

**IN THE COURT OF APPEALS OF IOWA**

No. 1999-48 (9-203) / 98-1197

Filed April 30, 1999

**STATE OF IOWA,**

Plaintiff-Appellee,

**vs.**

**TERRY P. ANDERSEN,**

Defendant-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin,  
Judge.

Defendant appeals his conviction and sentence, following a jury trial, for  
first-degree murder and willful injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney  
General, Richard Crowl, County Attorney, and Jeffrey Tekippe, Assistant County  
Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Schlegel,\* JJ.

\* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

**SACKETT, C.J.**

Defendant-appellant Terry P. Andersen appeals following his conviction of first-degree murder and willful injury. He contends the district court should have allowed the admission of evidence the victim was a violent person and had been convicted of voluntary manslaughter. We affirm.

Defendant was charged on January 29, 1998, by trial information with first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1997), willful injury in violation of Iowa Code section 708.4, possession of a firearm by a convicted felon in violation of Iowa Code section 724.8, and possession of a controlled substance in violation of Iowa Code section 124.401.<sup>1</sup>

Following a jury trial, defendant was found guilty of first-degree murder and willful injury. The district court sentenced defendant to life imprisonment for first-degree murder and ten years for willful injury, the sentences to be served concurrently.

The State's theory of the case was the victim was shot by defendant on January 9, 1998, in the home of Kim Theisen, defendant's girlfriend in Council Bluffs. Defendant's theory is someone else at Theisen's home shot the victim.

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<sup>1</sup> Defendant filed a motion for severance requesting his trial initially be limited to the murder and willful injury charges and trial on the other charges be delayed. The district court granted the motion. The charges for firearm possession and possession of a controlled substance were dismissed after defendant's conviction of the charges that are the subject of this appeal.

The State's evidence came primarily from three witnesses who testified they saw defendant shoot the victim. The testimony was the victim went to Theisen's home to ask about money advanced by Angela Blackburn to purchase controlled substances. The money was allegedly stolen by Theisen before the deal was completed. Also at the home were Carissa Potts, Aaron Letner, Cheryl Hall, and David Rooney. On arriving, the victim went to a bedroom to wake Rooney. Defendant, who had a romantic relationship with Theisen, next came to the home. At the time, Rooney was yet in the bedroom with the victim. Hall was in the dining room. Potts was in the bathroom next to the bedroom showering. Letner was in the kitchen. Theisen and defendant were in the dining room. According to Rooney, defendant went toward the bedroom door and shot the victim twice. Potts said she heard the first shot, opened the door to the bedroom, and saw defendant fire a second shot at the victim. Theisen testified she followed defendant to the bedroom door and saw him fire two shots at the victim.

The people in the house were to have put the victim's body in defendant's pickup and taken it to the railroad yards in Council Bluffs where it was hidden. Theisen testified defendant later took the body to a garage where he used a chain saw to dismember it.

Employees of an Omaha, Nebraska business discovered blood, flesh, and clothing fragments near the Missouri River. A necklace identified as the victim's was

also discovered in the area. The body was not found, but samples taken for DNA testing at the site, as well as those on Theisen's porch, matched exactly samples from the victim's pickup. Additionally, the samples, when compared to the victim's parents' samples, showed it 3700 times more likely they were the parents of the victim than a random couple.

Defendant contends he did not fire the fatal bullets. He argues it is likely someone at the home other than he was the murderer. He advances the others at the home who testified for the State that defendant was the murderer lied about both defendant's and their involvement in the crime.

Prior to trial, the State filed a motion in limine objecting to the admission of testimony of the victim's reputation for violence and evidence of his conviction of voluntary manslaughter. The State contended the evidence was not relevant. The district court sustained the motion.

Defendant made offers of proof through the testimony of Rooney, Blackburn, and members of the victim's family. The offer showed the victim had been convicted of voluntary manslaughter while involved in drug dealings, served time in prison, and had been violent on a number of occasions. The offer further showed two people in the home where the victim was shot were aware of these facts. Defendant advances this evidence is relevant to the motive and opportunity of others to kill the victim.

Defendant advances the evidence is admissible under Iowa Rule of Evidence 404(a)(2)(A)<sup>2</sup> permitting an accused to introduce relevant evidence of a victim's character. Defendant further contends the evidence is admissible under Iowa Rule of Evidence 404(b)<sup>3</sup> allowing the admission of evidence of other crimes or wrongs to show motive, intent, opportunity, or knowledge. Additionally, defendant advances the evidence is admissible under Iowa Rule of Evidence 405(a)<sup>4</sup> which permits the admission of evidence of an individual's reputation to show character.

Evidentiary matters are generally left to the trial court's discretion. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). Thus, we reverse rulings on such matters

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<sup>2</sup> Iowa Rule of Evidence 404(a)(2)(A) provides:

(2) *Character of Victim.*

(A) In Criminal Cases. Subject to Iowa R. Evid. 412, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in any case where the victim is unavailable to testify due to death or physical or mental incapacity to rebut evidence that the victim was the first aggressor . . . .

Iowa R. Evid. 404(a)(2)(A).

<sup>3</sup> Iowa Rule of Evidence 404(b) provides:

(b) Other Crimes, Wrongs, or Acts. 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. It may, however, be admissible 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).

<sup>4</sup> Iowa Rule of Evidence 405(a) provides:

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Iowa R. Evid. 405(a).

only when it is shown the trial court abused its discretion. *Id.* To be successful on this issue, defendant must show the district court abused its discretion in the rulings and, as a result, he was prejudiced. *See State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994).

The first question is whether the evidence was relevant. In addressing the admission of evidence, the court first must decide its relevance. *See State v. Larsen*, 512 N.W.2d 803, 807 (Iowa App. 1993). The district court determined defendant's purpose in seeking admission of the evidence was to show the fact other people at the scene were aware of the victim's character gave them a motive to shoot the victim.

The victim went to the Council Bluffs house to collect on a drug transaction. Defendant contends his offer of proof showed that transaction was similar to the transaction the victim was involved in when he committed the act resulting in his voluntary manslaughter conviction. The State contends defendant's offer of proof only showed the victim's conviction was associated with drugs, not it involved a situation similar to what was happening in this case as defendant argues.

Defendant also advances to have allowed this evidence would have permitted him to paint the witnesses testifying for the State as drug dealers, conscious of the victim's past and fearful for their own lives. Defendant reasons then the jury would have seen the shooting as a violent, drug-related dispute in which defendant had no stake, unlike others in the home who were the State's witnesses.

Evidence relevant to prove a fact or element in issue other than defendant's criminal disposition is admissible. *See State v. Barrett*, 401 N.W.2d 184, 187 (Iowa 1987). Generally, evidence of a victim's character is not admissible. *See State v. Jacoby*, 260 N.W.2d 828, 837 (Iowa 1977). Exceptions have been allowed: (1) where defendant claims self-defense alleging the victim was the aggressor and defendant seeks to show the victim was a violent person, *see State v. Hood*, 346 N.W.2d 481, 485 (Iowa 1984) (Harris, J., dissenting); and (2) where defendant claims his prior knowledge of the victim's propensity toward violent behavior was a factor he considered in assessing whether he was in danger. *See Jacoby*, 260 N.W.2d at 828. Neither of these exceptions apply here.

The specific evidence sought to be admitted was (1) the victim was into drugs; (2) he served time for voluntary manslaughter and either conspiracy to distribute cocaine or intent to deliver; (3) the manslaughter and drug charges evolved from the same transaction; and (4) "a kid who had a pager was there and they thought he was a snitch and he ended up dead."

The proffered evidence did not specifically set out the facts of the victim's convictions. Defendant has not shown the evidence (1) to be similar to the fact surrounding this crime, or (2) was relevant to show a fact or element in issue. The district court did not abuse its discretion in not admitting the evidence.

**AFFIRMED.**

**No. 98-1197. [1999-48 (9-203)] STATE v. ANDERSEN**

Appeal from the Iowa District Court for Pottawattamie County, J. C. Irvin, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel, J., and Schlegel, S.J. Opinion by Sackett, C.J. (7 pages \$2.80)

Defendant appeals following his conviction of first-degree murder and willful injury. He contends the district court should have allowed the admission of evidence the victim was a violent person and had been convicted of voluntary manslaughter. We affirm. Following a jury trial, defendant was found guilty. The State's theory was the victim was shot by defendant in the home of Kim Theisen, defendant's girlfriend. Defendant's theory is someone else at Theisen's home shot the victim. The State's evidence came primarily from three witnesses who testified they saw defendant shoot the victim. The people in the house put the victim's body in defendant's pickup and took it to the railroad yards where it was hidden. Defendant later used a chain saw to dismember the body. Employees of an Omaha business discovered blood, flesh, and clothing fragments near the Missouri River. The body was not found, but samples taken

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for DNA testing at the site, as well as those on Theisen's porch, matched exactly samples from the victim's pickup. The samples, when compared to the victim's parents' samples, showed it 3700 more likely they were the parents of the victim than a random couple. Defendant argues it is likely someone at the home other than he was the murderer. The State filed a motion in limine objecting to the admission of testimony of the victim's reputation and his conviction of voluntary manslaughter. The district court sustained the motion. Defendant advances this evidence is relevant to the motive and opportunity of others to kill the victim. Defendant advances the evidence is admissible under Iowa Rules of Evidence 404(a)(2)(A) and 404(b). Evidentiary matters are generally left to the trial court's discretion. Defendant contends his offer of proof showed that transaction was similar to the transaction the victim was involved in when he committed the act resulting in his voluntary manslaughter conviction. The specific evidence sought to be admitted was (1) the victim was into drugs; (2) he served time for voluntary manslaughter and either conspiracy to distribute cocaine or intent to deliver; (3) the manslaughter and drug charges evolved from the same transaction; and (4) a kid who had a pager was there and they thought he was a snitch and he ended up dead. The proffered evidence did not specifically set out the facts of the victim's convictions. Defendant has not shown the evidence (1).to be similar to the fact surrounding this crime, or (2) was relevant to show a fact or element in issue. The district court did not abuse its discretion in not admitting the evidence.