

IN THE COURT OF APPEALS OF IOWA

No. 1-099 / 90-545

FILED

MAY 29 1991

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

DANIEL JAMES CLARKSON,

Appellant.

379

Appeal from the Iowa District Court for Polk County,
Harry S. Perkins, Jr., Senior Judge.

Defendant appeals his conviction, following a jury
trial, of first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John
Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Richard J.
Bennett, Assistant Attorney General, John Sarcone, County
Attorney, and Melodee Hanes, Assistant County Attorney, for
appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Defendant Daniel J. Clarkson appeals a judgment upon a jury verdict finding him guilty of murder in the first degree, a violation of Iowa Code section 707.2. Defendant offers two arguments for reversal. First, he contends, the trial court abused its discretion in refusing to grant his request for surrebuttal argument. Second, he contends, the trial court abused its discretion in admitting evidence of alleged prior bad acts. We find no abuse of discretion and affirm the judgment and conviction.

I. Miland Van Mill, a forty-two-year-old man, was killed in Des Moines' Westchester Park on August 2, 1989. Van Mill was a homeless person who suffered from schizophrenia and alcoholism. Autopsy reports showed his blood alcohol level was 0.301 at the time of death. A medical examiner testified that his death was caused by a torn right atrium that was the result of a severe compression. Van Mill was found dead in an empty concrete wading pool in the park; his ribs, both anterior and posterior, were fractured in twenty-five places, and he had a fractured larynx. He had numerous abrasions on his face and chest. Clarkson, Orionne Turner, and Tim DeVore were accused of robbing, beating, and killing Van Mill.

The record shows that the twenty-two-year-old Clarkson and several others had congregated in Westchester Park and on the nearby Hoover High School grounds. They had been drinking all day, up to and through the incidents leading

to Van Mill's death in the early morning hours of August 2. Clarkson also had ingested LSD. Clarkson and several of the others were familiar with Van Mill, who frequented the park and picked up mail at a friend's home nearby.

Two witnesses testified that they had seen Van Mill stagger into the park and that Clarkson, Orionne Turner, or Tim DeVore had suggested they rifle Van Mill's pockets. These witnesses testified that they had seen the three men first talk to Van Mill, then all three began hitting him. They also testified that the six-foot tall, 190-pound Clarkson had kicked the 120-pound Van Mill.

The two witnesses, Clarkson, Turner, and DeVore met a few minutes later at the Hoover High School baseball dugout. Clarkson and Turner left for ten or fifteen minutes and returned to brag about further harassing Van Mill. Clarkson and Turner again left the dugout for ten or fifteen minutes. They returned again to boast about throwing Van Mill in an empty wading pool. Still another witness testified that Clarkson bragged about having jumped on Van Mill. And another witness testified that Turner had complained that his toe hurt from kicking Van Mill so much.

Clarkson testified on his own behalf. He disputed ever intending to harm Van Mill and stated that he wanted to help Van Mill to a tent that Van Mill apparently had in the park. Clarkson admitted to police that he had punched Van Mill and had kicked him in the head and the ribs. Clarkson

claims to have blacked out at some point and relied on an intoxication defense.

Two more witnesses testified that Clarkson had robbed and beaten Van Mill on another occasion at Westchester Park. These witnesses testified that Clarkson had stated his intention to rob Van Mill, had followed Van Mill, and had returned with fifty-two cents and a bag of food. They also testified that Clarkson had returned bragging about beating Van Mill's face against a fence post and that they later saw a man lying on the ground.

Two of Clarkson's family members testified that Clarkson had stolen checks or had embezzled money from them. Closing arguments were made to the jury in accordance with Iowa Rule of Criminal Procedure 18(1). The arguments, however, were not reported. On the record, defense counsel requested surrebuttal argument. Counsel indicated in his request that the prosecution had mentioned the family embezzlement in rebuttal and that the issue had not been raised in the prior closing arguments. The trial court denied the request for surrebuttal. Clarkson was convicted on the charge of first-degree murder.

II. Clarkson contends that the trial court abused its discretion in refusing to allow surrebuttal argument. See State v. Leek, 152 Iowa 12, 17, 130 N.W. 1062, 1064-65 (1911). He argues that the prosecutor failed to restrict her rebuttal argument to matters argued in closing arguments. See Iowa R. Crim. P. 18(1)(b). Distinguishing

our decision in State v. Van Hoff, 371 N.W.2d 180 (Iowa App. 1985), Clarkson asks us to reverse and remand for a new trial.

As we indicated above, the closing arguments were not reported. No bill of exceptions, see Iowa R. Crim. P. 23.1(4), or bill of bystanders, see Iowa R. Crim. P. 23.1(5), appears in the record. All that we have before us is counsels' brief colloquy:

[DEFENSE COUNSEL]: . . . Additionally, Your Honor, neither [the prosecutor] on her first closing argument nor did I on my closing argument make any reference to Mr. Clarkson embezzling from family members or stealing checks, and I believe that we should be afforded the opportunity for surrebuttal on that issue as well.

* * *

[PROSECUTOR]: Your Honor, the State resists that for the following reasons. First of all, with regard to Mr. Clarkson taking money and checks from his parents, [defense counsel] put into issue during his closing arguments the defendant's credibility. He asked the jury to believe what it was he said to them, and that made it fair game for rebuttal as to his credibility and to bring out those facts at trial which were inconsistent with his credibility.

* * *

THE COURT: It is the ruling of the Court that the request for surrebuttal argument is denied, and that the arguments made by counsel in rebuttal of the State were within the limits of the legitimate rebuttal argument.

Given that we review for an abuse of discretion, Leek, 152 Iowa at 17, 130 N.W. at 1064-65, defendant must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable," State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d

138, 140 (1974)). We cannot conclude from this minimal record that the trial court abused its discretion. For example, we have no way of knowing, except through counsels' arguments and the trial court's ruling, that the issue of credibility was discussed in closing arguments. Because we have no record to review, we cannot find that the trial court abused its discretion. State v. Washington, 308 N.W.2d 422, 424 (Iowa 1981).

III. Clarkson contends that the trial court abused its discretion by admitting the testimony that Clarkson had robbed and beaten Van Mill on another occasion at Westchester Park. See State v. Kern, 392 N.W.2d 134, 136 (Iowa 1986). He argues that the evidence was prejudicial and offered only to show that he acted in conformity with a prior bad act. See Iowa R. Evid. 404(b). He argues that the testimony was not relevant to any legitimate issue and that there was no clear proof that he had committed the act. See State v. Emerson, 375 N.W.2d 256, 259-60 (Iowa 1985).

The tripartite test for admissibility of evidence under rule 404(b) requires: (1) the evidence must be relevant; (2) there must be clear proof that the defendant committed the act; and (3) the offense charged must be similar to the prior act. Id. at 259. Although evidence of a prior "bad act" is not admissible to prove character and show that the defendant acted in conformity, such evidence expressly is permissible "for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 404(b); see also Emerson, 375 N.W.2d at 260 (citing State v. Wright, 191 N.W.2d 638, 640 (Iowa 1974)).

Taking these elements in reverse order, defendant did not cite the third element for our consideration. The prior act "must be reasonably similar to the crime charged." Id. (quoting State v. Cuevas, 282 N.W.2d 74, 80 (Iowa 1979)). We think it clear that the two attacks on Van Mill were so frighteningly similar that further discussion would be unnecessary.

The second element requires the State to "present clear proof that the defendant was culpable in the other acts in question." Id. (quoting State v. Johnson, 224 N.W.2d 617, 620 (Iowa 1974)). Defendant notes that no one saw him attack Van Mill and that no assault was reported. We think, however, that Clarkson's statements against interest coupled with the witnesses' viewing of Van Mill does constitute clear proof that Clarkson committed the act.

The first element requires the evidence to be relevant. Id. (quoting State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978)). Defendant contends that the evidence does nothing to demonstrate intent. We conclude that the evidence was relevant to show defendant's intent to commit first-degree murder or felony murder. The use of such evidence has been repeatedly upheld. See, e.g., id.; State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979); State v.

Kellogg, 263 N.W.2d 539, 542 (Iowa 1978). It is evident that the testimony also could have been offered to show absence of mistake or accident, as well as motive, and identity. We find no abuse of discretion.

IV. We hold that Clarkson has failed to submit an adequate record to demonstrate that the trial court abused its discretion in refusing to grant surrebuttal arguments. We further hold that the trial court did not abuse its discretion in admitting certain testimony relating to prior bad acts committed by the defendant.

AFFIRMED.