

IN THE COURT OF APPEALS OF IOWA

No. 3-819 / 10-1795
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDY LEROY CUE,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

After a jury trial, Cue was found guilty of murder in the first degree. The district court denied his motion for new trial and he appealed. **AFFIRMED.**

Brian S. Munnely, Omaha, Nebraska, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Kevin R. Cmelik, Assistant Attorneys General, Matthew D. Wilber, County Attorney, and Jon S. Jacobmeier and Thomas Nelson, Assistant County Attorneys, for appellee.

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

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MULLINS, J.

After a jury trial, Cue was found guilty of murder in the first degree. The district court denied his motion for new trial and he appealed. He asserts four grounds on which the district court's order should be reversed: insufficiency of the evidence, prosecutor misconduct, exclusion of character evidence, and denial of his motion to continue trial. We affirm.

I. BACKGROUND

At 10 p.m. on March 24, 2008, the appellant Randy Cue (Cue) and his girlfriend Lisa Green entered a house in Council Bluffs where Cue lived with his mother Florence Cue (Florence) and Randy "Coon" Deville. Earlier in the day, Cue and Green had looked at a motorcycle that Cue wished to purchase, and then they went drinking at a few local bars. Cue had just received a Social Security settlement and was in a good mood. At the final bar Green asked the "bartenders to cut Randy off" due to his state of intoxication.

When Cue and Green entered the house, they found Florence and Deville sitting in the living room. Both were about to watch a local news broadcast. The four had a brief conversation, first about the potential motorcycle purchase, then about black magic. Deville became annoyed and went to his room.

After Deville left, Cue asked Green to go to the Hy-Vee Drug Store and pick up his prescription of Viagra. She refused. Cue then convinced Florence to get his prescription. As she moved to leave the house, Cue grabbed her arm and emphasized the name of his prescription. Green told him to let go of his mother, and Florence left.

At this point Cue took off his shoes and Green tried to help. Agitated, Cue threw money at Green and stuffed a few bills in her pants. Green removed the money and tossed it under a chair. Cue grabbed Green's hair and coat collar and walked her to the door. Cue "threw [Green] out the door and slammed the door." Green left the Cue residence and drove home.

Minutes after Green left, at 10:19 Deville called Richard Mangan, former employer and friend of Deville and Cue, and told Mangan, "If you have any control, if you can do anything, give Randy [Cue] a call. You've got to calm him down. He is going crazy He is turning everything up in the house." Deville hung up. Mangan testified that Deville seemed scared. Mangan called Deville back. During the second call, Deville stated, "you've got to try to do something. I am loading my gun right now," and he hung up.¹ Mangan called Cue's phone number, but the call went to voicemail.

Meanwhile, Florence was unable to obtain Cue's prescription from the pharmacy. At 10:28 Florence called Cue to tell him the news, but her call also went to voicemail. Florence then called Deville twice, at 10:29 and 10:31, and spoke to him for about thirty seconds each time. At trial, she could not remember what they discussed during those calls. Shortly thereafter, at 10:35 Deville placed a call to 911, but could only groan.

Florence arrived home within minutes of Deville's 911 call. As she entered the front door, Cue was leaving the house. Cue asked for the keys and stated "he would be back." Florence handed him the keys to her 1988

¹ Mangan testified that he had never seen Deville with a gun. The police did not find a gun at the scene.

Oldsmobile. Florence testified that he seemed drunk as he left the house, but otherwise was normal. After she entered the house, Florence saw Deville kneeling on his bed. Florence asked him if he was hurt and touched his shoulders. She testified that he made a growling sound and appeared to be alive. Florence saw blood in the hallway and in Deville's room, and she called 911. She also called Green and asked her to come back to the house, at least until the ambulance arrived. Green, thinking it was a ruse, did not go to the house. Florence paced around the house until the ambulance reached the scene.

After the police entered and secured the house, the paramedics examined Deville. Paramedic Christopher Eichhorn testified that he found Deville in a "praying position" resting on the bed. Eichhorn observed that Deville had been stabbed in the abdomen and that there was a large amount of blood on the floor." The medical examiner later testified that "the cause of death was stab wounds of the abdomen and leg."

In the interim Cue arrived at Louis Bar & Grill in Omaha, Nebraska, where he met his friend Bill Hansen. Paul Miller, the bar manager, testified Cue was belligerent; "[o]bnoxious, loud just kind of calling attention to himself." Miller also noted that Cue had a "knife sticking out of his pants" near the small of his back, and was not wearing shoes. Miller stated that at one point he noticed Cue mimicking a "stabbing technique." A waitress at the bar, Tamara Davis, testified she heard Cue tell Hansen he "stabbed the fucker" or "I stabbed him." She noted that he said similar phrases about five other times while he was at the bar. Cue

also told Davis directly that she should be scared of him because he “just stabbed someone.” Davis did not see Cue’s knife, though she saw a “bulge” under his shirt.

Cue and Hansen left the bar around 1:00 p.m. when Hansen’s mother picked them up. The Omaha police found Cue at about 3:00 a.m. “sitting or half laying on the curb” in front of Hansen’s house. The police took Cue into custody where they removed his blood-soaked clothing and did tests on the bloodstains. Blood containing DNA consistent with Deville's DNA was found on Cue's feet, socks, and jeans. Blood containing DNA consistent with Deville's DNA was also found in a trail of footprints that led from Deville's room to the front door of the Cue house, and on the floor mat and door sill of Florence Cue's car, which Cue used during the night of March 24.

The State charged Cue with murder in the first degree. A jury found Cue guilty. Cue’s attorney then filed a motion for new trial in which he asserted various deficiencies with the trial. The trial court overruled Cue’s motion and stated:

The jury was not misdirected by the Court on any material matters of law. The verdict of the jury was not contrary to the law or the weight of the evidence. The verdict was not the result of prejudicial prosecutorial misconduct. The jury received proper instructions regarding the law. Defendant received a fair trial from an impartial jury. Defendant's motion in arrest of judgment is overruled. No reason is offered that judgment should not now be pronounced and none appears in the record.

On appeal, Cue asserts four arguments: (1) the evidence provided was insufficient to prove beyond a reasonable doubt that he murdered Deville, (2) the prosecutor committed misconduct during the course of the trial, (3) the court

improperly excluded character evidence, and (4) the court improperly denied his motion for continuance. We will analyze each below.

II. SCOPE AND STANDARD OF REVIEW

Challenges to the sufficiency of evidence are reviewed for errors at law. *State v. Sanford*, 814 N.W.2d 611, 614–15 (Iowa 2012). We review allegations of prosecutorial misconduct, evidentiary claims, and a district court’s denial of a motion for continuance for an abuse of discretion. *State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011); *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008); *State v. Artzer*, 609 N.W.2d 526, 529 (Iowa 2000). An abuse of discretion occurs when a ground or reason is based upon erroneous application of the law or is not supported by substantial evidence. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

III. SUFFICIENCY OF THE EVIDENCE

Cue argues that the State did not present sufficient evidence to prove beyond a reasonable doubt that he committed murder in the first degree. The jury’s finding of guilt is binding on appeal if supported by substantial evidence. *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). Substantial evidence exists to support a verdict when the record reveals evidence that could convince a rational trier of fact a defendant is guilty beyond a reasonable doubt. *State v. Brubaker*, 805 N.W.2d 164,171 (Iowa 2011). We consider all of the evidence in the record in the light most favorable to the verdict and make all reasonable inferences that may fairly be drawn from the evidence. *Id.* But “it is the State’s ‘burden to prove every fact necessary to constitute the crime with which the

defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” *Id.* (quoting *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004)).

A. Error Preservation

The State argues that Cue failed to preserve error on this issue. In support, the State notes that in Cue’s motion for judgment of acquittal he argued the evidence was not sufficient to support premeditation and “the inferences that the State may have by the use of a dangerous weapon.” The State further argues that on appeal, Cue changes his position and argues the evidence is not sufficient to “overcome his defenses of intoxication and justification.”

“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. Geier*, 484 N.W.2d 167, 170–71 (Iowa 1992) (stating motion for judgment of acquittal does not preserve error where there was no reference to grounds in district court). We agree with the State that Cue failed to raise the issues of self-defense and intoxication in his motion for judgment of acquittal during trial. While Cue did raise the issues of self-defense and intoxication in his post-trial motion for new trial, “[t]he grounds of a motion for new trial must stand or fall on exceptions taken at trial and a party cannot in a post verdict motion amplify or add new grounds as a basis for relief.” *State v. Droste*, 232 N.W.2d 483, 488 (Iowa 1975); *State v. Buchanan*, 207 N.W.2d 784, 787 (Iowa 1973) (“It avails a trial court nothing for a defendant to

save part of his exceptions for a motion for new trial, when the court can no longer change its instructions before reading them to the jury.”). Accordingly, Cue’s motion for judgment of acquittal did not preserve the specific arguments he is now making for the first time on appeal.

IV. PROSECUTORIAL MISCONDUCT

Cue argues the prosecution committed misconduct that prejudiced his right to a fair trial. To support his contentions of prosecutorial misconduct, Cue highlights three instances during the trial where he claims the prosecutor engaged in misconduct and committed “extreme prejudice” to his case. First, during his opening statement, the prosecutor stated that an expert witness would testify that Deville’s blood was found on the “left hip or back portion of the jeans in the precise place where Paul Miller will testify that he saw [Cue] with a dagger sticking out of the back of his pants.” Cue protests this statement because the expert actually found the blood on the “interior left hip, thigh area of those jeans.” Second, in the prosecutor’s rebuttal closing he stated: “Every murder scene has a mystery. Some of those mysteries we will never solve.” Third, and also in his rebuttal closing, the prosecutor told the jury “to do the right thing.”

The prosecutor owes a duty to the defendant to comply with the requirements of due process throughout a proceeding. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). The defendant must satisfy two elements to prove a due process violation through prosecutorial misconduct. First, the defendant must establish misconduct. *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006). Second, he must prove that the misconduct resulted in prejudice denying him a

fair trial. *Id.* Among the factors we consider in determining prejudice are: “the severity and pervasiveness of the misconduct, the significance of the misconduct to the central issues in the case, the strength of the State’s evidence, the use of cautionary instructions or other curative measures, and the extent to which the defense invited the improper conduct.” *Id.* at 755 (citing *Graves*, 668 N.W.2d at 869).

A. Error Preservation

The State argues Cue did not preserve error on this issue. The State notes that Cue did not raise this issue until after the trial, and that he should have raised the issue when the alleged misconduct occurred. Cue argues error was properly preserved because he raised the issue of prosecutorial misconduct in his motion for new trial.

“[A] motion for new trial is not the appropriate time to raise matters for the first time that could have been raised earlier.” *State v. Krogmann*, 804 N.W.2d 518, 524 (Iowa 2011). The defendant cannot obtain a new trial if defense counsel did not move for a mistrial at the time of the misconduct. *Id.* We find that Cue failed to timely preserve error on the issue of prosecutorial misconduct.

V. CHARACTER EVIDENCE

Cue argues that the trial court committed error when it did not allow one of his witnesses, Lyn Estrada, to testify to an incident that occurred in 1997 or 1998 because the incident transpired more than ten years ago. During a course-of-trial hearing the State agreed Cue could present witnesses to testify to Deville’s aggressive character if the testimony did not concern events that happened more

than ten years ago. In support of this, the State argued that Iowa Rule of Evidence 5.609 does not even allow evidence of past convictions occurring more than ten years ago. The court agreed with the State and ruled Cue could not present character evidence over ten years old, “unless there [are] specific incidents between Mr. Deville and Mr. Cue.”

Evidence of a decedent’s character is generally inadmissible. *State v. Pletka*, 310 N.W.2d 525, 528 (Iowa 1981). Evidence of a decedent’s “quarrelsome, dangerous or turbulent character” can be shown to support a claim of self-defense if the accused knew of the traits. *Id.* Evidence of the decedent’s aggressive behavior can be used “[t]o show the state of mind of the defendant, the degree and nature of his or her apprehension of danger which might reasonably justify resort to more prompt and violent measures of self-preservation,” and to provide evidence on who was the likely aggressor. *State v. Jacoby*, 260 N.W.2d 828, 837 (Iowa 1977) (citations omitted).

At trial Cue presented the testimony of Martin Kaskie and Jeffrey Chaney. Both men discussed Deville’s aggressive character and history with knives. Kaskie testified about an incident where Deville cut another man’s hand with a knife. Chaney testified that Deville had threatened him with a knife on a few occasions and that he usually carried a knife. According to a deposition taken of Estrada, if she had been allowed to testify her testimony would have been substantially similar to Chaney and Kaskie. Based on these facts, we find that the trial court did not abuse its discretion in barring Estrada’s cumulative, stale testimony because Estrada’s testimony would have added nothing substantial to

Chaney's and Kaskie's testimony. Therefore, the trial court did not err by excluding Estrada's testimony.

VI. CONTINUANCE

On September 9, 2010, Cue's attorney Frank Robak (Robak) filed a motion for two-week continuance because the State filed a notice of additional witnesses fifteen days² before trial and he needed more time to conduct discovery, prepare for trial, and recover from the "surprise" caused by the State's witness concerning a photo. The court rejected Cue's continuance motion stating "[t]his case has been pending for nearly thirty months. Defendant has had the statements given by the additional witnesses for two years. Defendant has not demonstrated that he will be prejudiced by proceeding to trial." Cue argues the court's denial of his motion for continuance constituted an abuse of discretion that resulted in prejudice.

Iowa Rule of Criminal Procedure 2.9 governs a trial court's decision to grant or deny a motion for continuance. Rule 2.9(2) provides that "[t]he date assigned for trial shall be considered firm. Motions for continuance are discouraged. A motion for continuance shall not be granted except upon a showing of good and compelling cause." Iowa R. Crim. P. 2.9(2). "The decision to grant or deny a motion for continuance rests in the sound discretion of the trial

² Iowa Rule of Criminal Procedure governs the prosecution's duty to disclose witnesses before trial, it provides: "If the prosecuting attorney does not give notice to the defendant of all prosecution witnesses (except rebuttal witnesses) at least *ten days before trial*, the court may order the State to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witnesses." Iowa R. Crim. P. 2.19(2) (emphasis added).

judge. It will not be disturbed on appeal unless an injustice has resulted.” *State v. Artzer*, 609 N.W.2d 526, 530 (Iowa 2000). It is within the trial court’s discretion to grant or deny a continuance on the ground of surprise. *State v. Clark*, 814 N.W.2d 551, 564 (Iowa 2012) (citation omitted).

In support of its argument, the State reasserts the trial court’s reasoning for the denial of the continuance. The State highlights the fact that Robak represented Cue from the beginning and was aware or should have been aware of the State’s witnesses. The State finally notes that Cue raises only general assertions concerning why the trial court’s denial prejudiced his right to a fair trial. The State relies on *Clark* to show in order to prevail Cue should have presented a specific reason why the trial court abused its discretion.

We find the reasoning in *Clark* analogous to this case. *See id.* *Clark* concerned the late disclosure of evidence. After receiving the evidence, the defense counsel asked for a continuance, though counsel only asserted “vague and uncertain” reasons for requesting a continuance. *Id.* at 562. The court found that without “good and compelling cause” supporting the motion, the trial court did not abuse its discretion by denying the defendant’s continuance motion. *Id.* Cue’s claims of prejudice by the trial court’s denial of his continuance suffer from the same vagueness and uncertainty deficit as the claims made in *Clark*. *See id.* Cue fails to show how the allegedly late list of witnesses that he had known about for the past two years prejudiced his case. We conclude the trial court did not abuse its discretion by denying Cue’s continuance.

AFFIRMED.