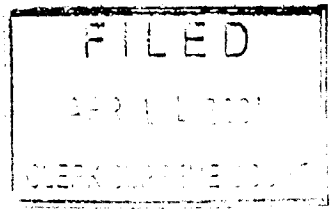
IN THE COURT OF APPEALS OF IOWA

No. 1-093 / 00-0501
Filed April 11, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL EDWARD INMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee (South) County, D.B. Hendrickson, Judge.

Michael Edward Inman appeals the district court's judgment and sentence, following a jury trial, for arson in the first degree, murder in the first degree, and assault with intent to inflict serious injury. **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn, Montgomery & Boles, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael Short, County Attorney, and Bruce McDonald, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Michael Edward Inman appeals the district court's judgment and sentence, following a jury trial, for arson in the first degree, murder in the first degree, and assault with intent to inflict serious injury. He contends (1) the trial court erred by denying his motion for a judgment of acquittal on the charges as each and every element of the offenses were not proven beyond a reasonable doubt, (2) he was denied effective assistance of counsel in violation of the United States and Iowa Constitutions, (3) the verdict was contrary to the weight of the evidence and therefore the trial court erred in denying his motion for new trial, and (4) the cumulative effect of the trial court's constitutional errors denied him a right to a fair trial as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article One, Section Nine of the Iowa Constitution. We affirm.

I. Factual Background and Proceedings. In the early morning of July 25, 1999, Donald "Cookie" McComb died in an apartment fire in Keokuk, Iowa. On the evening before the fire, Inman and his girlfriend, Starla Smith, were visiting a mutual friend, Jay Haas. Haas lived in the same apartment building as McComb. Inman, Smith, Haas, and another woman named Theresa Russell gathered in Haas's apartment to drink beer. As the evening progressed, Russell and Haas engaged in several sexual acts. Russell then had sex with Inman while Smith and Haas engaged in kissing and fondling. Apparently, Inman consented to the sexual activity between Smith and Haas on the evening in

question. Smith testified she and Haas had sexual relations on prior occasions, often with Inman present.

Later in the evening, Inman left Haas's apartment several times to see other acquaintances in the neighborhood and to get more beer. Several witnesses testified he was very drunk that evening and they wondered if he would be able to walk back to Haas's apartment. When he was walking around visiting friends, Inman made several comments regarding his dislike for Haas because of his sexual relationship with Smith. He told several people he was going to get even with Haas for "messing with" Smith. He told others he was angry at another man for being intimate with his girlfriend and he was going to get even with this man.

At approximately 11:30 p.m. that evening, Inman and Smith left Haas's apartment and went downstairs. Inman told Smith to wait on a bench on the sidewalk in front of a nearby bar called Harrington's. Smith complied and Inman left her for approximately fifteen minutes. When he returned, he said "Come on, let's go" to Smith and they left the area. They walked to Dave Brilon's apartment, which Inman had visited earlier in the evening, and Inman stated he had "taken care of business." When asked to explain the comment, Inman said, "You know what I mean, Jay [Haas]." Between 11:45 and midnight, several witnesses observed a fire burning on the back porch of the apartment building. One witness described the fire as "a wall of fire," others described it as enormous and burning in a straight line along the porch. In a short period of time, the fire became very large, engulfing the entire porch and spreading to the building.

When firefighters arrived on the scene, they were surprised to see the fire had "gotten so far ahead of them." McComb was in the building when the fire started and perished before he could be rescued.

At trial, the State presented expert testimony regarding the cause of the fire. Special Agent Michael Hiles of the State Fire Marshal's Office determined the fire had been intentionally set on the porch using a liquid accelerant. Expert witness John Agosti testified for the defense. He opined faulty wiring in one of the vacant apartments smoldered for some time and then projected flames on to the porch. He also testified the flames could have originated from a cigarette which smoldered and ultimately started the porch on fire. The jury found Inman guilty of first-degree arson, first-degree murder, and assault with the intent to cause serious injury, the lesser-included offense of the attempted murder charge.

II. Standard of Review. Our scope of review varies with the nature of the claims raised. We review claims of insufficient evidence for errors at law. *State v. Artzer,* 609 N.W.2d 526, 529 (Iowa 2000). Rulings on motions for new trial are reviewed for abuse of discretion. *State v. Weaver,* 554 N.W.2d 240, 244 (Iowa 1996). We review claims of ineffective assistance of counsel de novo. *State v. Johnson,* 604 N.W.2d 669, 673 (Iowa Ct. App. 1999).

III. Sufficiency of the Evidence. In resolving the issue of whether substantial evidence supports the verdict, we view the evidence in the light most favorable to the verdict. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). Evidence is substantial if it could convince a rational trier of fact the defendant is guilty of the crimes charged beyond a reasonable doubt. *State v. Jacobs,* 607

N.W.2d 679, 682 (Iowa 2000). The relevant question in our review of the case is whether any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt. *State v. Astello,* 602 N.W.2d 190, 197 (Iowa Ct. App. 1999). Inherent in our standard of review of jury verdicts in criminal cases is the recognition the jury was free to reject certain evidence and credit other evidence. *State v. Anderson,* 517 N.W.2d 208, 211 (Iowa 1994). The credibility of the witnesses is a question for the jury; the jury is free to believe or disbelieve any testimony as it chooses. *State v. Thornton,* 498 N.W.2d 670, 673 (Iowa 1993).

Inman challenges the sufficiency of the evidence to support his convictions for first-degree arson and first-degree murder. To sustain a conviction for arson in the first degree, the State must show the defendant caused a fire and intended to destroy or damage property in which the presence of one or more persons could be reasonably anticipated. *See* Iowa Code § 712.2 (1999). Inman specifically argues the State did not prove he started the fire, placed an incendiary device near the fire, or possessed a fire accelerant on the evening of the fire. He also contends none of the witnesses at trial could affirmatively place him at the scene of the fire.

Most of the evidence in this case was circumstantial. Inman is correct in his assertion no witness could identify him as the person who set the fire or testify he was in possession of an accelerant on the night of the fire. However, the State need not prove their case solely with direct evidence. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A

verdict can rest on circumstantial evidence alone. *State v. Kirchner,* 600 N.W.2d 330, 334 (Iowa Ct. App. 1999). However, "the evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. Casady,* 491 N.W.2d 782, 787 (Iowa 1992) (citations omitted). In addition, we note the element of intent is seldom susceptible to proof by direct evidence. *State v. Finnel,* 515 N.W.2d 41, 42 (Iowa 1994). Rather, proof of intent usually depends on circumstantial evidence and inferences drawn from such evidence. *Id.* "The fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experiences and observation." *State v. Howard,* 404 N.W.2d 196, 198 (Iowa Ct. App. 1987). "The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true." *Finnel,* 515 N.W.2d at 42.

The record contains sufficient evidence to support Inman's convictions. Although he had condoned Haas's relationship with Smith in the past, he made several statements on the night of the fire regarding his anger towards Haas based on Haas's sexual relationship with Smith. Shortly before the fire started, Inman told one witness he was very mad and angry about Smith engaging in sexual acts with Haas. Approximately four hours before the fire started, Inman told a friend and his co-workers he was angry because another man had been with his girlfriend and he was going to kill or get even with the man. When his friend questioned him about his sincerity, he stated, ". . . all I can say is read the

papers in the morning." During the same period of time before the fire, Inman spoke to another friend about his feelings regarding Smith and Haas's relationship. Inman told this friend Haas had been "messing with" Smith and he was going to "get him back." In addition, several witnesses testified they spoke to Inman immediately after the time when the fire started and he told them he had "taken care of business." When asked to explain, Inman stated, "You know what I mean, Jay [Haas]" and then said, "You think I'm bullshitting, you'll see." This circumstantial evidence creates an inference of intent on the part of Inman to start the fire and cause some sort of harm to Haas.

Smith testified she and Inman left Haas's apartment together at approximately 11:30 p.m.. She said Inman told her to sit on a bench near Haas's apartment building and wait for him. She further testified after about fifteen minutes, Inman returned and stated, "Come on let's go." A patron of Harrington's bar testified he saw a woman sitting on a bench in front of the bar at about 11:45 p.m. that evening. As the witness was entering the bar, he observed a man approach the woman and say, "Come on, let's go." Three minutes after the witness saw the couple near the bench, a woman came into Harrington's to report the fire. Although neither witness could positively identify Inman or Smith, this circumstantial evidence strongly supports the State's theory Inman was in the alley near the porch of the apartment building around 11:45 p.m. that night.

While the State could not positively identify the presence of an accelerant used to start the fire, a fair inference from the evidence presented at trial supports the conclusion one was used. All of the witnesses to the fire testified

when they noticed the fire, it was almost all flames rather than smoke. The chief of the fire department testified most accidental fires, such as those that result from faulty wiring or a smoldering cigarette, produce a large amount of smoke before they develop flames. An arson investigator, Michael Hiles, testified there were several indications the fire was intentionally set. Significantly, there were burn patterns on portions of the porch indicating a flammable liquid had been used. Hiles brought a dog trained specifically to detect accelerants at fire scenes to the scene of the fire during the course of his investigation. The dog indicated very quickly upon his arrival at the scene that an area of the porch contained evidence of accelerants. Although subsequent laboratory testing could not detect an accelerant, Hiles stated it was common because a dog's nose is much more sensitive than the laboratory equipment. Hiles agreed with the fire chief that the cause could not have been accidental because the fire started too fast and burned very quickly. Finally, Hiles indicated if the fire had been started on the porch by faulty wiring or a cigarette, the fire would have burned upwards seeking more oxygen. The fire in the present case burned across the porch rather than up to the roof, indicating an accelerant was poured along the entire length of the porch. We conclude there was sufficient evidence in the record to support Inman's convictions of arson in the first degree and murder in the first degree.

IV. Motion for New Trial. In ruling on motions for new trial, the district court has broad but not unlimited discretion. Iowa R. App. P. 14(f)(3). A reviewing court is slower to interfere with the grant of a new trial than with its

denial. Iowa R. App. P. 14(f)(4). The district court must apply the "weight of the evidence" test in its ruling on motions for new trial. *State v. Ellis,* 578 N.W.2d 655, 659 (Iowa 1998). Inman argues the district court erred by failing to grant his motion for new trial for the following reasons: (1) the jury reached inconsistent verdicts on two of the counts charged and (2) the verdict was contrary to the weight of the evidence.

Inman claims an inconsistency exists between the jury's verdict on Count III, acquitting him of the attempted murder of Jay Haas but finding him guilty of assault with intent to inflict serious injury, and its verdict on Counts I and II, finding him guilty of first-degree arson and first-degree murder of McComb. Multiple offenses, which arise out of the same transaction and occurrence, may be charged and prosecuted as separate counts of the same trial information. Iowa R. Crim. P. 6(1). Multiple verdicts as to separate counts are inconsistent if the factual and legal conclusions implicit in one verdict are rationally incompatible with those implicit in the jury's findings as to the other counts. *State v. Pearson,* 547 N.W.2d 236, 240 (Iowa Ct. App. 1996).

In the present case, the jury was given instructions regarding Count III of the trial information charging Inman with the attempted murder of Haas. The jury was further instructed as to the lesser-included offense of assault with intent to inflict serious injury. The jury ultimately convicted Inman of the assault charge following this instruction:

> 1. On or about the 25th day of July, 1999, the defendant did an act which was intended to cause pain or injury to Jay Haas.
> 2. The defendant had the apparent ability to do the act.

> 3. The act was done with the specific intent to cause a serious injury.

In addition, the jury was instructed as to arson and murder in the first degree. The elements of the first-degree murder instruction were given as follows:

> 1. On or about the 25th day of July, 1999, the defendant participated in the offense of Arson in the First Degree as defined in Instruction No. 18.
>
> 2. That while so participating, the defendant, with malice aforethought, caused a fire in an occupied structure with the intent to destroy or damage said property.
>
> 3. That the property in which the fire was caused was property in which the presence of one or more persons could be reasonably anticipated.
>
> 4. That as a result of the act of the defendant, Donald E. "Cookie" McComb died.

There is no inconsistency between the jury's verdicts on the above-stated charges. In order to find Inman guilty of the assault charge, the jury found he intended to cause pain or injury to Haas and he had the apparent ability to do so. To find him guilty of murder in the first degree, the jury found Inman participated in the crime of arson, did so with malice aforethought, caused the fire in an occupied structure, and the fire resulted in the death of McComb. The jury found Inman acted with the specific intent to cause bodily harm to Haas while acting with malice aforethought in setting the fire that ultimately killed McComb. Even though the jury determined Inman was not guilty of intentionally attempting to murder Haas, this verdict is consistent with the jury's finding of guilt on the first-degree murder charge. The jury concluded Inman acted with malice aforethought by setting the fire but did not act with the intent to kill Haas. The district court did not abuse its discretion by denying Inman's motion for a new trial on this ground.

Inman next contends the verdicts were against the weight of the evidence presented at trial. Following our reasoning in Division III of this opinion, we determine the district court did not abuse its discretion by determining the greater weight of the credible evidence supports the convictions in this case. The testimony of the witnesses, both lay and expert, created a strong inference this fire was caused by arson rather than by accidental causes. In addition, there is strong evidence in the record indicating Inman was involved in starting the fire. He was in close proximity to the scene minutes before the fire started and made several comments during the evening before the fire regarding his desire to harm Haas, a resident of the apartment building that ultimately burned. We affirm the district court on this issue.

V. Ineffective Assistance of Counsel. Inman makes several claims of ineffective assistance of counsel. He asserts trial counsel was ineffective for failing to: (1) have closing statements reported or to object to improper testimony from the prosecutor during closing arguments; (2) move for a change of venue due to pretrial publicity; (3) request voir dire be recorded; (4) file a motion to continue the trial; and (5) raise the defense of intoxication.

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan,* 559 N.W.2d 603, 612 (Iowa 1997). To prevail, Inman must prove by a preponderance of the evidence that his counsel failed in an essential duty and prejudice resulted. *State v. Westeen,* 591 N.W.2d 203, 207 (Iowa 1999). Prejudice is shown where there is a reasonable probability the result would have been different if counsel had performed competently. *Id.* at

211. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Carrillo,* 597 N.W.2d 497, 500 (Iowa 1999). Generally, we preserve such claims for postconviction proceedings to allow trial counsel an opportunity to defend the charge. *Pearson,* 547 N.W.2d at 241. We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed and the allegedly ineffective attorney may have the opportunity to explain his or her conduct. *State v. Mulvany,* 603 N.W.2d 630, 633 (Iowa Ct. App. 1999). That is particularly true where the challenged actions of counsel implicate trial tactics or strategy that might be explained in a record fully developed to address those issues. *State v. Rubino,* 602 N.W.2d 558, 563 (Iowa 1999).

Inman's first claim of ineffective assistance is trial counsel failed to have closing arguments recorded and failed to object to statements made by the prosecutor during his closing argument. In Inman's motion for new trial, trial counsel challenged the fairness of the trial alleging "the State in its closing argument referred to evidence that the Defendant could have presented but did not present, such as other possible suspects in this case. . . . The argument's inference that Defendant had some burden to prove himself not guilty was improper." The district court denied Inman's motion. When considering comments made by the prosecutor during closing arguments, our supreme court has held:

> In the past we have expressed concern about prosecution arguments that focus on lack of evidence or failure to produce

> witnesses. . . . However, not all remarks relating to the evidence are forbidden. "A prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify."

State v. Craig, 490 N.W.2d 795, 797 (Iowa 1992) (quoting *State v. Bishop,* 387 N.W.2d 554, 563 (Iowa 1986)). We conclude the record is adequate to review this particular claim of ineffective assistance of counsel. Under the circumstances of the present case, the language used by the prosecutor amounted to fair comment on the evidence at trial. Although the argument was not recorded, we conclude from both Inman's motion for new trial and the district court's order denying the motion that the prosecutor did not comment on Inman's failure to testify. Rather, the prosecutor addressed the lack of evidence showing someone else committed the crime. Inman's trial counsel did not fail in an essential duty by not objecting to the prosecutor's closing argument because he was under no duty to do so.

We now consider the remaining claims of ineffective assistance of counsel raised by Inman. We find the record before us is insufficient to make a determination on them, and therefore preserve them for possible postconviction relief proceedings.

VI. Cumulative Error. Inman asserts the cumulative effect of all of the district court's errors deprived him of a fair trial. We have determined the district court did not err in its rulings on the issues decided in this appeal and therefore find no reversible cumulative error. *See Wemark v. State,* 602 N.W.2d 810, 818

(Iowa 1999); *State v. Atwood,* 602 N.W.2d 775, 785 (Iowa 1999); *State v. Veal,* 564 N.W.2d 797, 812-13 (Iowa 1997).

AFFIRMED.