IN THE COURT OF APPEALS OF IOWA

No. 2-822 / 10-1638
Filed November 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JARMAINE LEVAR ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert Blink, Judge.

Defendant appeals his conviction for voluntary manslaughter. **AFFIRMED.**

John Audlehelm of Audlehelm Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John Sarcone, County Attorney, and Dan Voogt, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Miller, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

A grand jury indictment issued on August 6, 1997, accused Jarmaine Allen of first-degree murder, in violation of Iowa Code sections 707.1 and 707.2 (1995), in the shooting death of Jody Stokes on October 14, 1995. Thereafter followed a long procedural history.[1]

This case involves Allen's fourth jury trial, which was held in July 2010. The evidence presented during the trial showed that on the evening of October 13, 1995, Allen and Stokes were both at a party and they "got into it." Allen's good friend Shaun Brown testified Stokes and Allen had words and Stokes hit Allen, knocking him down. Brown stated he got Allen up, Stokes hit Allen again, and Brown and Allen left the party. Marquetta Slater, Stokes's girlfriend, testified she was sitting in a car across the street from the party when she noticed Allen standing outside with a 9 millimeter gun in his hand and saying, "[b]ring your fat ass outside." Slater got Stokes into her car and they drove away.

The next day, on the afternoon of October 14, 1995, Stokes was outside the TNT Lounge in Des Moines selling drugs. Allen and his friend Cortez Brown were down the street outside the Drake Liquor Store when they ran into William "Chuck" Holder. Holder observed Stokes make a gesture toward Allen which he

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[1] The first trial, held in February 1998, resulted in a mistrial. In a second trial, held in August 1998, Allen was found guilty of first-degree murder. That conviction was affirmed on appeal, *State v. Allen*, No. 98-2012, 2000 WL 767686 at *1 (Iowa Ct. App. June 14, 2000), but was subsequently reversed in postconviction proceedings. *Allen v. State*, No. 03-1288, 2005 WL 974189, at *1 (Iowa Ct. App. April 28, 2005). His conviction for first-degree murder in a third trial, held in May 2006, was reversed on appeal, and the case remanded for a new trial. *State v. Allen*, No. 06-1495 2008 WL 5234319, at *1 (Iowa Ct. App. Dec. 17, 2008).

took to mean, "[l]ike, come down here to me or like, I don't know." Holder heard Cortez Brown call Allen, "a punk." Holder walked away, and a little bit later heard gunshots. Stokes was shot at least five times. Bullet casings from a 9 millimeter gun were found on the ground near him.

Nicholas Jones stated that he walked past Stokes on the sidewalk outside the TNT Lounge. He testified that after he walked by he heard shots, and he ducked down on the ground, so that he did not see the shooter. He heard Stokes say, "oh, cuz, oh, cuz." During the present trial Jones testified about the following statements he made in the past: (1) after the incident he told the county attorney that he had seen Allen shoot Stokes; (2) he later told the grand jury that he did not know who had killed Stokes; (3) during a trial in 1998 he testified that Allen was the person who killed Stokes; and (4) in the 2006 trial he had again stated he did not know who had shot Stokes. Jones stated he was pressured into identifying Allen as the shooter by Stokes's brothers. Officer Paul Houston testified Jones had previously stated he saw Allen shoot Stokes with a 9 millimeter chrome-plated handgun, and after the shooting he saw Allen run towards an alley.

Robert Hawthorne was working at the TNT Lounge, and he was standing outside near the door when he heard shots. He testified the shots came from the corner of the building. Hawthorne was asked if he saw who was firing the gun, and he answered, "I seen a vision of a guy." On further questioning, he answered, "I would have believed at the time a guy named Jarmaine," and he identified Allen in the courtroom. On cross-examination, when asked, "[a]nd, in

fact, you only saw a silhouette of a person standing at the other end of that building," Hawthorne answered in the affirmative.

Jerry Ball was in his vehicle stopped at a stoplight on Martin Luther King Jr. Parkway when he saw a man come out from behind the TNT Lounge and shoot another man. He testified that shooter took off behind the bar. Ball was not close enough to identify the shooter.

Kelly Scott testified that in 1995 he lived down the alley and around the corner from the TNT Lounge. Scott stated he was in his yard when he heard gunshots. He saw someone running down the alley from the direction of the TNT Lounge and then run through his yard. After the incident, Scott picked a photograph of Allen out of a photo array. He identified Allen in the courtroom as the same person he had identified for police officers from the photo array. On cross-examination, Scott stated that he told the grand jury he could not see the person because they ran through his yard real fast, and this statement to the grand jury was made because he was afraid of Allen.

After Stokes's death, Slater began dating Shyrome Avant. In late 1996 or early 1997 Allen and Avant were both at the Iowa Medical and Classification Center. Avant testified that Slater sent him a picture of herself and Allen saw it.[2] He stated he and Allen were talking about Slater, when Allen stated, "Man, I remember when I shot big Jody's fat ass." He stated Allen told him he, "just started dumping on him," which Avant stated meant, "[u]nloading, just emptying

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[2] At some time after the jury trial in August 1998, Avant suffered a medical condition that prevented him from testifying. The parties agreed his testimony would be presented through a transcript of his testimony at the 1998 trial, which was read to the jury.

the gun on somebody." Avant stated Allen told him he used a "Nina," which meant a 9 millimeter gun. He also recalled that Allen told him that Stokes said, "oh, cuz, oh, cuz," when he was shot. According to Avant, Allen stated he came out from behind the TNT Lounge, shot Stokes, and then ran away. Avant stated another person, B.J. Harris, was present when Allen made these statements to him.

After the State presented its evidence, the district court denied Allen's motion for judgment of acquittal. Defendant presented the testimony of Anthony Marshall, who wanted to obtain some crack cocaine from Stokes on October 14, 1995. As Marshall was waiting for Stokes to finish another deal, someone said, "Jody," and started shooting. Marshall said he saw a 9 millimeter gun and an arm, but did not see the shooter.

Pecola Fugate testified that in 1995 she lived near the TNT Lounge. She stated that almost simultaneously with the shooting Holder appeared on her porch. After that another man ran up the street. She testified this man who ran by was not Allen, who she knew from the neighborhood.

John Harris testified that he was at the Iowa Medical and Classification Center at the same time as Allen and Avant. Harris stated he did not remember Avant getting any pictures from Slater. He also testified he did not hear Allen make any of the statements Avant testified Allen had made.

Attorney James Benzoni testified he took a deposition of Scott in 1997 when he was representing Allen, and at that time Scott was unable to identify Allen as the person who ran through his yard. He stated that during the first trial,

which resulted in a mistrial, Scott did not identify Allen, but at the second trial, in August 1998, Scott testified the person he saw was Allen.

After hearing this evidence, the jury found Allen guilty of the lesser included offense of voluntary manslaughter, in violation of section 707.4. The court denied Allen's motion for a new trial. The court ordered Allen would be imprisoned for a period not to exceed ten years, and this sentence would be served consecutively to a sentence he was already serving.[3] Allen now appeals his conviction for voluntary manslaughter.

II. Motion for Judgment of Acquittal

A. Allen claims the district court should have granted his motion for judgment of acquittal because there was insufficient evidence in the record to show he was the person who shot Stokes. He asserts Scott, Holder, and Jones were unreliable witnesses. He also states that Hawthorne only saw a "vision of a guy," who he believed was Allen.

We review claims challenging the sufficiency of evidence in a criminal case for the correction of errors at law. *State v. Dalton*, 674 N.W.2d 111, 116 (Iowa 2004). We will uphold the jury's verdict when it is supported by substantial evidence. *State v. Hagedorn*, 679 N.W.2d 666, 668 (Iowa 2004). "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). We consider all record evidence, not just that supporting guilt, but view the

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[3] Allen was given a fifty-year sentence on a conviction for second-degree murder for the shooting death of Phyllis Davis. *See Allen v. Iowa Dist. Ct.*, 582 N.W.2d 506, 507 (Iowa 1998).

evidence in the light most favorable to the State, "including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005).

There is clearly evidence in the record to show Allen had a motive to shoot Stokes. The evidence showed Stokes had struck Allen down two times at a party the night before in front of many witnesses. Slater testified Allen was angry and stood outside the party with a 9 millimeter gun, waiting for Stokes to appear. Stokes was able to leave the party without further incident. The next day, Allen saw Stokes down the street, where Stokes made a gesture which could have meant "come down here to me." One of Allen's friends then called him a "punk," apparently for not responding to the taunt by Stokes. Stokes was shot a few minutes later.

There is also sufficient evidence in the record to show Allen was the person who shot Stokes. When asked, "Can you tell us who shot Jody Stokes," Hawthorne replied, "I would have believed at the time a guy named Jarmaine," and identified Allen in the courtroom. Also, Scott testified that he heard gunshots and then less than two minutes later saw someone run through his yard. He identified Allen as the person he saw. Evidence placed Allen at the scene of the crime. Also, there was evidence Stokes was shot with a 9 millimeter gun, and Allen was seen with this type of gun the evening before the shooting. Even without evidence that other witnesses had identified Allen in past criminal trials, there was sufficient evidence to support a finding that Allen shot Stokes.

B. Allen contends there is insufficient evidence in the record to show that the shooting was the result of a "sudden, violent, and irresistible passion resulting from serious provocation," as required for voluntary manslaughter under section 707.4. Allen's motion for judgment of acquittal was based on the argument that he had not been sufficiently identified as the shooter, and did not raise this issue. "[W]hen the motion for judgment of acquittal did not make reference to the specific elements of the crime on which the evidence was claimed to be insufficient, it did not preserve the sufficiency of the evidence issue for review." *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). We conclude Allen has not preserved this issue for our review.

We determine the district court did not err in denying the motion for judgment of acquittal.

III. Jury Compromise

Allen contends the district court should have granted his motion for new trial on the ground that his conviction for voluntary manslaughter was the result of improper jury compromise. He contends there was no rational, or even theoretical, basis for the jury to find the offense was the result of a sudden irresistible passion, which is an element of voluntary manslaughter under section 707.4. We review a district court's ruling on a motion for new trial for an abuse of discretion. *State v. Serrato*, 787 N.W.2d 462, 472 (Iowa 2010).

We first note that voluntary manslaughter is a lesser included offense of first-degree murder based on the specific language of section 707.4. *State v. Kinsel*, 545 N.W.2d 885, 889 (Iowa Ct. App. 1996) ("Voluntary manslaughter is a

statutorily-mandated lesser included offense of murder in the first-degree."). However, before voluntary manslaughter, as a lesser included offense, is submitted to the jury there must be sufficient evidence in the record to support it. *See State v. Spates*, 779 N.W.2d 770, 774 n.3 (Iowa 2010); *State v. Hilleshiem*, 305 N.W.2d 710, 717 (Iowa 1981).

As noted above, in his motion for judgment of acquittal Allen did not challenge whether there was evidence of a "sudden, violent, and irresistible passion resulting from serious provocation," as required for voluntary manslaughter. Additionally, he did not object to the inclusion of a jury instruction on voluntary manslaughter being submitted to the jury. The first time he raised this issue was in his motion for a new trial.[4] *See State v. Geier*, 484 N.W.2d 167, 170 (Iowa 1992) (noting a motion for new trial could not raise new issues that a party had not previously raised).

We determine this case is similar to *State v. Thompson*, 326 N.W.2d 335, 338 (Iowa 1982), where the Iowa Supreme Court stated:

> At no time was the trial court ever specifically told that there was insufficient evidence to submit the lesser included offense of voluntary manslaughter.
>
> Although it might well be expected that, as a lesser included offense, voluntary manslaughter was considered an appendage of the major crime charged, defendant should not be allowed to gamble on the verdict and then complain. Under these circumstances he should have specifically addressed the sufficiency challenge to the lesser included offense or objected to the instruction and verdict form on voluntary manslaughter.

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[4] We note that although Allen's issues statements concerning these two contentions state the district court committed error by "failing to direct an acquittal," he argues error was preserved by the relevant portions of his motion for new trial.

(Citation omitted.). *See also State v. Couser*, 567 N.W.2d 657, 659 (Iowa 1997) ("Defendant's failure to object to the submission of the lesser included offense of which he was convicted results in both an absence of error preservation and the application of law of the case consequences.").

In addition, on the issue of improper jury compromise Allen cites *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010), which discussed compound inconsistent jury verdicts. "When a jury convicts a defendant of the compound offense, but acquits the defendant on a predicate offense, our confidence in the outcome of the trial is undermined." *Halstead*, 791 N.W.2d at 815. This case does not involve inconsistent compound verdicts or a legal impossibility. *See id*. We, therefore, conclude *Halstead* does not apply. We determine the district court did not abuse its discretion in denying Allen's motion for new trial on the ground that his conviction for voluntary manslaughter was the result of improper jury compromise.

IV. Sentencing

Allen asserts the district court imposed an illegal sentence by making his sentence in this case consecutive to a sentence he is already serving for second-degree murder. Our review of a sentence imposed by the district court is for correction of errors at law. Iowa R. App. P. 6.907; *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008).

Allen states that when he was previously convicted of first-degree murder for this crime in 1998, and again in 2006, his sentence was made concurrent to

the sentence for second-degree murder. He claims, then, that his sentence for voluntary manslaughter has been discharged.

The State agrees that Allen is entitled to credit for any time he has already served for this offense. As the State notes, under section 814.27 Allen is entitled to have "the period of the defendant's former confinement deducted from the period of confinement fixed on the last verdict of conviction by the district court." Whether Allen has in fact discharged his time in this case should be determined by the Iowa Department of Corrections, using applicable legal principles. We do not further address this issue.

V. Impeachment of Witness

Allen contends that by presenting the testimony of Jones, and then impeaching that testimony with his prior statements, the State violated the rule found in *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990), that the State may not "place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible." Allen claims Jones's previous inconsistent statements were inadmissible hearsay. Our review is for the correction of errors at law. *State v. Wixom*, 599 N.W.2d 481, 484 (Iowa Ct. App. 1999).

In the present criminal trial, Jones testified that when he heard shots he ducked down on the ground, so that he did not see the shooter. Over objection by Allen, Jones testified at the present trial about statements he had made in the past—that shortly after the incident in 1995 he told the county attorney that he had seen Allen shoot Stokes; that he had later testified before a grand jury that

he did not know who had killed Stokes; that during a trial in 1998 he had testified Allen was the person who killed Stokes; and that in the 2006 trial he stated he did not know who had shot Stokes.

Under Iowa Rule of Evidence 5.801(d)(1)(A), a prior statement is not hearsay if a person testifies at a trial and is subject to cross-examination, and the prior statement is "inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." Thus, Jones's testimony at the 1998 trial that he could identify Allen as the person who had killed Stokes would not be hearsay. Jones was testifying in the present trial, was subject to cross-examination, his prior statement was inconsistent with his testimony at the present trial, and was given under oath at the 1998 trial. *See State v. Elliott*, 806 N.W.2d 660, 673 (Iowa 2011) (finding prior inconsistent statements were admissible when the declarant testified at trial and was subject to cross-examination). The evidence that he told the county attorney Allen was the person who shot Stokes was cumulative to the admissible statements given at the 1998 trial, and therefore was not prejudicial. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("[W]e will not find prejudice if the admitted hearsay is merely cumulative.").

Furthermore, Jones's prior consistent statements that he could not identify Allen, given before the grand jury and at the 2006 trial, were admissible under rule 5.801(d)(1)(C), because they were made during the present trial, Jones was subject to cross-examination, and the prior statements were of identification after perceiving the person. *See State v. Mann*, 512 N.W.2d 528, 535 (Iowa 1994)

(noting that where a person testifies at trial and is subject to cross-examination, an out-of-court identification is admissible). Also, the statements could not be prejudicial because they merely bolstered his testimony at the present trial that he could not identify Allen as the person who shot Stokes.

There is no *Turecek* violation when evidence is properly admissible either because it is not hearsay, *State v. Nance*, 533 N.W.2d 557, 561 (Iowa 1995), or it is admissible under a hearsay exception. *State v. Rojas*, 524 N.W.2d 659, 662 (Iowa 1994). The statements in question here were not inadmissible hearsay. We conclude Allen has not shown the State violated *Turecek* by presenting Jones's testimony primarily as a way to introduce otherwise inadmissible evidence.

VI. Evidentiary Ruling

Finally, Allen asserts the district court improperly ruled on the State's motion in limine concerning a report dated June 25, 1998, by a corrections counselor for Avant which stated, "Inmate states that these charges should be dropped in the near future, and his probation returned." Allen argued this statement showed Avant believed he would receive a benefit for his testimony at the 1998 trial. We review evidentiary rulings for an abuse of discretion. *Elliott*, 806 N.W.2d at 667. On issues of hearsay, however, our review is for the correction of errors at law. *Id*.

In a written ruling on the State's motion in limine, the district court determined:

> However, Witness Avant's statement would be admissible if presented to the jury through the testimony of the person who

> heard him say it, i.e. Mr. Paulson. Without the contextual circumstance of the statement included in the report, and without knowing if it was a verbatim quote or a paraphrasing or even the author's interpretation of remarks made, the danger of unfair prejudice outweighs the probative value. And, indeed, there is sworn testimony of Witness Avant in which he expresses confidence that the charges will be dismissed.

Allen did not call Paulson, the correctional counselor, to testify at his criminal trial. He, however, did make an offer of proof of the correctional counselor's report. In determining the report would not be admitted, the court found both that the report did not fit a hearsay exception and that the report was cumulative to other evidence that had been admitted.

Allen claims the report was admissible as a public record, an exception to the hearsay rule, under rule 5.803(8)(A), and it should have been admissible without the testimony of the correctional counselor. We determine that even if the district court erred in this evidentiary ruling, Allen has not shown prejudicial error. *See id*. at 669 (noting that generally there is no prejudicial error when evidence in question is merely cumulative).

As previously noted, Avant had testified at Allen's 1998 trial. Allen's attorney's questioning had strongly implied that Avant had improper motives for testifying against Allen. Avant acknowledged that his girlfriend, Marquetta Slater, was formerly Stokes's fiancé. More importantly, his testimony revealed that he was then facing several serious criminal charges, charges that could lead to as much as fifty-one years imprisonment, including one charge that carried a lengthy mandatory minimum sentence. Those charges were being prosecuted by the same prosecutor who was then trying the case against Allen. Avant

repeatedly denied he was getting a deal from the prosecutor in exchange for his testimony against Allen. All of this testimony was presented to the jury during Allen's 2010 trial, through a transcript of Avant's 1998 testimony.

At the time of Allen's 1998 trial, Attorney Paul Rosenberg was representing Avant on the charges then pending against Avant. Rosenberg testified as a witness at Allen's 2010 trial. During his testimony a May 21, 1998 "Order of Pretrial Conference" from the 1998 case against Avant was received in evidence. The Order set forth an offer to Avant to plead guilty to one of the charges, terrorism, involving a firearm, with the remaining charges to be dismissed and the sentence on the terrorism charge to be consecutive to a sentence on a conviction for which Avant was currently facing revocation of a suspended sentence and probation.

Following Allen's August 1998 trial, Avant pleaded guilty to terrorism, not involving a firearm, and was sentenced to ten years imprisonment. The sentence was not made consecutive to the sentence imposed on revocation of his previously suspended sentence. Four other charges were dismissed. These facts were presented to the jury during Allen's 2010 trial through Rosenberg's testimony and the receipt in evidence of an October 9, 1998 "Guilty Plea and Sentencing Order" from the 1998 case against Avant.

Attorney James Benzoni testified at Allen's 2010 trial. Benzoni had represented Allen in Allen's 1998 trial. Benzoni testified that at Allen's 1998 trial Avant had indicated he had no need to make a deal with the State, as he, Avant, was innocent of the charges against him.

The evidence thus shows an arguable inconsistency between Avant's denial of motivation to make a deal in exchange for his testimony and his later guilty plea to one charge, dismissal of the others, and a non-consecutive sentence.

We conclude that, as argued by the State, error, if any, in denying admission of a purported statement by Avant to a correctional counselor that the then pending charges "should be dropped in the near future" was harmless. There is an abundance of other, stronger evidence in the record suggesting motives by Avant to testify against Allen. Such evidence includes not only the plea offer to dismiss most of the charges, including the most serious charge. It also includes evidence that following Allen's 1998 trial all of the charges against Avant except one were in fact dismissed, the remaining charge to which he pleaded guilty did not include the firearm enhancement, and the sentence imposed was not made consecutive. The purported statement to the correctional counselor, even viewed in the light most favorable to Allen, is merely cumulative of other, stronger evidence in the record.

We conclude Allen suffered no prejudice as a result of the district court's evidentiary ruling that the correctional counselor's record was not admissible.

We affirm Allen's conviction for voluntary manslaughter.

AFFIRMED.