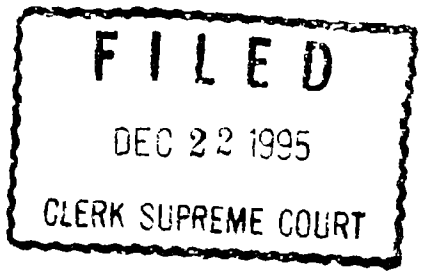
IN THE COURT OF APPEALS OF IOWA

No 5-529 / 94-1292



STATE OF IOWA,

Appellee,

vs.

BRIAN SCOTT KETELSEN,

Appellant.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge

Defendant appeals judgment and sentence entered upon his conviction of first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Huitink, JJ.

HAYDEN, P.J.

At about 2 a.m on October 23, 1993, Brian Ketelsen shot and killed Gregory Goodyear outside Wemi's Tap in Cedar Rapids, Iowa Ketelsen was apprehended about an hour later and taken to the police station. Officers explained to Ketelsen they were going to conduct a gun powder residue test. Ketelsen had not been given the *Miranda* warnings. Ketelsen explained he had been target practicing earlier on October 22. Officers then asked him several questions, many of which were part of a questionnaire included with the residue test. Ketelsen answered the questions. Ketelsen was later read his rights and refused to answer further questions.

Ketelsen was charged with first-degree murder. He filed a notice of the defenses of self-defense and intoxication. He moved to suppress his statements made without benefit of *Miranda* warnings as involuntary. The district court denied the motion concluding Ketelsen's statements were voluntary and the initial statement about target practice was not in response to any questions asked of him.

At trial several witnesses testified Goodyear hit Ketelsen's friend, Bruce Armstrong, in the mouth. After Armstrong was hit, Ketelsen approached Goodyear. Ketelsen testified he knew Goodyear had a reputation for violence and aggression and he was coming to Armstrong's aid. One shot was fired into the ground. Some witnesses testified Goodyear kicked Ketelsen after the first shot was fired while another witness testified Goodyear's kick never made contact with Ketelsen. A second shot

was fired which struck and killed Goodyear. Ketelsen admitted shooting once into the ground as a warning shot; however, he testified the gun accidentally discharged the second bullet when Goodyear kicked him in the chest. Ketelsen also admitted he initially lied to police when questioned about the evening's events.

In addition to Ketelsen's testimony about Goodyear's reputation, Lee Goins testified Goodyear had a reputation for fighting and violence, Armstrong testified Goodyear hit him for no apparent reason, and Goodyear's parole officer in 1991 testified Goodyear had several assault convictions. The district court refused to let Roger Ackerman testify about his knowledge of a specific instance where Goodyear's prior assaultive behavior was evident. The testimony was excluded because Ketelsen failed to timely notify the State Ackerman would be called as a witness; the evidence was irrelevant, and if relevant, it was more prejudicial than probative; and the testimony was merely cumulative.

Ketelsen was convicted as charged. Ketelsen moved for judgment of acquittal contending there was insufficient evidence of specific intent to kill or lack of justification to support the conviction. He also moved for a new trial alleging juror misconduct. He asserted one juror misinformed the others by stating Ketelsen would be out in "a couple of years" if convicted of second-degree murder. The district court overruled the motions.

Ketelsen appeals presenting four issues for consideration: (1) whether the district court erred in overruling Ketelsen's motion to suppress statements made by the Ketelsen without *Miranda* warnings; (2) whether the district court abused its discretion in precluding testimony concerning the victim's violent and aggressive character; (3) whether the district court erred in failing to grant Ketelsen's motion for a directed verdict of acquittal based on insufficiency of evidence; and, (4) whether the district court erred in denying Ketelsen's motion for a new trial based on juror misconduct.

I. Motion to Suppress Statements.

Scope of review in deciding the propriety of a district court's decision on suppression of evidence is de novo. *State v. Hibdon*, 505 N.W.2d 502, 504 (Iowa App. 1993).

Prior to trial, Ketelsen filed a motion to suppress statements made by Ketelsen to police officers without the benefit of Miranda. Ketelsen argued he was questioned by officers as they conducted a gun powder residue test on his hands. As an officer explained the test to Ketelsen, Ketelsen stated he had been target practicing the night before. The officers then proceeded to ask Ketelsen several questions about his target practicing. The questions asked were part of a questionnaire accompanying the test which were designed to uncover information about Ketelsen's activities which might facilitate or taint the test. Ketelsen alleges the statements he made caused police to contact Tim Kilpatrick and later gather physical evidence at Kilpatrick's farm.

At the hearing on Ketelsen's motion to suppress, officers admitted Ketelsen was in custody and not free to leave when he made the statements. The officers further acknowledged they did not inform Ketelsen of his *Miranda* rights during the questioning. The trial court held statements made by Ketelsen concerning target practicing at Kilpatrick's farm were admissible because they were voluntary statements not in answer to any questions propounded to him. The court further held Ketelsen's statements in response to police inquires were admissible because the officers conducting the gun powder residue test did not ask Ketelsen any questions except preliminary questions pertaining to the test itself. We agree.

The exclusionary rule of *Miranda* bars from evidence statements of a defendant made during in-custody interrogation unless the defendant has been advised of his *Miranda* rights and has knowingly and intelligently waived such rights. *State v. Brown*, 176 N.W.2d 180, 182 (Iowa 1970) (citing *Miranda v. Arizona*, 384 U.S. 436, 477-78, 86 S. Ct. 1602, 1629, 16 L. Ed. 2d 694, 725-26 (1966). There are, however, two exceptions. *Id.* One is general on-the-scene questioning as to facts surrounding a crime, and the other, statements freely volunteered without compelling influences. *Id.*

As stated above, Ketelsen's statements concerning target practicing were admitted because they were deemed voluntary and not in response to any questions propounded of him. The statements about target practicing were not the product of a police initiated interrogation. Custodial interrogation has been defined as "questioning

initiated by law enforcement officers " *State v. Matlock*, 289 N.W.2d 625, 627 (Iowa 1980). The record does not show Ketelsen was being questioned by police officers at the time he stated he was target shooting. Ketelsen volunteered the statement when officers merely stated they were going to administer a gun powder residue test. As such, the statement by Ketelsen about his target shooting was not the product of custodial interrogation and, thus, is not subject to the exclusionary rule set out in *Miranda*.

After Ketelsen stated he was target practicing, the police officers asked him several questions pertaining to his activities designed to uncover information which may taint or facilitate the test. These statements, as well as the statements concerning target practicing, were voluntary. As such, they are not subject to the *Miranda* exclusionary rule.

Statements are voluntary if they were the product of an essentially free and unconstrained choice, made by the defendant whose will was not overborne or whose capacity for self-determination was not critically impaired. *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992). The burden of proof is on the State to show Ketelsen's statements were voluntary. *Id.* The burden must be met by a preponderance of the evidence, not beyond a reasonable doubt. *Id.* The court gives considerable weight to the findings of the trial court on the question of voluntariness. *Id.*

In *Payton*, 481 N.W.2d at 328, the court listed a number of factors to be considered in determining voluntariness including, defendant's age, whether defendant had prior experience in the criminal justice system, whether defendant was under the influence of drugs; whether *Miranda* warnings were given; whether defendant was mentally "subnormal"; whether deception was used; whether defendant showed an ability to understand the questions and respond; the length of time defendant was detained and interrogated; defendant's physical and emotional reaction to interrogation; and whether physical punishment including deprivation of food and sleep was used. *Id.* at 328-29 (citations omitted).

One factor alone militates strongly in favor of Ketelsen's challenge to the voluntariness of his admissions -- Ketelsen was not given *Miranda* warnings. Our review, however, is on the totality of the circumstances. *Id.* at 328. Our courts have held one factor alone is not conclusive, and is only one thing to consider in determining voluntariness. *See id.* at 329 (deception, though a factor, is not conclusive, and is only one thing to consider in determining voluntariness). All other factors appearing here strongly militate in favor of voluntariness.

Ketelsen, twenty-eight years old at the time of his arrest, was not inexperienced in dealing with police officers. He has an extensive juvenile and adult criminal record. Although Ketelsen had been drinking, none of the officers who dealt with him believed him to be intoxicated. There is no evidence Ketelsen was mentally "subnormal" and

no evidence deception was used by police officers Evidence indicated Ketelsen was alert, talked and communicated well, responded appropriately to questions, and understood the purpose of the gun powder residue test. The entire conversation at issue lasted only a few seconds. No evidence indicates Ketelsen had any unusual physical or emotional reaction to the questioning. Lastly, there is no evidence of punishment or deprivation of any sort.

Beyond analyzing this issue under the *Payton* factors, we conclude admission of the statements was proper under United States Supreme Court precedent. The United States Supreme Court has held a defendant's utterances during a series of sobriety tests were voluntary and, thus, admissible. *See Pennsylvania v. Muniz*, 496 U.S. 582, 110 L. Ed. 2d 528, 110 S. Ct. 2638 (1990). In *Muniz*, the defendant, while performing various sobriety tests, "attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform." *Id.* at 586, 110 L. Ed. 2d at 542, 110 S. Ct. at 2642.

In holding the defendant's statements were voluntary, the Supreme Court stated the police officers' dialogue consisted primarily of carefully scripted instructions as to how the tests were to be performed. *Id.* at 603, 110 L. Ed. 2d at 553, 110 S. Ct. at 2652. The instructions were not likely to be perceived as calling for any verbal response and, therefore, were not "words or actions" constituting custodial interrogation. *Id.*

Additionally, the statements made by the suspect while he was being asked to submit to the breathalyser test, having the test and the relevant law explained to him, and being asked whether he understood, were not prompted by an interrogation within the meaning of *Miranda* rule, as the officer's limited and focused inquiries were necessarily "attendant" to the legitimate procedure and were not likely to be perceived as calling for an incriminating response. *Id.* at 605, 110 L. Ed. 2d at 554, 110 S. Ct. at 2652.

We find Ketelsen's statements are admissible under the same analysis. The officers inquires were limited to questions designed to uncover information about Ketelsen's activities which would facilitate or taint the gun powder residue test. The inquiries were necessarily attendant to a legitimate procedure and were not likely to be perceived as calling for an incriminating response. As such, the statements are admissible.

In summary, Ketelsen's first statement about target practicing was voluntary and not the result of an interrogation because police officers had not asked Ketelsen any questions. The officers were merely explaining the gun powder residue test when Ketelsen volunteered the information. After Ketelsen volunteered this information, he was asked several questions pertaining to the gun powder residue test. The statements Ketelsen made in response to these preliminary questions, as well as his initial statements about target shooting, were voluntary under *Payton*. As such, they are not

subject to the exclusionary rule of *Miranda*. Furthermore, the statements Ketelsen made in response to police questions are also admissible under *Muniz* because the police inquiries were necessarily attendant to a legitimate police procedure and did not call for an incriminating response.

II. Admissibility of Specific Prior Aggressive Act of Murder Victim.

We review for an abuse of discretion. *State v. Brewer*, 247 N.W.2d 205, 214 (Iowa 1977). In order to show an abuse of discretion, one generally must show 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 *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

Iowa Rule of Evidence 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Iowa Rule of Criminal Procedure 12(3) provides: "At or before the time of the taking of a deposition by a defendant . . . the defendant shall file a written list of the names and addresses of all witnesses . . . and the defendant will have a continuing duty before and throughout the trial promptly to disclose additional defense witnesses."

At trial, the district court refused to admit evidence of decedent's character through Roger Ackerman. Ackerman was going to testify about specific acts

demonstrative of decedent's violent and aggressive character. The trial court gave three reasons for its refusal: (1) the request for the witness was untimely under rule 12; (2) the evidence was irrelevant and, if relevant, it was more prejudicial than probative; and (3) the evidence was cumulative.

We determine the trial court did not abuse its discretion in refusing to admit Ackerman's testimony. First, it was not an abuse of discretion for the trial court to conclude the testimony was irrelevant and, if relevant, the prejudice of the testimony outweighed the probative value. Ackerman was going to testify about a specific instance where Goodyear pointed a gun at Ackerman's head. Clearly this testimony was not relevant to the case at hand. Furthermore, the testimony was highly prejudicial and, given the other testimony about Goodyear's character, Ackerman's testimony had little probative value.

Second, as the trial court noted, a previous witness already testified about the matter to which Ackerman was going to testify. Terry Eickstaedt testified Goodyear had threatened to beat him up about a year ago. He also heard Goodyear would fight at a drop of a hat. Eickstaedt testified Armstrong had not threatened or provoked Goodyear before Goodyear punched him in the mouth. Lee Goins, Ralph Kane, and Ketelsen testified Goodyear had a reputation for fighting and violence. Armstrong testified Goodyear struck him for no reason. Additionally, Goodyear's parole officer testified Goodyear had numerous convictions for assault. Given this evidence, any

further testimony from Ackerman would have been cumulative, would have confused the issues, and would have taken more time than necessary.

Lastly, the trial court's refusal to admit Ackerman's testimony was justified because Ketelsen's notice of witnesses was untimely. Iowa Rule of Criminal Procedure 12(3) requires the defendant file a list of all witnesses expected to be called at trial at the time of or before the taking of depositions. The rule imposes a continuing duty to disclose additional witnesses as they become apparent. Ketelsen did not list Ackerman as a witness until well into trial. Although Ketelsen argues his failure to comply with rule 12(3) is justified, we do not agree.

We determine the trial court's refusal to admit Ackerman's testimony was not an abuse of discretion.

III. Sufficiency of the Evidence.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence

at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

Ketelsen argues the State failed to establish beyond a reasonable doubt the elements of first-degree murder. Ketelsen focuses on the State's failure to disprove his justification defenses. In order to establish a lack of justification, the State is required to prove: (1) the defendant 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 he was in immediate danger of death or injury and the use of force was not necessary to save himself; (4) the defendant did not have reasonable grounds for the belief; or (5) the force used by the defendant was unreasonable. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993); *State v. Mayes*, 286 N.W.2d 387, 392-93 (Iowa 1979).

Generally, a jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should be received. *Thornton*, 498 N.W.2d at 673 (Iowa 1993). "In fact, the very function of the jury is to sort out the evidence and 'place credibility where it belongs.'" *Id.* (quoting *State v. Blair*, 347 N.W.2d 416, 420 Iowa 1984)).

Self Defense. Ketelsen claims he justifiably shot Goodyear in self defense. We determine the State sufficiently disproved this affirmative defense and there is sufficient evidence to support Ketelsen's conviction of murder in the first degree.

With regards to Ketelsen's self-defense argument, some witnesses stated Goodyear kicked Ketelsen while another testified Goodyear's kick did not make contact with Ketelsen. Numerous witnesses also testified Goodyear was retreating, or at least in a defensive position, when shot by Ketelsen. There was no evidence Goodyear was armed. The forty-five degree downward trajectory of the bullet supports the conclusion Goodyear was crouching or leaning forward as he tried to back away from Ketelsen. Despite Ketelsen's argument he was unable to retreat, he had no trouble getting away from the crowd after the shooting.

The jury also heard evidence Ketelsen left the scene immediately after the shooting without stopping to call the police or an ambulance, or to explain to his friends present what had happened. Instead, Ketelsen left the scene, smashed the gun, and kicked the gun into the river. Furthermore, once arrested, Ketelsen was uncooperative, resisted arrest, denied owning or recently shooting a pistol, and lied to police officers about the evening's events.

Under this set of facts, the jury could rationally have chosen to disbelieve Ketelsen's testimony and his claim of self-defense. *See id.* The jury could rationally believe Ketelsen's actions were not those of someone who honestly believed he acted in self-defense. *See id.* at 673-74. Under the record, the jury could have found Ketelsen did not believe himself in danger and did not believe it was necessary to use force to protect himself. *See id.* at 674. Furthermore, the jury could have found, even

if Thornton had such beliefs, they were unreasonable or the use of deadly force was unreasonable. *See id.*

Intoxication Defense. Ketelsen also raised an intoxication defense, arguing his intoxication at the time of the shooting rendered him incapable of forming the specific intent element of first-degree murder. At trial, Ketelsen attempted to convince the jury he had drunk a great deal before the shooting. He testified he drank a few beers at a friend's house, ten beers and Cuervo tequila at one bar, and two beers at another bar before going to Werni's. Again, we find the State sufficiently disproved this affirmative defense and there is sufficient evidence to support Ketelsen's conviction of murder in the first degree.

The officers who observed Ketelsen less than half an hour after the shooting testified Ketelsen was not drunk. Officer Deeds testified Ketelsen "appeared fairly normal" when arrested. Sergeant Andries testified Ketelsen was not intoxicated when questioned at the scene of the crime. Detective Potter testified Ketelsen "did not appear intoxicated" when observed at the jail. Officer Murphy testified Ketelsen responded appropriately to questions and appeared coherent. Based on this evidence, the jury could reasonably have believed Ketelsen was not under the influence of alcohol when Goodyear was shot, thus eliminating his intoxication defense.

In summary, the evidence was sufficient to generate a jury question on the five elements the State needed to prove to overcome Ketelsen's justification defenses. *See*

id Furthermore, we determine the State disproved the justification defenses and there was sufficient evidence to support Ketelsen's conviction of murder in the first degree. We affirm the trial court's ruling on this issue.

IV. Motion for New Trial Based on Juror Misconduct.

The trial court has broad discretion in ruling on a motion for a new trial based on jury misconduct. *State v. Jones*, 511 N.W.2d 400, 409 (Iowa App. 1993); State *v. Powell*, 400 N.W.2d 562, 565 (Iowa 1987). We review for an abuse of discretion. *Jones*, 511 N.W.2d at 409. In order to show an abuse of discretion one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Blackwell*, 238 N.W.2d at 138 (quoting *Weeks*, 326 A.2d at 140).

In order to receive a new trial based on jury misconduct, Ketelsen must meet the following three conditions:

> First, the evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct. Second, the acts or statements complained of must exceed tolerable bounds of jury deliberation. Third, and finally, it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

State v. Wells, 437 N.W.2d 575, 580 (Iowa 1989).

We determine the trial court did not abuse its discretion in denying the motion for a new trial based on juror misconduct even though one juror informed the others a conviction for second-degree murder would allow the defendant to "be on the streets

in a couple of years" and a conviction for first-degree murder would allow the defendant to be out of prison "in a few years." As noted by the trial court, all testimony about potential misconduct dealt with the internal workings of the jury and, as such, rule of evidence 606(b) prohibits the court from considering the testimony to impeach the jury's verdict. *Lund v. McEnerney*, 495 N.W.2d 730, 733 (Iowa 1993).

In addition to his failure to prove the misconduct dealt with external influences on the jurors, Ketelsen has not proven the conduct complained of exceeded tolerable bounds of jury deliberation and was calculated to, and with reasonable probability did, influence the verdict. The incident in question was isolated and was made during the first day of deliberations. There is no evidence the verdict would have been different if the juror had not made the challenged statement. As such, we determine the trial court did not abuse its discretion in denying Ketelsen's motion for a new trial base on juror misconduct. We affirm.

AFFIRMED.