IN THE COURT OF APPEALS OF IOWA

No. 2-430 / 11-1269
Filed July 11, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAY DEE MACK,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, Paul R. Huscher, Judge.

Jay Dee Mack appeals from his conviction for second-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Michael K. Jacobsen, County Attorney, and Susan Wendel, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

Angie Ancer was shot at home three times and died from her wounds. Jay Dee Mack was convicted of murder in the second degree for her death. On appeal, Mack raises four issues. First, he claims the district court erred in denying his motion for judgment of acquittal. Second, he contends the district court improperly excluded evidence regarding the character of the victim. Third, he challenges the district court's failure to provide certain evidence to the jury during deliberations. Finally, he appeals the denial of his motion for change of venue.

We find error was not preserved on the grounds for which he challenges the denial of his motion for judgment of acquittal. We find the district court did not abuse its discretion in excluding the offered character evidence, declining review of the evidence during deliberations, or denying the motion for change of venue.

I. Background Facts and Proceedings

Angie Ancer and Jay Dee Mack began living together in a house rented by Mack in January of 2008. The couple had a turbulent relationship; they were prone to fights, some of which occurred in public. During these fights, Ancer demonstrated a pattern of shoving Mack, as well as threatening violence including burning his house down or hurting his loved ones.

On October 9, 2010, the couple spent the afternoon drinking with a friend. They did not fight that afternoon. After the friend left, Mack fell asleep on the couch. He awoke to Ancer yelling at him, accusing Mack of insulting the friend. She threatened to burn the house down and harm Mack's loved ones. Ancer

shoved Mack and some of the furniture. Mack decided to go outside and smoke a cigarette. Ancer continued the threats, and Mack told her he wanted her to leave. He retrieved a gun from the garage. Mack displayed the weapon to Ancer, who told him he would not do anything with the gun and called him a little man. Mack "snapped" and shot Ancer three times.

Mack called the police and was arrested. Four-and-a-half hours after he was taken into custody, his blood alcohol content was found to be .176. The police interrogated Mack and his recorded statement was played at trial. During the interrogation, Mack admitted to shooting Ancer, but stated he did not know where the bullets hit her or whether they did at all. He asserted defenses of intoxication and diminished capacity to the charge of murder in the first degree. The jury convicted Mack of the lesser-included offense of second-degree murder.

II. Analysis

A. Denial of Motion for Judgment of Acquittal

Mack first contends the district court erred in denying his motion for judgment of acquittal. "To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004); *see also State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011) (finding error not preserved where motion for directed verdict of acquittal lacked specific grounds).

Here, the motion for judgment of acquittal was made at the close of the State's case on the ground that the State had failed to prove the element of specific intent; Mack argued his blood alcohol content resulted in an inability to

form the specific intent required for murder in the first degree. Mack's counsel renewed this motion at the close of evidence "for the same reasons stated." Mack now argues the evidence was insufficient to prove the malice aforethought element of murder in the second degree. He also now raises a claim of serious provocation to support his argument that he should have been convicted of voluntary manslaughter. He failed to raise at trial the specific grounds that he now raises on appeal. Therefore, the issues were not preserved, and we do not reach them here.

B. Exclusion of Testimony Regarding Victim's Character

Mack next appeals the district court's refusal to admit evidence of a specific instance regarding the victim's character. He made an offer of proof of a 2008 incident during which Ancer became enraged at a graduation party when a lit cigarette caused a fire in the couple's car. We review evidentiary rulings for abuse of discretion. *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008). "An abuse of discretion occurs when the trial court 'exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable.'" *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005). Even if an abuse of discretion has occurred, reversal is not required unless prejudice is shown. *Id*.

Evidence of the victim's character offered to prove she acted in conformity with a reputation or character trait for violence is admissible where the defendant charged with murder claims he acted in self-defense. *State v. Begey*, 672 N.W.2d 747, 752 (Iowa 2003). Our supreme court has stated:

> All persons, independently of their character or reputation, are under the equal protection of the law. A homicide victim's prior violent or turbulent character or reputation is ordinarily immaterial

> and furnishes another no excuse to become his or her private executioner. Thus where the accused denies the killing or asserts it was unintentional, evidence of the deceased's character is inadmissible.
>
> But an exception to this general rule applies where the accused asserts he or she acted in self-defense and the slightest supporting evidence is introduced. Then the violent, quarrelsome, dangerous or turbulent character of the deceased may be shown, both by evidence of his or her reputation in that respect and by witnesses who can testify from an actual knowledge of the victim's character.

Id. (internal citations and quotation marks omitted). Though he did testify he was scared of Ancer, Mack did not assert a defense of justification or self-defense. Evidence of the victim's character was therefore properly excluded.

C. Denial of Jury Request to Review DVD Evidence

Mack next contends error was committed by the trial court when it denied the jurors' request during their deliberations for "a piece of technology to review the video evidence," including the interrogation of Mack. "Submission of exhibits to the jury is a matter resting in the trial court's discretion." *Brooks v. Holtz*, 661 N.W.2d 526, 532 (Iowa 2003). The trial court possesses considerable discretion to grant or deny a jury's request to view exhibits received in evidence during deliberations. *Id*.; *State v. Baumann*, 236 N.W.2d 361, 366 (Iowa 1975) (holding district court did not abuse its discretion in denying jury's request to review audio tape recordings admitted into evidence). We will not disturb the district court's decision unless it is clearly unreasonable or rests on untenable grounds. *Brooks*, 661 N.W.2d at 532 (affirming trial judge's decision to withhold a videotape from the jury since such evidence might be over-emphasized by the jury). Grounds for a decision are untenable where they are not supported by substantial evidence or are based upon an erroneous application of the law. *Id*.

Considerations appropriate in exercising this discretion include "(i) whether the material will aid the jury in a proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury." *State v. Thompson*, 326 N.W.2d 335, 337 (Iowa 1982) (citations omitted). Error by the trial court is reversible only where prejudice results to the defendant. *Id*.

Here, the district court denied review of the video evidence, even though the State and defendant agreed to its submission to the jury during deliberations. The court stated it "believe[d] the jury was adequately instructed during the trial that they needed to pay attention to the evidence . . . for they would only hear it once." It also noted the difficulty of determining what type of equipment would be necessary for such review, as well as the concerns of providing a computer, which could be used to access other, non-evidence materials. Because the district court found the technology to review the evidence could be subjected to improper use, and found jurors were adequately exposed to the evidence during trial, we find no abuse of discretion.

D. Denial of Motion to Change Venue

In his pro se brief, Mack appeals the denial of his motion to change venue. He contends the denial of this motion "reduced the chances of selecting jurors not prejudiced (in favor of) the victim" because "Ms. Ancer was known and well recognized by the public (via employment) in her community." The motion to change venue was considered by the district court on June 21, 2011. Neither party presented evidence at the hearing. The district court judge ruled no

transfer was necessary, as no showing was made that the defendant could not obtain a fair trial or impartial jury in Jasper County.

We review the denial of a motion for change of venue de novo. *State v. Evans*, 671 N.W.2d 720, 726 (Iowa 2003). Motions for change of venue are governed by rule 2.11(10) of the Iowa Rules of Criminal Procedure, which allows a change where "such degree of prejudice exists in the county in which the trial is to be held that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county." A trial court's refusal to grant a defendant's motion for change of venue will not be overturned unless it constitutes an abuse of discretion. *Evans*, 671 N.W.2d at 726.

During jury voir dire in September of 2011, eight jurors acknowledged they knew the victim; five were excused for cause, one was the subject of a peremptory strike by the attorneys, and the remaining two had very limited familiarity with the victim. "From the facts presented in the record, we cannot presume prejudice[.]" *Id*. We therefore find the district court did not abuse its discretion by denying the motion to change venue.

AFFIRMED.