

IN THE COURT OF APPEALS OF IOWA

No. 5-522 / 94-1172

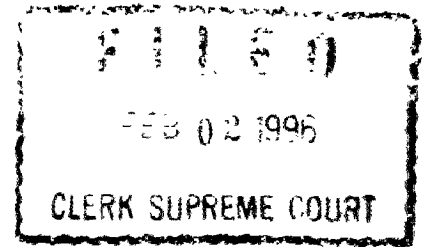
STATE OF IOWA,

Appellee,

vs.

DAVID JAMES MUNZ,

Appellant.



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

Defendant appeals from judgment and sentences, following jury trial, entered
upon his convictions of second-degree burglary and interference with official acts
causing injury. **REVERSED AND REMANDED FOR NEW TRIAL.**

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

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, J. Patrick White, County Attorney, and Anne Lahey, Assistant County
Attorney, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

CADY, J.

Defendant David Munz was convicted of burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5 (1991), and interference with official acts causing injury, in violation of section 719.1. He now appeals. We reverse his convictions and remand for new trial.

In September 1992, Munz moved to Iowa City and was looking for a place to stay. He met Vernon Alcorn, who leased rooms in his trailer. Munz moved into the trailer and began a homosexual relationship with Alcorn. George Johnson, Regina Rochman, and Richard Lucas also rented rooms from Alcorn.

In October 1992, Munz and Rochman got into an argument, and Rochman slapped Munz. Munz then got a knife out of a drawer in the kitchen and threatened her. After this incident, Alcorn asked Munz to move out and assisted him in moving to a nearby trailer where Corey Phillips and her children lived.

Alcorn and Munz continued to visit each other until Alcorn discovered Munz had entered into a romantic relationship with Phillips. Alcorn told Phillips he was going to report her to the Department of Human Services because she was living with a homosexual man, and he believed her relationship with Munz was not beneficial to her children.

On October 21, 1992, Munz went to Alcorn's trailer to confront him concerning his threats against Phillips. Munz knocked on the door and asked to speak to Alcorn. Alcorn stated he did not wish to speak to Munz. Munz then kicked the

door to the trailer open. Johnson, who was sitting in the living room crocheting an afghan, testified he saw Munz approach Alcorn with a closed fist. Alcorn testified Munz scratched him on his chest and arm. Munz did not resist Alcorn's attempt to subdue him, however, and in fact, told Alcorn he loved him.

While the altercation was taking place, Rochman telephoned the police. Officers testified Munz appeared calm when they took him outside and questioned him. Munz's demeanor changed once officers told him he was under arrest. He began yelling and spitting at the officers. He threatened to sue the officers and told them he would not be convicted because he suffered from post-traumatic stress syndrome. Munz struggled when officers placed him in a patrol car and again when he was placed in a padded cell. He kicked one officer in the head, and caused another officer to sustain a small laceration on his leg.

Munz was charged with burglary in the second degree and interference with official acts causing injury. At trial, Munz presented a defense of diminished responsibility due to post-traumatic stress disorder and intoxication. The district court denied defendant's request to have his brother, Thomas Munz, who was an inmate in a federal penitentiary, testify at his trial as an expert on post-traumatic stress syndrome.

Defendant testified he had been severely beaten by his father when he was a child. He claimed this history of child abuse caused him to suffer from post-traumatic stress syndrome. He also stated he was intoxicated on October 21, 1992. He stated

he had no memory of entering the trailer, or of his struggles with the police officers. Munz presented the testimony of James Knott, a psychologist, who diagnosed Munz as suffering from post-traumatic stress disorder. He testified the syndrome can cause uncontrollable outbursts of anger and loss of memory during times of anxiety or stress.

In rebuttal, the State presented the testimony of Dr. Romulo Lara, a psychiatrist, and Dr. Leonard Welsh, a psychologist. They testified they did not believe Munz suffered from post-traumatic stress syndrome. They diagnosed him as having an antisocial personality disorder and alcohol dependency.

The district court refused defendant's request to instruct the jury on diminished responsibility, finding there was insufficient evidence in the record to support this instruction. A jury found defendant guilty of the crimes charged. The court sentenced Munz to a term of imprisonment not to exceed ten years on the burglary charge and one year in the county jail on the charge of interference with official acts. The sentences are to run concurrently. Munz appeals.

I. Munz claims the district court abused its discretion by precluding him from presenting the testimony of his brother to support his defense of diminished responsibility. He claimed his brother was an expert in the area of post-traumatic stress syndrome due to his education and personal experience as a sufferer of the syndrome. He also claimed his brother should have been permitted to give lay

opinion testimony concerning his observations of the beatings defendant received as a child.

Our review of the district court's rulings on the admissibility of opinion testimony is for abuse of discretion. *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992). An abuse of discretion will not be found unless the court exercised its discretion on grounds, or for reasons, which are clearly untenable. *Id.* For testimony to be admissible as an expert opinion, the proposed witness must be qualified to give an opinion. *State v. Peterson*, 219 N.W.2d 665, 673 (Iowa 1974). The testimony must also be reliable. *State v. Brown*, 470 N.W.2d 30, 32 (Iowa 1991).

We find no abuse of discretion in the district court's decision not to permit Thomas Munz to testify as an expert at defendant's trial. Thomas was not qualified to give an expert opinion of the subject of post-traumatic stress syndrome because he had no education or training in the fields of psychiatry or psychology. Thomas' only qualification was his claim that he had been diagnosed with this syndrome, and we find this is not sufficient to qualify him as an expert. Also, Thomas was not qualified to give an opinion as to whether defendant suffered from post-traumatic stress syndrome because he had only seen him on one day since 1989, and thus, had no knowledge of his current condition. Furthermore, Thomas' reliability is questionable due to the fact he has multiple felony convictions.

We find no abuse of discretion in the district court's decision not to allow Thomas to testify concerning defendant's history of child abuse. Thomas' testimony

on this issue would only have been cumulative. Defendant testified extensively about the beatings he received as a child. Knott testified he believed Munz had been subjected to child abuse. Additionally, Dr. Lara read from a 1964 report which stated defendant's parents did not demonstrate concern for him and regarded him as a problem they would just as soon have off their hands. Thus, evidence of defendant's unhappy childhood was already in the record without the need for Thomas' testimony.

We find no abuse of discretion in the district court's decision not to allow Thomas to testify at defendant's trial, either in person or by deposition.

II. Munz further claims the district court erred in failing to instruct the jury on his defense of diminished responsibility. The district court denied the request to instruct the jury on diminished responsibility, finding substantial evidence was not presented to warrant the instruction. Munz states there was substantial evidence to show he suffered from post-traumatic stress syndrome.

Ordinarily, a defendant is entitled to have instructions presented relating to any theory of defense for which there is foundation in the evidence. *State v. Stewart*, 445 N.W.2d 418, 421 (Iowa App. 1989). Diminished responsibility is an appropriate defense in any crime which requires proof of a specific intent as an element, and if supported by the evidence, should be the subject of an appropriate instruction. *State v. Jacoby*, 260 N.W.2d 828, 836 (Iowa 1977). In order to obtain such an instruction, the defendant must produce substantial evidence to support the instruction. *State v.*

Griffin, 389 N.W.2d 858, 861 (Iowa App. 1986). The evidence is not substantial unless it is sufficient to convince a rational finder of fact that diminished responsibility has been established. *State v. Broughton*, 425 N.W.2d 48, 52 (Iowa 1988).

We observe the defense of diminished responsibility is available only on the burglary charge, which is a specific intent crime. We also observe there was substantial evidence in the record Munz suffered from post-traumatic stress syndrome. The fighting question is whether the evidence of the disorder was sufficiently tied to the factual scenario which led to Munz's conviction for burglary. The state argues the evidence showed the disorder allegedly suffered by Munz only caused him to lose control of the behavior when confronted by persons in blue uniforms, such as police, and the crime of burglary was complete by the time the police arrived at the scene.

We acknowledge much of the critical opinion testimony of Knott centered on the inability of Munz to control his behavior when confronted by police. We agree with the State this testimony would not support an instruction on diminished responsibility. However, a careful review of the record reveals additional testimony tending to make the disorder relevant to the specific intent element of the burglary.

There was testimony Munz had alerted his friends and roommates before the burglary charge that hostilities could trigger a violent reaction due to his disorder. Furthermore, a few days before the burglary incident Munz held a kitchen knife to the

throat of a former roommate after a confrontation, and appeared to have no memory of the matter the next day. More significantly, Munz went to Alcorn's trailer immediately after his girlfriend told him Alcorn had threatened her and her children. Munz testified he was having "flashes" at the time of Alcorn taking his hostility out on his girlfriend's youngest child. Munz also testified he had no recollection of kicking in the door of the trailer.

Knott testified in detail about post-traumatic stress syndrome and how sufferers can react with uncontrollable violence to stress or anxiety. Knott indicated Munz can be placed under stress by people being harmed by other people and feeling potential for harm to himself, in addition to being around people in uniforms. Knott also opined that Munz was unable to distinguish between right and wrong when having a reaction or episode of increased arousal.

We believe this evidence was sufficient to justify an instruction on diminished responsibility. Although there was other evidence that Munz did not suffer from post-traumatic stress syndrome, the expert testimony of Knott tends to support Munz's defense that due to his mental state he harbored no specific intent to assault Alcorn when he entered the trailer. We believe Munz was entitled to an instruction that would have allowed the jury to consider his mental condition as it related to the charge of burglary.

REVERSED AND REMANDED FOR NEW TRIAL.