the opinion. State v. Paulsen, 265 N.W.2d 581, 589 (Iowa 1978). However, the subject matter of the expert's opinion must not be within the common knowledge of the jury. M-Z Enterprises v. Hawkeye Insurance Co., 318 N.W.2d 408, 414 (Iowa 1982); State v. Galloway, 275 N.W.2d 736, 740-42 (Iowa 1979) (Reynoldson, J., concurring specially).

Robert Harvey is an expert criminalist who investigated the interior of the Crompton home for three hours. He also observed Jennifer's wounds and talked with other investigators for the purpose of reconstructing the events which culminated in Jennifer's death. We do not decide whether the trial court abused his discretion in overruling defendant's objection to Harvey's testimony. If he did, we hold it was harmless error.

The uncontroverted evidence in the record and before the jury is overwhelming in support of defendant's guilt.

The victim was a 15-year-old girl. She had at least 63 stab wounds inflicted to the front and back of her body. Defendant had bought a shotgun the day before Jennifer Crompton was killed. He threw the gun box, with a knife in it, out of his moving car window. He also threw his shoes, worn at the time of the murder, out of his car window. He admitted stabbing Jennifer one time. The gun box was found. It had blood on it which was consistent with both defendant and the victim. There is evidence defendant made the statements "the authorities would not be able to pin it on him because they would never find the knife" and "I will never plead insanity. The bitch deserved to die."

There is evidence the defendant and victim had dated each other for approximately six months when Jennifer wanted to date other men. Defendant protested their breakup. He called the Crompton residence constantly after the breakup and during the six weeks before Jennifer was murdered. Defendant appeared at the Crompton residence uninvited on at least two occasions. He was observed slapping Jennifer two different times. They were observed fighting frequently. Approximately one month before the victim's murder he wrote her a note stating "I hope you fucking die."

Defendant stated on the witness stand on the afternoon of the murder he went to Jennifer's house "to make my point,and I wasn't going to leave until I did."

We do not recite all of the evidence in the record supportive of defendant's guilt because of time and space restraints. However, the above sampling is sufficient to establish the abundance of evidence before us on this appeal.

This is one of those rare criminal trials where it matters not whether the trial court committed error in overruling defendant's attorney's objection to Mr. Harvey's testimony. The other evidence in the record and before the jury is so overwhelming it is harmless. See State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1983). Although defendant is entitled to a fair trial, he is not necessarily entitled to a perfect one. Id.

IV.

Smith's final assertion on appeal is application of the felony murder rule to his case was violative of due process and equal protection. This same claim was recently rejected by our supreme court in another case. See State v. Ragland, 420 N.W.2d 791, 793-94 (Iowa 1988). We conclude Ragland is controlling in this case.

AFFIRMED.

Habhab, J., concurs; Donielson, J., specially concurs; Oxberger, C.J., and Sackett, J., specially concurs; and Schlegel, J., dissents.

OXBERGER, C.J. (specially concurring)

In Division III the majority states:

> This is one of those rare criminal trials where it matters not whether the trial court committed error in overruling defendant's attorney's objection to Mr. Harvey's testimony. The other evidence in the record and before the jury is so overwhelming it is harmless.

I agree with Judge Schlegel that admission of Mr. Harvey's testimony was error. However, I would find the error was harmless because the impact of Mr. Harvey's opinion is not obvious. He opined that the victim was contacted upon her entry into the door, and that the attack occurred there. Harvey's testimony tended to leave the impression that the defendant lay in wait at the home of the victim, having let himself in before the victim arrived.

I do not believe this testimony was very persuasive when viewed with the evidence defendant stabbed the victim 63 times. I would hold the error was harmless because defendant was not denied a fair trial by its admission.

Sackett, J. joins this special concurrence.

DONIELSON, P.J. (specially concurring)

I concur specially to address the issue discussed in Division III of the majority opinion. The testimony of criminalist Robert Harvey is clearly admissible. Qualified expert opinions are admissible to assist the jury in understanding the evidence presented. Robert Harvey is qualified and his opinion is an aid to the jury. The trial court was well within its range of discretion admitting this testimony. No error was committed. Therefore, we do not need to reach the question of whether this testimony resulted in harmless error.

Iowa allows the liberal use of expert witnesses to present opinion evidence. State v. Myers, 382 N.W.2d 91, 94 (Iowa 1986). Such evidence is admissible "if it will aid the jury in the discharge of its duties and if based on the witness's special training, experience or knowledge." State v. Taylor, 336 N.W.2d 721, 726 (Iowa 1983).

The trial court is vested with the broad discretion to rule on the admissibility of expert testimony. State v. Hall, 297 N.W.2d 80, 88 (Iowa 1980), cert. denied 450 U.S. 927, 101 S. Ct. 1384, 67 L. Ed. 2d 359 (1981). Reversal will occur only upon a showing of manifest abuse of discretion. Taylor, 336 N.W.2d at 726. No abuse has occurred as long as the witness is qualified to advance an opinion about the subject asked and a sufficient factual basis for the opinion exists. State v. Paulsen, 265 N.W.2d 581, 589 (Iowa 1978).

Harvey is a qualified expert witness. He is employed by the Iowa Division of Criminal Investigation as a supervisor in the Laboratory Section. He supervises the staff within the laboratory in addition to doing examinations in the area of firearm identification, tool mark identification, and gunshot residue analysis. He also is the captain of a crime scene investigation team that primarily does homicide investigations. His job responsibilities as captain are "to record the scene, to identify potential pieces of evidence, to collect the evidence, and to collect and preserve items of evidentiary value." He is also required to make observations and draw conclusions as to how a crime occurred.

Harvey's background includes a bachelor of science degree in biology and chemistry. He worked for two and one-half years as a chemist for the Kansas State Department of Health and seven years as a special agent for the Kansas Bureau of Investigation. He had been with the Iowa Division of Criminal Investigation for approximately thirteen years at the time of trial. Harvey also received specialized training in laboratory analysis at the F.B.I. Academy on several occasions. Part of this training involved crime scene reconstruction. Harvey has also earned some graduate hours in criminalistics.

Harvey's knowledge of the evidence came through his personal involvement with the case. He spent approximately

three hours investigating the scene on the day of the crime. He made notes and took photographs as he worked. He met with other detectives and agents involved in the case to reconstruct the events surrounding the murder.

Harvey is qualified to advance an opinion about the scene of the crime. This was well established by the State through foundation testimony about Harvey's qualifications and special knowledge of the scene. The only remaining requirement for admission is that the opinion must assist the jury to understand the evidence or a fact in issue. Iowa R. Evid. 702.

The opinion requested was whether Harvey was able to determine where the person who had committed the offense entered the premises. The home had more than one means of entry. The question was intended to help the jury view the scene as Harvey saw it when he observed it personally.

It does not matter that the jury could have reached its own conclusions based on the other facts presented. The standard expressed in rule 702 is one of helpfulness. Even if the jurors are able to make their own judgments based on their common knowledge or experience, experts such as Harvey may have specialized knowledge to bring to bear on the subject which would be helpful to the jury. See J. Weinstein & M. Berger, Weinstein's Evidence § 702[02], pp. 702-9 through 702-10 (1986) (discussing Fed. R. Evid. 702).

In this case, the evidence was not so obvious unexplained as to foreclose the possibility that Harvey could assist the jury. Harvey observed on the scene where several pieces of mail were scattered unopened by the door. He observed the book bag in the same area. He saw where the bloodstains were and whether they were smeared or spattered. He observed where the homecoming button and victim's bloodstained sunglasses were found. He saw the blood smeared on the patio door and he saw the shoeprints.

Harvey's opinion as to how the attack occurred was based on his trained personal observations. His opinion helped the jury give meaning to the pieces of evidence presented. Harvey's testimony satisfies Iowa Rule of Evidence 702. Therefore, the district court did not abuse its discretion in admitting this expert's opinion.

SCHLEGEL, J. (dissenting)

I respectfully dissent. 376

I address only the issue involving the court's allowance of the testimony of Robert Harvey, the so-called expert criminalist. I agree with the defendant that the trial court erred in admitting the testimony of Robert Harvey, offered as expert testimony as to how the crime occurred in this case. Because I believe the error was prejudicial, the judgment must be reversed and the case remanded to the district court for a new trial.

Robert Harvey testified in response to questioning by counsel for the State of Iowa, following the overruling of proper objections by defense counsel, as follows:

> A. In my opinion, I felt the point of entry or the attack would have occurred in the area of the front door of the entrance. I think Jennifer Crompton was confronted with the perpetrator either coming in contact with her from the outside and forcing her inside the front door or contacting her, I mean the perpetrator, being inside and taking hold of her shortly after she entered the front door.

In response to the follow-up question:

> Q. And then what occurred or what does your experience and observation tell you probably occurred?

Mr. Harvey was allowed by the court to testify:

> A. I believe that Jennifer Crompton entered the house with several pieces of unopened mail, and at the time the attack occurred, that several of

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> these pieces of mail were dropped at the initial point of contact, that being right in the entry way door. And I believe that the attack then proceeded into the living room, where Jennifer Crompton was stabbed several times on the floor in the living room, based on the blood, blood splatters, and other items of evidence that were found in that location. And then I believe that the perpetrator left the scene through the sliding glass doors at the back of the residence. That is based primarily on the presence of blood smears inside the door frame and on the outside of the sliding glass handles.

Defendant objected to this testimony on the grounds, among others, that it was not a proper subject of expert opinion testimony.

As stated in Dougherty v. Boyken, 261 Iowa 602, 605-06, 155 N.W.2d 488, 490-91 (Iowa 1968):

> An expert has been defined as one who is qualified by study, training, or experience in a particular subject or field of endeavor which gives him special knowledge and permits him to form a definite opinion of his own on matters persons lacking such knowledge or training cannot correctly decide. (Citations omitted.)
>
> The use of expert testimony is not new, but the conditions under which it may be used are the subject of endless litigation. This whole subject is exhaustively discussed in Grismore v. Consolidated Products Company, 232 Iowa 328, 5 N.W.2d 646. As pointed out there, all expert opinion testimony is admitted as a matter of necessity; it must first appear that a jury needs assistance on issues it is unable to intelligently and correctly determine alone. Once this is shown, expert opinions may be admitted to help the jury reach a true determination.

Iowa has adopted rule 702, Iowa Rules of Evidence, which states:

> TESTIMONY BY EXPERTS. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

> training or education may testify thereto in the form of an opinion or otherwise.

Rule 702 is consistent with prevailing Iowa case law. Rule 104, however, charges the court with the responsibility to determine the qualifications of the witness.

In this case, the court overruled defense counsel's objections and permitted Mr. Harvey to give the opinions stated above. The Iowa Supreme Court has stated that "we generally will not admit expert opinion testimony that essentially passes on the guilt or innocence of the defendant." State v. Myers, 382 N.W.2d 91, 95 (Iowa 1986). Cases held inadmissible in this area "go a step beyond merely aiding the factfinder in understanding the evidence and actually invade the exclusive domain of the jury . . . ." I believe that such is the case here. In allowing Harvey to testify as to his opinions, the court permitted the witness to make the determination that the jury was charged to make. The evidence, excepting for the testimony of the defendant, was entirely circumstantial as to how the crime occurred. The testimony and statements attributed to defendant do not make Harvey's opinions any less harmful or prejudicial. Unlike defendant's statements and prior acts, Harvey's testimony tended to leave the impression that the defendant lay in wait at the home of the victim, at the very time of the attack, having let himself in before the victim arrived. He opined that the victim was contacted upon her entry into the door, and that

the attack occurred there. That was also the theory upon which the State tried its case of first degree murder.

Mr. Harvey did not show qualifications to testify as a reconstruction expert, nor did he lay any foundation, on the basis of training, scientific knowledge, education, or experience, which would enable him to form such opinions. There were, to be sure, parts of both answers that were properly within his area of expertise, e.g. that the stabbing also took place in the living room. However, it is just as reasonable that the jury would have found that to be the fact from the physical evidence presented in the trial. Both Mr. Harvey and the jury would be equally able to discern that the perpetrator left by the sliding glass door, considering the fact that blood appeared on the inside and on the outside.

The fact is that the opinions solicited were not proper subjects of expert testimony. The court abused its discretion in allowing that testimony.

Such error is not reversible error unless it is prejudicial. Because of the cumulative nature of some of the evidence, it is necessary to address the issue of prejudice. In almost every respect except the opinion of Mr. Harvey which at least implies that the perpetrator was lying in wait in the house, the defendant gave testimony which was identical to Harvey's testimony. The stabbing apparently took place initially in the entryway. The

defendant claims he doesn't remember what happened after that. There was blood in the living room and upon items there. But for the placement of defendant in the home before the victim arrived, one could say that the error caused no prejudice. That evidence, however, was evidence which, if believed, would supply the premeditation element of first degree murder rather than a lesser degree. See, e.g., State v. Oppedal, 232 N.W.2d 517, 524 (Iowa 1975) (police officer's testimony on essential element of crime tantamount to permitting witness to testify as to ultimate fact of defendant's guilt or innocence). There is no question but that it was prejudicial.

The majority does not decide whether the trial court abused its discretion in overruling defendant's objection to Harvey's testimony, and goes on to observe that this is one of those rare criminal trials where it does not matter whether the trial court committed error in overruling defense counsel's objection to Mr. Harvey's testimony. The majority holds that the error would be harmless in any event. In his special concurrence, my brother Donielson, J., believes there was no error. (Presumably criminal trials could be reduced to a contest between experts as to all the issues a jury must decide.)

I cannot help but observe that it is indeed not a rate occasion when errors committed by the trial court are ruled to not matter. One is forced to wonder what rule cannot be

excused upon the supposed assertion that the ruling, though error, is harmless. The defendant in this case may well be undeserving of the scrutiny that we must give to this issue. It is never pleasant for a decision such as this one to require a new trial for one whom most would feel is obviously guilty as charged. The higher purpose of preservation of the rule of law and the fairness and predictability of rules upon which we all must rely requires that devastating inroads upon the rules of evidence be avoided except upon sound reason and careful scrutiny as to its effect upon the criminal justice system as a whole. Such expert testimony, which in effect allows a reconstruction of the crime from circumstantial evidence, by one who is in no better position to analyze the evidence that are the members of the jury, stands the whole concept of expert evidence upon its head. It opens the floodgates of trial by experts in criminal trials, permitting the courts to determine that a witness may testify as to all of the elements of a crime, without having any direct evidence to rely upon. This is a very important danger to our system of justice and the jury trial concept.

The only evidence available to supply the premeditation element of first-degree murder cannot, if its admission is error, be harmless error.

I would reverse and remand the case to the district court for a new trial.