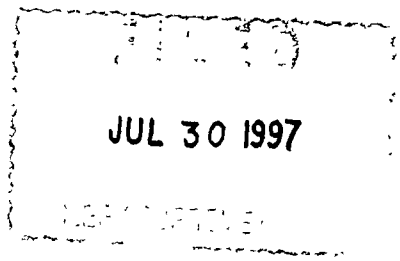
IN THE COURT OF APPEALS OF IOWA

000647

No. 7-207 / 96-0318



STATE OF IOWA,
Plaintiff-Appellee,

vs.

VANCE TERRELL HEATH,
Defendant-Appellant.

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

Vance Terrell Heath appeals from his conviction, following a jury trial, for first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1995).

AFFIRMED.

Mark D. Reed of Bertroche Law Offices, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Vogel, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

000648

SCHLEGEL, S. J.

Defendant Vance Terrell Heath appeals his conviction for first-degree murder in violation of Iowa Code sections 707.1 and 707.2. We affirm.

I. Background Facts and Proceedings.

The record contains evidence of the following: On March 17, 1995, Heath and his friend, Eddie Appleton, both members of the Gangster Disciples, arrived at a Cedar Rapids Hy-Vee at about 10:00 p.m. Fellow gang member Carlos Montford and an unidentified man were involved in a confrontation at the front of the store with two rival gang members, Tayo Washington and Kevin Donte Eatman. Washington insulted the Gangster Disciples by uttering the words "GD Killer" outside the store and a chase ensued. Heath, Appleton, Montford, and the unidentified individual participated in the pursuit of the two men.

After falling during the chase, Eatman was surrounded by the four men who began to kick and beat him. Washington heard a gunshot while he was still running. He testified at trial that he turned around to see Heath pointing a pistol at Eatman. Eatman sustained three gunshot wounds from a .25 caliber handgun and was pronounced dead later that evening.

Washington fled to his apartment and later returned to the scene. Initially, he provided investigators with false names for himself and the victim. Washington was charged with the murder but further investigation led to dismissal of the charges.

Washington was able to identify Heath, Appleton, and Montford from

photographic arrays but he could not identify the fourth suspect. Washington described Heath as a stocky, dark-skinned African-American man with cornrow braids, a goatee, and a long, dark leather coat. He was familiar with Heath as a result of a confrontation with him and Appleton the day before the murders. Descriptions provided by two other witnesses who observed Heath the evening of the murders were consistent with Washington's description.

Heath and Appleton fled to the home of a friend where they shed their coats to avoid identification. Witnesses later indicated the gunman was wearing a dark jacket and another man, later identified as Monfort, was wearing all white. Heath and Appleton left Cedar Rapids for Waterloo and eventually returned to their native Chicago. Appleton was arrested in Chicago where he made a statement indicating Heath was the shooter and that Heath threw the weapon in a sewer. The weapon was never recovered by authorities. Appleton later retracted his statements and testified during Heath's trial that Montford was the shooter.

Heath was eventually arrested in Beloit, Wisconsin. He denied knowledge of who did the shooting, although he admitted he hit one of men that he and his fellow gang members were chasing.

Heath, Appleton, and Montford were each charged with first-degree murder. Appleton reached a plea agreement with the State whereby he pled guilty to voluntary manslaughter in exchange for his testimony that Heath was the shooter. Montford

was tried prior to Heath and was convicted of the lesser-included offense of voluntary manslaughter.

Following a jury trial, Heath was convicted of first-degree murder in December 1995. Heath filed a motion for new trial in February 1996, which was later denied.

Heath appeals his conviction challenging the sufficiency of the evidence in support of the verdict. He also asserts several errors that denied him a fair trial.

II. Sufficiency of the Evidence.

A. Standard of Review and Preservation of Error.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it or it is clearly against the weight of the evidence. *State v. Schrier,* 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of evidence, we view the record in a light most favorable to the State. *State v. Robinson,* 288 N.W.2d 337, 340 (Iowa 1980). All evidence is considered, not simply the evidence supporting the verdict. *Id.*

The State contends Heath has failed to preserve error on appeal on his challenges to the evidence presented on premeditation, malice aforethought, and intent to kill. The State submits that Heath limited his motion for judgment of acquittal to the issue of accomplice testimony corroborating the verdict and, therefore, all other claims are waived. *See State v. Geier,* 484 N.W.2d 167, 170 (Iowa 1992)

(where motion for acquittal made no reference to evidence that stun gun was "dangerous weapon," defendant failed to preserve sufficiency of evidence contention on that issue). Although Heath's arguments on his post-trial motion apparently did not address these elements, we will consider the merits of each issue raised with regard to the sufficiency of the evidence.

B. Merits.

Heath asserts the State presented insufficient evidence of premeditation, malice aforethought, and intent to kill to support the verdict of murder in the first degree. He also argues there is no physical evidence connecting him to the shooting such as fingerprints, a weapon, or bullets in his possession. Heath suggests the physical evidence indicates that more than one shooter fired the bullets. He contends his presence at the scene of the crime was merely coincidental and that prior to arriving at the Hy-Vee store, he was unaware of the presence of Montford, the unidentified man, and the two rival gang members. He claims he was not armed prior to his arrival at the store nor was he aware that Montfort often carried a weapon. Heath also emphasizes that the confrontation only lasted a few minutes during which there was no indication a killing would occur.

Heath also emphasizes the testimony of the pathologist revealed the fatal bullet was shot from a weapon at least three feet away, almost perpendicular to the body, as if it were in an upright position. However, he argues, the testimony of the eye witnesses described the victim as running with the shooter following from behind.

Heath asserts that the location of this bullet, as well as the other two found in the victim's body, did not indicate an intent to kill on behalf of the assailant.

Finally, Heath argues there is no reliable eyewitness testimony sufficiently corroborating the accomplice testimony of Washington. He emphasizes the eyewitnesses could not provide a description of the shooter. Their accounts also indicated that some of the participants in the chase did not make it around the corner into the alley-way where the shooting occurred. Moreover, Heath contends, at least four eyewitnesses immediately identified Washington as being involved in the assault and the shooting. Heath also asserts Appleton's testimony identifying Montford as the shooter is inconsistent with Washington's statements.

The jury was instructed that to find Heath guilty of murder in the first degree, the following elements had to be proven beyond a reasonable doubt:

1. That on or about the 17th of March, 1995, the defendant or another person shot Kevin Donte Eatman.
2. Kevin Donte Eatman died as a result of being shot.
3. The defendant acted with malice aforethought.
4. The defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Kevin Donte Eatman or aided and abetted another person . . .

Instruction No. 25.

Deliberation and premeditation may be shown by circumstantial evidence in one of three ways: (1) evidence of planning activity of the defendant which was directed toward the killing; (2) evidence of motive which might be inferred from prior relationships between defendant and victim; and (3) evidence regarding the nature of

the killing. *State v. Khouri,* 503 N.W.2d 393, 395 (Iowa 1993) (quoting *State v. Wilkens,* 346 N.W.2d 16, 20 (Iowa 1984)). Malice, premeditation, and specific intent to kill may be inferred from a defendant's use of a deadly weapon with the opportunity to deliberate. *Waterbury v. State,* 387 N.W.2d 309, 311-12 (Iowa 1986). The element of intent is seldom susceptible to proof by direct evidence; it often depends on circumstantial evidence and inferences drawn from such evidence. *State v. Hernandez,* 538 N.W.2d 884, 887 (Iowa App. 1995).

"Malice aforethought" is fixed purpose or design to do some physical harm to another that exists at any time before killing; it can be implied from use of a deadly weapon accompanied by opportunity to deliberate and also from prior relations between the accused and the victim. *State v. Walker,* 538 N.W.2d 316 (Iowa App. 1995). The fixed purpose to do harm need not exist for any given length of time; it is sufficient if it exists at any time before the killing. *Id.*

Our review of the record confirms that the State produced sufficient evidence to satisfy its burden on each element challenged by Heath. First, we reject his arguments challenging the evidence connecting him to the shooting. Washington, who had an encounter with Heath the previous day, identified Heath as the gunman. He was able to recognize him from a photo array and his description of the assailant matched that provided by other eyewitnesses who saw the shooting and who also saw Heath earlier that evening. Heath cites to the absence of physical evidence connecting him to the crime. However, we conclude that, given the eyewitness testimony and

Heath's admitted participation in the skirmish between the rival gangs, the jury could have found additional physical evidence was not required for a determination of guilt.

Heath's arguments asserting that the uncorroborated accomplice testimony of Washington and Appleton undermined the verdict are without merit. There is no support in the record for characterizing Washington, who was not tried in the incident, as an accomplice. Moreover, Appleton's statements to investigators identifying Heath as the shooter, were corroborated by Washington and other bystanders who witnessed the same.

We also find sufficient evidence in support of the intent elements of the crime. The day before the shooting, Washington and Eatman had a confrontation with Heath and Appleton at a barbecue hosted by a mutual friend. The tension between the rival gangs resurfaced at Hy-Vee the night of the murder when Heath and Appleton became involved in an altercation between fellow gang member Montford and Washington and Eatman. It was reasonable for the jury to infer malice aforethought from the evidence presented concerning both incidents. The jury could have also inferred premeditation and malice aforethought from the threat uttered by Washington that instigated the chase. Moreover, the evidence demonstrates Heath participated in chasing, surrounding, kicking, and beating Eatman. Heath's role in the assault on Eatman provides additional evidence of premeditation and malice aforethought.

Finally, we reject Heath's assertion that the State presented insufficient evidence demonstrating a specific intent to kill. Washington identified Heath as the

gunman. Eatman was shot three times and the pathologist opined that two of the shots were fired after he fell to the ground. *See Waterbury,* 387 N.W.2d at 311-12 (intent to kill may be inferred from use of deadly weapon). Given the circumstances, it was reasonable for the jury to conclude Heath shot Eatman with the specific intent to kill. Moreover, we also conclude the evidence of hostilities between the gang members that evening and Heath's participation in the chase and beating of Eatman supports the specific intent element. We are not persuaded by Heath's contention that the position of the fatal bullet, coupled with the evidence of the chase, is contrary to any indication of a specific intent to kill. The evidence reveals Eatman had fallen to the ground before at least two of the shots were fired.

Heath contends that the incident at the barbecue was an insignificant and petty confrontation. He also denies he was armed when he arrived at the Hy-Vee or that he was aware of the conflict between Montfort and the two rival gang members. The jury, however, was free to resolve any conflicts in the evidence regarding the credibility of the witnesses and reject Heath's assertions. *State v. Allen,* 348 N.W.2d 243, 247 (Iowa 1984). Given the evidence presented at trial, we find it was reasonable for the jury to infer that Heath used a firearm in the commission of the crime and he did so with premeditation, malice aforethought, and a specific intent to kill. Accordingly, we reject Heath's arguments and affirm on this issue.

000656

III. Aiding and Abetting.

The State's trial information alleged that Heath was guilty of first-degree murder either as a principal or as an aider and abettor. Heath contends the trial court erred in denying his motion to strike the aiding and abetting portion of the trial information because the evidence did not support the submission of that theory of guilt. Furthermore, Heath argues the theories are repugnant. He asserts the submission of both theories allowed the jury to reach a unanimous verdict of guilt based on a less than unanimous vote as to the theory supporting the verdict. Heath maintains the State should be limited to the theory that he was the shooter.

Heath's challenge to the submission of alternative theories is without merit. The aiding and abetting theory was supported both by Heath's own statement that he was not the shooter but that he participated in the assault on Eatman, and also the testimony of Appleton that identified Montford as the shooter. Furthermore, we find no error in the submission of both theories to the jury. *See Gavin v. State,* 425 N.W.2d 673, 678 (Iowa App. 1988) (court held defendant not deprived of constitutional right to unanimous jury verdict when alternative theories of first-degree murder were submitted to jury; substantial evidence supported alternative theories which were consistent and not repugnant to each other). The evidence supported the instruction on both theories and accordingly, we affirm on this issue.

000657

IV. Right of Confrontation.

Heath subpoenaed co-defendant Montford to testify at trial. The court excluded the testimony following an offer of proof made by Heath in which Montford invoked his Fifth Amendment right against self-incrimination in response to many of the questions.

Heath argues the trial court's ruling violated his constitutional right of confrontation. Among other testimony, Heath sought to introduce evidence of Montford's prior convictions and gang-related activities. He also sought to elicit testimony concerning alleged statements made by Montford in which he threatened to "kill a nigger." He contends Montford's testimony would have established his identity as the shooter as well as his habit of carrying a loaded pistol. Heath emphasizes the State's case had already revealed Montford was in the possession of a handgun soon after the shooting, that Montford possessed bullets in his home that were of the same caliber and brand as that used in the crime, and that he possessed a handgun capable of firing some of the bullets found at the scene. In addition, Appleton's testimony identified Montford as the shooter. Finally, Heath maintains the court improperly allowed Montford to invoke his Fifth Amendment right against self-incrimination.

On evidentiary issues we review for abuse of discretion. *State v. Archivia,* 495 N.W.2d 364, 367 (Iowa App. 1992). In order to show 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. *Id.*

The State asserts that Heath fails to set forth a statement of how he preserved this issue for appellate review as required by Rule 14(a)(5) of the Iowa Rules of Appellate Procedure and, therefore, his claims are waived. The State also contends Heath did not raise any confrontation right challenge at trial. We decline to affirm the trial court's evidentiary rulings on this basis and instead will consider Heath's arguments on the merits.

The record indicates that, on advice of counsel, Montford refused to answer nearly every question pertaining to the crime itself. We conclude the trial court correctly determined Montford was entitled to do so pursuant to his Fifth Amendment rights. In *State v. Parham,* 220 N.W.2d 623, 628 (Iowa 1974), the Supreme Court held that sustaining the Fifth Amendment privilege of a witness already adjudicated guilty in connection with the crime was not an abuse of discretion. Although Montford had been convicted of voluntary manslaughter, we believe there were other circumstances justifying the exercise of his Fifth Amendment privilege, including the risk of additional charges such as perjury, or the adverse impact on the possibility of Montford's future parole. Furthermore, Heath's confrontation clause argument fails as a result of Montford's privilege. When Sixth Amendment rights conflict with Fifth Amendment rights against self-incrimination, the Sixth Amendment rights "must yield." *Id.* at 629.

We also agree with the trial court's conclusion that the questions relating to Montford's presence during the execution of a search warrant at his home, his gang-related activities, and his commission of several criminal offenses were not relevant or were more prejudicial than probative. *See* Iowa R. Evid. 401, 403. Moreover, much of the proffered testimony concerned inadmissible evidence of prior bad acts. *See* Iowa R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. . . .").

Finally, we reject Heath's arguments urging that the testimony concerning Montford's alleged practice of carrying loaded weapons was admissible as evidence of habit. *See* Iowa R. Evid. 406. Evidence of habit may be inferred from specific instances of conduct that "were sufficiently numerous and occurred under substantially similar circumstances to qualify as a habit." *State v. Mary,* 368 N.W.2d 166, 169 (Iowa 1985) (citations omitted). The only testimony elicited by Heath in this regard concerns Montford's prior criminal convictions. We find this evidence insufficient to satisfy the test. Moreover, the proffered testimony concerns prior bad acts and is therefore inadmissible pursuant to Rule 404(b) of the Iowa Rules of Evidence. We affirm on this issue.

V. Spoilation.

Heath alleges the State intentionally destroyed the primer imprint on the misfired Winchester .25 caliber bullet found at the scene of the crime. He argues the

trial court erred in admitting the test-fired shell casings because the State did not establish the proper foundation and chain of custody. Accordingly, Heath claims he was denied due process of law by the State's actions and he was therefore entitled to an instruction on spoilation.[1]

The State has again submitted that Heath failed to set forth a statement of how he preserved this issue for appellate review and he failed to preserve his constitutional due process issue. We will not deny review of this issue based on the State's assertions but instead will consider Heath's arguments on their merits.

Heath has raised a constitutional challenge to the State's handling of physical evidence admitted at trial. Accordingly, our standard of review on this issue is de novo. *See State v. McKettrick,* 480 N.W.2d 52, 55 (Iowa 1992); *State v. Maniccia,* 355 N.W.2d 256, 258 (Iowa App. 1984).

To prove a due process violation based on destruction of evidence, Heath must show: (1) a proper defense request for the evidence was made; (2) the evidence was material; and (3) the evidence would have been significantly favorable to the defendant. *State v. Hulbert,* 481 N.W.2d 329, 334 (Iowa 1992). To obtain a

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[1] The record indicates that Heath requested the uniform instruction concerning spoilation be submitted to the jury:

> **Unif. Crim. Jury Instr. No. 200.46 Destruction of Evidence - Permissible Inference.** If you find that (description of the material physical evidence) existed and the State knowingly and intentionally destroyed (description of the material physical evidence), you may, but are not required to, conclude that the information contained in the (description of the material physical evidence) would be unfavorable to the State and favorable to the defendant.

spoilation instruction, the defendant must also demonstrate that the destruction was intentional. *Id.* "Only a deliberate act supports the rationale underlying the rule: that destruction serves as an 'admission by conduct of the weakness of one's case.'" *Id.* (quoting *State v. Langlet,* 283 N.W.2d 330, 333 (Iowa 1979)); *see also Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281, 289 (1988).

The ammunition recovered from the crime scene, including the Winchester bullet at issue, was submitted to the Iowa Division of Criminal Investigation Laboratory for test firing using a .25 caliber weapon found in Montford's apartment. The firearms specialist testified that all three spent cartridges and all three bullets taken from the victim's body had been fired by the same gun but not the gun found in Montford's apartment. He also testified he examined the primer at the base of the cartridge on the bullets before test firing and did not discover any markings.

Heath has not satisfied his burden to demonstrate that the DCI firearms specialist intentionally destroyed the firing pin marking on the Winchester bullet. The authorities sought to determine if Montford's gun was the murder weapon. This objective would not have been served by the purposeful refiring of a misfired bullet. Heath has been unable to prove the destruction, if any, was anything more than the result of negligence or inadvertence. Nor has he shown the State failed to establish a proper foundation and chain of custody. We affirm on this issue.

000662

VI. Impeachment.

Heath contends the trial court improperly permitted the State to impeach its own witness, co-defendant Appleton, with inconsistent prior written statements, and also with the testimony of Appleton's attorney concerning prior inconsistent oral statements made by Appleton. *State v. Turecek,* 456 N.W.2d 219 (Iowa 1990) (State is not entitled to place witness on stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible). He also asserts the written statements and the testimony of Appleton's attorney amounted to improper introduction of extrinsic evidence.

The State argues Heath failed to preserve error on this issue by raising similar objections at trial. Heath made objections at trial to the impeachment evidence but not, according to the State, the precise objections he now asserts on appeal. We will nevertheless consider the merits of all arguments concerning the impeachment of Appleton.

The State sought to impeach Appleton following his retraction of his earlier statements to police identifying Heath as the shooter and his testimony that Montford in fact had been the shooter. The State also sought to impeach Appleton's trial testimony denying that he advised the county attorney, in the presence of his own counsel, that Heath had pressured him to lie.

Rule 613 of the Iowa Rule of Evidence governs the impeachment of a witness by prior inconsistent statements:

> **Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interest of justice otherwise require. . .

Iowa R. Evid. 613(b).

Our review of the record confirms the State properly impeached Appleton. The State asked Appleton if he made the prior written statement to police and provided him with an opportunity to explain the reasons for the statement. Furthermore, the State asked Appleton about his attorney's presence at the jail during his discussion with the county attorney. Both procedures followed by the State satisfy the requirements of Rule 613(b).

We also reject Heath's arguments asserting a *Turecek* violation. Appleton was not called for the purpose of offering otherwise inadmissible evidence but rather was necessary to provide additional details of what occurred on the night of the murder. Furthermore, Heath has not shown the State anticipated unfavorable testimony from Appleton's attorney. Accordingly, we conclude the impeachment of Appleton's testimony was proper.

VII. Jury Instructions.

Heath submits the trial court improperly instructed the jury after the jury inquired whether there must be a unanimous agreement of not guilty of first-degree murder before considering lesser-included offenses. The trial court advised the jury

000664

to re-read the reasonable doubt instruction.[2] Heath requested a clarification stating that unanimity was not required before considering the lesser-included offenses. He asserts the court's failure to provide the supplemental instruction caused the jury to deliberate contrary to law.

Heath has cited no legal authority in support of his proposed instruction. Moreover, he has not asserted the instructions that were submitted contained an incorrect statement of the law. *See State v. Lindsey,* 302 N.W.2d 98, 104 (Iowa 1981). Accordingly, we reject his argument and affirm on this issue.

VIII. Cumulative Error.

Finally, Heath argues the cumulative effect of the errors committed by trial counsel resulted in prejudice. *See State v. Hardy,* 492 N.W.2d 230, 234 (Iowa App. 1992). We have rejected each of Heath's error claims. Accordingly, he cannot demonstrate cumulative error.

We have considered all of Heath's arguments challenging his conviction for first-degree murder. We conclude he has not prevailed on any of the claims asserted. The conviction is affirmed.

AFFIRMED.

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[2] Instruction No. 10:

> If there is a reasonable doubt as to the offense committed, the defendant shall only be convicted of the offense for which there is no reasonable doubt.