STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1590

State of Minnesota,
Respondent,

vs.

Joshua A. Krueth,
Appellant.

Filed May 6, 2008
Affirmed
Harten, Judge[*]

Anoka County District Court
File No. KX-04-010480

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka County Attorney's Office, 2100 Third Avenue, Suite 720, Anoka, MN 55303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Harten, Judge.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

Appellant Joshua Krueth challenges his conviction of second-degree intentional murder, asserting that the district court abused its discretion in admitting evidence of a second homicide for the purpose of identification, in denying his requests for a *Frye-Mack* hearing on bullet trajectory analysis, and in not instructing the jury on the lesser-included offense of unintentional felony murder. Appellant also challenges his sentence, asserting that the district court abused its discretion in departing from the presumptive sentence because the aggravating factors are inadequate to support the upward departure. There being no abuse of judicial discretion in the conviction or the sentence, we affirm.

FACTS

On 4 September 2004, around 11 p.m., in Anoka County, Lawrence Plessel, 60, was shot through his kitchen window and killed. On 19 September 2004, early in the morning, Suzanne Fischer was shot and killed while at home and in bed with her husband. Appellant was arrested in connection with the Fischer murder.[1] He was also questioned about and confessed to the Plessel murder, stating that he stood behind the tailgate of a truck parked 50 to 100 yards from Plessel's house, watched Plessel through the scope of a rifle, then killed Plessel with one shot. On 20 September 2004, appellant recanted his confession to the murder of Plessel.

[1] Appellant pled guilty to first-degree felony murder of Fischer and received a mandatory life sentence.

Appellant was charged with first-degree premeditated intentional murder of Plessel. In spring 2006, two federal inmates being held in the Anoka County jail reported that appellant confessed to them that he killed Plessel, using the phrase "One shot, one kill"; they also provided the police with appellant's handwritten description of Plessel's murder.

At his jury trial, appellant tried unsuccessfully to exclude *Spreigl* evidence of the Fischer murder, introduced for the limited purpose of establishing appellant's identity. The district court also denied his requests for a *Frye-Mack* hearing on the state's bullet-trajectory evidence and for a jury instruction on the lesser-included offense of unintentional felony murder.

The jury found appellant guilty of second-degree intentional murder. After a *Blakely* hearing at which the jury found two aggravating sentencing factors, he was sentenced to 480 months, consecutive to the life sentence imposed for the murder of Fischer. He now appeals from his conviction, challenging the evidence of the second homicide, the denial of the *Frye-Mack* hearing, and the denial of the lesser-included-offense jury instruction; he also challenges his sentence on the ground that the aggravating factors do not support the upward departure.

D E C I S I O N

1. *Spreigl* Evidence

Evidence of appellant's murder of Fischer, which occurred 15 days after the Plessel killing, in a house a few miles from Plessel's, in the dark, by a single gunshot wound, was admitted for the purpose of establishing appellant's identity as Plessel's

murderer. Evidence of a defendant's other crimes or bad acts is characterized as *"Spreigl* evidence." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). A reviewing court will not reverse the district court's admission of *Spreigl* evidence unless an abuse of discretion is clearly shown. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996).

Appellant first asserts that the ruling to admit *Spreigl* evidence should have been made prior to trial instead of at the end of the state's case. But "trial court[s] should postpone the final decision on admissibility of [*Spreigl*] evidence until the state has presented all non-*Spreigl* evidence and the strength of [its] case can be determined." *State v. DeWald*, 464 N.W.2d 500, 504 (Minn. 1991). Appellant's reliance on *State v. Ness*, 707 N.W.2d 676 (Minn. 2006), is misplaced; *Ness* holds that "courts should address the need for *Spreigl* evidence in the context of balancing the probative value of the evidence against its potential for unfair prejudice." *Id*. at 690. *Ness* determined that the *Spreigl* evidence was erroneously admitted in part because it was admitted to prove identity and the state already had a very strong case on identity. *Id.* at 690-91. Here, the state's case on identity was not strong; appellant's major defense was the state's failure to prove his identity. The district court did not abuse its discretion in deciding to admit *Spreigl* evidence only after the state had presented its case-in-chief.

Appellant also challenges the relevance of the *Spreigl* evidence. Relevance is determined by considering "the closeness of the relationship between the other crimes and the charged crimes in terms of time, place and modus operandi." *Id.* at 688-89 (quotation omitted). Appellant concedes that the time and place factors are satisfied because the two murders were committed only 15 days and a few miles apart, but argues

that the modus operandi factor is not satisfied because one murder occurred at 6:30 a.m. and the other occurred around midnight and because appellant entered the house to shoot one victim and shot the other from outside his house. But both victims were killed in darkness; both were killed with one shot; both were killed in their homes. These similarities, together with the murders' proximity in space and time, provide the nexus needed to establish relevance.

The district court did not abuse its discretion in admitting the *Spreigl* evidence.

2. Denial of a *Frye-Mack* Hearing

"[T]he *Frye-Mack* test applies to evidence based on emerging scientific techniques . . . ." *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 528 (Minn. 2007) (quotation omitted). This court reviews de novo the question of whether evidence is based on an emerging scientific technique. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000).

The state submitted bullet-trajectory evidence produced by running a string through the three bullet holes in the glass panes and the screen of Plessel's window. The district court denied a *Frye-Mack* hearing on this evidence. Appellant acknowledges that there is no legal support, in Minnesota or elsewhere, for requiring a *Frye-Mack* hearing on bullet-trajectory evidence because it is not novel; he nevertheless asserts that a hearing should have been held on the second prong of *Frye-Mack*, i.e., whether a particular test "complied with appropriate standards and controls." *See State v. Roman Nose*, 649 N.W.2d 815, 819 (Minn. 2002). But, unless the evidence is novel and thus satisfies the first prong of *Frye-Mack*, *Frye-Mack* has no application; the ordinary rules of evidence

establish reliability. *See Jacobson*, 728 N.W.2d at 528-529 (holding that, because the evidence was not novel, no *Frye-Mack* hearing was required and that "courts are to evaluate the admissibility of . . . evidence on a case-by-case basis by applying Minn. R. Evid. 702 and 703—that is, by determining whether such evidence and the expert testimony through which it is introduced are (1) helpful to the trier of fact; and (2) supported by an adequate foundation").

Because bullet-trajectory analysis is not novel, the district court did not abuse its discretion in denying a *Frye-Mack* hearing.

3. Denial of a Lesser-Included-Offense Jury Instruction

Appellant requested that the jury be instructed on second-degree felony murder, a lesser-included offense of second-degree intentional murder. *See* Minn. Stat. § 609.19, subd. 1(1) (2004) (intentional murder is causing the death of another with intent to kill); Minn. Stat. § 609.19, subd. 2(1) (2004) (felony murder is causing the death of another while committing or attempting to commit a felony). The district court declined to give the instruction, opining that the evidence did not support an offense other than intentional murder. "[O]n appeal we will review the record in the light most favorable to the party requesting the [lesser-included-offense] instruction to determine whether the trial court abused its discretion in deciding the instruction was not warranted by the evidence." *State v. Dahlin*, 695 N.W.2d 588, 598 (Minn. 2005).

The evidence here included: (1) appellant's statement to a police officer that he had shot Plessel from behind the tailgate of a truck parked by a woodpile near Plessel's house with one bullet "[c]ause that's all I needed"; (2) appellant's statement to two

police officers that he shot Plessel not at close range but by shooting upward from behind the tailgate of a truck and he offered to "show you like how I did it if you want me to do it again"; (3) appellant's statement to the two officers who were trying to get him to admit shooting at close range that "I snagged it from by the wood pile. . . . One shot"; (4) the officer's statement when appellant later tried to deny the crime: "You gave us information that only the shooter would know"; (5) another inmate's statements that appellant told him that "[I] shot [Plessel] through the window, and then ran off" and that, in describing the incident, appellant would say, "One shot, one kill, basically"; (6) the inmate's statement that appellant, unable to finish his account of the murder, said he would write it out; (7) a handwritten statement, asserted by a handwriting expert to have been written by appellant, saying appellant saw Plessel "inside his house in the kitchen makeing [sic] a sandwich in front of the kitchen window. I stood their [sic] for a minute & watched him threw [sic] my cross hairs then I pulled the trigger & he fell to the floor"; and (8) another inmate's statement that appellant said Plessel "put his hands up like that and [appellant] raised the rifle and shot him, center mass."[2] Intent can be inferred from the words and actions of an assailant before and after an incident and from the presupposition that a person intends the natural consequences of his action. *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). Appellant does not dispute any of this evidence. His intent to kill Plessel can be inferred from his viewing Plessel in the rifle scope and pulling the trigger.

[2] The inmate subsequently explained that "'center mass' just means the easiest shot for—for a human is where all the internal organs are, in the center where the heart is."

Appellant argues in support of his request for a felony murder jury instruction that some evidence shows he went to Plessel's house intending to commit burglary. But felony murder and intentional murder are not mutually exclusive; a defendant may separately intend both to commit a felony and to kill. The fact that appellant may have intended to burglarize Plessel's house does not prevent his having intended to kill Plessel when, after viewing him through his rifle scope, he pulled the trigger.

Appellant also argues that, because the jury found him not guilty of premeditation, it would also have found him not guilty of intent to kill if it had been given that option. He relies on *State v. Harris*, 713 N.W.2d 844, 850 (Minn. 2006) (concluding that a felony-murder instruction should have been given). But in *Harris*, "[the defendant] testified that although he did intend to *shoot* [the victim], he did not intend to kill him" and "[t]he shooting occurred during a brief, chaotic brawl as [the defendant] was being assaulted by a number of people." *Id.* Here, appellant offered no comparable testimony—his defense was that the evidence failed to show he was the shooter; moreover, the shooting occurred when the victim was alone in his kitchen and the gunman was alone outside the house. In this case, the evidence that supported giving the instruction in *Harris* is absent.

The district court did not abuse its discretion in recognizing that there was no evidence to support appellant's claim that the murder of Plessel was unintentional so as to warrant a lesser-included-offense instruction on unintentional murder.

4. Sentencing

Following a *Blakely* hearing, the jury found two aggravating factors: (1) the victim was shot in his zone of privacy; and (2) the victim was chosen at random. These factors and appellant's prior conviction for the Fischer murder resulted in an upward departure from the presumptive sentence of 306 months' to 480 months' imprisonment. We review a departure from the sentencing guidelines for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003).

Appellant challenges the zone-of-privacy finding on the ground that, because the victim is dead, there has been no disruption to his enjoyment of his zone of privacy. *But see State v. Bock*, 490 N.W.2d 116, 121 (Minn. App. 1992) (rejecting this view because "[v]iolation of the victim's zone of privacy . . . encompasses the fact that the violator deliberately trespassed in a place where the victim felt particularly safe"), *review denied* (Minn. 27 Aug. 1992).

Appellant raises two challenges to the finding of randomness. He asserts that randomness should not be an aggravating factor because extensive planning is also an aggravating factor, and the two are mutually exclusive. But this court has no authority to add or delete aggravating factors. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. 18 Dec. 1987). Moreover, randomness and extensive planning are not mutually exclusive; an accused can plan or execute the indiscriminate killing of a complete stranger for no reason whatsoever.

Appellant also argues that his choice of Plessel was not random; he selected Plessel because he thought Plessel was likely to have money or valuables in his home. *But see State v. Back*, 341 N.W.2d 273, 277 (Minn. 1983) (defining "randomness" as without selection and finding it where victim had no prior connection to defendant); *State v. Esler*, 553 N.W.2d 61, 63-65 (Minn. App. 1996) (upholding finding of randomness as aggravating factor when defendant went for a walk, noticed a light on and a person watching television in a house, shot and killed the person, and later said the victim "could have been anybody"), *review denied* (Minn. 15 Oct. 1996). When the officer asked appellant, "Why this [Plessel's] house?" appellant answered, "I don't know." In his written statement, appellant said, "I ran up to a house . . . . I saw a old man [sic] looked like he had alot [sic] of money." Appellant had no prior relationship with Plessel, his random victim.

The district court did not abuse its discretion in using the two aggravating factors found by the jury to support an upward durational departure.

There being no abuse of judicial discretion in either appellant's conviction or his sentence, we affirm.

Affirmed.