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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-004/98-1640
Filed April 12, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BOBBY MORRIS,
Defendant-Appellant.

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

Bobby Morris appeals from the judgment and sentence entered upon a jury verdict finding him guilty of first-degree murder. He contends the trial court erred in (1) allowing certain evidence, (2) not allowing certain evidence, and (3) not granting him a new trial based on prosecutorial misconduct in the form of misstatements of the law and facts in closing argument. In the alternative, he argues trial counsel was ineffective if error was not preserved on his first and third claims. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward and Steve Foritano, Assistant County Attorneys, for appellee.

Heard by Streit, P.J., Miller, J., and Schlegel, S.J.,* but decided by Streit, P.J., Miller, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

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MILLER, J.

Defendant Bobby Joe Morris appeals his conviction of murder in the first degree, contending the trial court erred in (1) admitting certain evidence (2) not allowing certain evidence, and (3) not granting a new trial after the prosecution allegedly made misstatements of fact and law during closing arguments. We affirm.

I. Background Proceedings and Facts

From the evidence presented at trial, the jury could find the following facts. On December 31, 1997, victim Kelsey Bitting and her two-year-old daughter, Taylor, moved into the Des Moines apartment of Kelsey's mother, Claudia O'Conner. This move was necessitated because Ms. Bitting's husband, Bobby Joe Morris, had beaten her up.

The murder took place late in the evening of January 2, 1998. That night, Bitting, Taylor, and a friend of Ms. O'Conner's, Mike Caster, were with Ms. O'Conner at her apartment. Sometime late that evening, Morris came to the apartment and knocked on the door, asking to come in. No one allowed Morris to enter the apartment. A "conversation" ensued between Bitting and Morris through the door, which consisted of Morris cussing and screaming at Bitting. The argument apparently centered on Morris's belief she had told police about his drug trafficking, which had resulted in a search of his apartment earlier the same day. During this argument, Morris told Bitting "she going (sic) to be sorry, that he couldn't help her now. There was going to be a drive-by, and she had better get out of the house." Morris then left the apartment building. After watching Morris go out the front of the building, Bitting and Morris argued through

an open window. O'Conner asked them to stop, because she was fearful she would be evicted.

Because of trouble with Morris before, Bitting had been instructed to call the police if there were any further problems. Unfortunately, Bitting's mother did not have a phone in her apartment. It was then decided everybody would leave in Caster's 1973 Chevy Blazer, call the police, and take Bitting to another friend's house. Caster and Bitting went down one set of stairs, and O'Conner and Taylor went down another set. Once Caster and Bitting arrived at the Blazer, Morris and an unknown female approached them. Bitting said to Caster "Oh, my God, there's Bobby." Morris told the female "that's her." As Caster was fumbling with the keys, Morris said "See, Kelsey, I told you what would happen." Morris's female companion, whom Caster later identified in a police photo lineup as Courtney Burnett Nelson, raised a gun and started firing, at which time Caster went down to the floorboard. Bitting also tried to get on the floorboard, but the console and gearshift of the Blazer impeded her path. Bitting then screamed her last words: "Bobby, no. No, Bobby. No, please." Caster heard Morris's voice coming from the driver's side of the Blazer, then heard two shots fired. After Caster heard a vehicle leaving the scene, he ran and got help. The victim's mother also saw Morris on the driver's side of the truck, heard a "pop," and saw the flash of the gun.

The State also presented three independent witnesses, each of whom was in the apartment complex at the time of the murder. Lisa Porter testified that around 11:00 p.m. on January 2, 1998, she heard some commotion outside her window. Porter observed a black man, of similar stature as the defendant, shoot

a female hanging out of a Blazer, although Porter could not positively identify Morris as the person who shot the victim. Two other witnesses for the State, Erin Woody and Amanda Gorsche, each testified similarly.

The next day, in Iowa City, a Johnson County deputy sheriff spotted a vehicle which earlier had been reported to have been involved in a homicide in Des Moines. Morris was driving the vehicle. After following Morris for a while, the deputy pulled up behind him after Morris parked. The deputy announced he was with the Johnson County Sheriff's Department and directed Morris to put his hands out the window. Morris instead drove away, and became stuck in a ravine. Morris then complied with the deputy's request. Both Morris and his passenger, Courtney Nelson, were arrested. The deputy searched Morris, incident to the arrest, and discovered four .38 caliber bullets on his person. Morris admitted there might be a weapon under the front seat. After obtaining a search warrant, police discovered a revolver under the vehicle's floor mat, two .38 caliber spent shell casings in the front seat area, and a cloth bag containing eight live .38 caliber bullets in the front seat area. The State presented expert testimony that the spent shell casings found at the scene and the spent shell casings found in Morris's vehicle were fired from the gun found in Morris's vehicle. The expert also testified there was a "high probability" that a bullet recovered from the victim during autopsy was fired from the revolver found in Morris's vehicle.

The jury returned a verdict of guilty, and Morris was sentenced to life imprisonment. He appeals, contending the judge abused his discretion by (1) admitting certain evidence (2) not allowing certain evidence to be admitted, and

(3) not granting a new trial after the prosecution allegedly made misstatements of both fact and law during closing arguments.

II. The Evidentiary Objections

Morris first contends the trial court erred in allowing two State's witnesses to testify Morris had beaten the victim up a few days prior to her untimely death, as violative of Iowa Rules of Evidence 402, 403, and 404(b). Morris argues as an alternative that to the extent part of this issue may not have been preserved for appeal counsel was ineffective for not objecting to such testimony from one of the two witnesses. Morris also contends the trial court erred in not allowing him to present evidence of certain past violent acts by the victim, for the purpose of supporting his theory that someone else shot the victim, and to impeach O'Conner's testimony that the victim was fearful of Morris. We reach the merits of Morris's evidentiary contentions, even though we have serious doubts as to whether he preserved error on his claims that evidence was improperly admitted.[1]

A. Scope of Review

Ordinarily, we review the district court's decision to admit evidence for an abuse of discretion. *State v. Rains*, 574 N.W.2d 904, 912 (Iowa 1998). An abuse of discretion occurs when the trial court "exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994). Even if an abuse of discretion is found, reversal is required only when the abuse is prejudicial. *See State v. Clark*, 325

[1] At trial, Morris objected to the contested testimony of O'Connor as "hearsay." He no longer advances the hearsay objection on appeal. He did not contend at trial the evidence violated Iowa Rule of Evidence 404(b). He made no objection to similar testimony of Caster.

N.W.2d 381, 383 (Iowa 1982) (holding erroneous ruling of trial court with respect to exclusion of evidence of prior acts of misconduct was not reversible because error was not prejudicial).

B. Prior Bad Acts Evidence

1. Standard of Review

Our standards in analyzing challenges to evidence of prior bad acts are well settled:

> We apply a two-step analysis in reviewing challenges to evidence of prior "bad acts" under rule 404(b). We first decide "whether the evidence is relevant" for a purpose other than to show that the defendant acted in conformity with his or her propensity to commit the wrongful act. If the evidence is relevant for one of these legitimate purposes, we move to a second step: "whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice." A trial court applies the same two-step analysis in deciding whether to admit the evidence. We reverse the trial court decision only on finding a clear abuse of discretion.
>
> Evidence is relevant and thus satisfies the first step of the two-step analysis "when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Evidence is relevant if a reasonable person might believe the probability of the truth of the consequential fact to be different if the person knew of the challenged evidence.
>
> In applying the second step of the analysis we determine if the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice. An affirmative answer renders the challenged evidence inadmissible. "Unfair prejudice" is an undue tendency to suggest decisions by the fact finder based on an improper basis, often an emotional one. Of course the whole purpose of evidence is to sway the fact finder toward an outcome that favors one party, so most evidence that damages a party's case is not to be considered unfairly prejudicial. Unfairly prejudicial evidence is evidence that
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> > appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a

> jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

State v. Brown, 569 N.W.2d 113, 116-17 (Iowa 1997) (internal citations omitted).

2. Relevance

To prove Morris guilty of murder, the State was required to prove that he killed the victim "with malice aforethought." Iowa Code § 707.1 (1997). The State argues, and we agree, that the evidence of Morris beating the victim in the week prior to her murder was relevant to prove malice aforethought. One well established exception to the prohibition contained in rule 404(b) allows the prosecution to show prior relations between the accused and the victim to show malice aforethought. *State v. Plowman*, 386 N.W.2d 546, 549 (Iowa App. 1986).

> To prove murder, one of the elements the State had to establish was malice aforethought. (citation omitted). Since this element constitutes a state of mind, the prosecutor in murder cases may show prior relations between the parties including incidents of quarrels and physical acts, as bearing on the defendant's *quo animo*. This rule is firmly established in our law. *State v. Moelchen*, 53 Iowa 310, 314, 5 N.W. 186, 189 (prior altercation at which blows were struck--"The evidence was competent, because it tended to show that the parties had not lived together agreeably"); *State v. Cole*, 63 Iowa 695, 697, 17 N.W. 183, 184 ("evidence of conduct exhibiting a bad state of feeling on the part of the defendant towards the deceased is admissible"); *State v. O'Donnell*, 176 Iowa 337, 157 N.W. 870; *State v. Flory*, 198 Iowa 75, 199 N.W. 303; *State v. Johnston*, 221 Iowa 933, 267 N.W. 698. *See also*, 40 Am.Jur.2d, Homicide § 274 at 540-541 (quarrels, altercations, and hostile acts); 40 C.J.S., Homicide § 241 at 1176.

State v. Kellogg, 263 N.W.2d 539, 542 (Iowa 1978).

The evidence now challenged also is relevant to "complete the story." *See State v. Walters*, 426 N.W.2d 136, 140-41 (Iowa 1988). It was relevant to explain to the jury why the victim had moved in with her mother, why the victim may have informed the police there was drug trafficking at Morris's residence, why Morris was not allowed into the apartment, why the victim was afraid of him, why she wanted to leave, and why Morris was "yelling and screaming" at her through the apartment door, and later the apartment window. Morris's very recent abuse of the victim was an inseparable part of the crime.

The critical fact issue in this case was whether Morris shot the victim or aided and abetted another who did so. His recent beating of her was therefore relevant on the issue of identity also. *See State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979).

3. Rule 403 Analysis

Having concluded, under the first prong of the 404(b) analysis, that the evidence is relevant to legitimate issues in the case, we move to the second prong, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. In *State v. Haskins*, 573 N.W.2d 39, 45 (Iowa App. 1997), this court rejected the defendant's contention that evidence of a prior domestic assault, relevant to show the crime the defendant was convicted of was not an accident, was unfairly prejudicial. *In State v. O'Connell*, 275 N.W.2d 197, 201-02 (Iowa 1979), our supreme court held that evidence of the defendant's prior assaults on his wife, the murder victim, tended to prove intent, as well as identity and that such evidence was not so unduly prejudicial that the trial court abused its discretion in admitting it.

In support of his claim the challenged evidence was unfairly prejudicial, Morris cites *State v. Williams*, 427 N.W.2d 469, 472 (Iowa 1988). In *Williams*, the Iowa Supreme Court reversed the defendant's conviction for the first-degree murder of his wife in part due to the trial court's error in admitting evidence of the defendant's domestic abuse of a former wife. *Williams*, 427 N.W.2d at 472. The holding in that case, however, was based on the evidence's failure of the first prong of a rule 404(b) analysis, relevancy. *Id.* It does nothing to shed any light on the second prong of the 404(b) analysis.

Morris has not shown the probative value of evidence of his recent physical abuse of the victim was substantially outweighed by the danger of unfair prejudice, if such an objection had been made at trial.

4. Conclusion

The trial court, had it been presented with a rule 404(b) objection, would not have erred in overruling it. Further, had we resolved this issue on ineffective assistance of counsel grounds, we would find counsel breached no essential duty in not making the suggested objection, as it would have been meritless. *See State v. Ray*, 516 N.W.2d 863, 866 (Iowa 1994).

C. Evidence of the Victim's Character

1. Offer of Proof

Morris offered evidence the victim had previously been involved in fights for the purposes of (1) impeaching O'Conner's testimony that the victim feared the defendant; and (2) supporting Morris's theory someone else shot the victim.

Morris made an offer of proof in the form of the testimony of a Ms. Houser. Houser stated over three years prior to the victim's homicide, Bitting, after being

"cut off" while driving, followed the car through town, running stop lights in the process, to the police station, where the other vehicle stopped. Bitting got out of her vehicle and fought with the occupants of the other vehicle. Houser also related that Bitting fought often with her (Ms. Houser's) brother, often involving punches. However, Houser's brother had been in prison for about two years at the time of trial, which was held some seven months after Bitting was killed. Therefore, their last fight had been at least one and one-half years before she was killed.

Upon completion of this offer of proof, the trial court ruled the evidence was irrelevant. The trial court noted

> There is no claim of self-defense here. The issue is one of identity. The defense is identity. . . . Therefore, the only reason to introduce [this] testimony . . . would be to identify the perpetrator of that homicide and that right now is confined to two unidentified women of a road rage incident of more than three years and a man who was in prison at the time of this homicide.

Morris argues the trial court abused its discretion because the proffered evidence was relevant for both of the purposes for which it was offered.

2. The Law

"Impeachment" is the word given to denote the technique for calling into question the veracity of a witness. *State v. Harvey*, 242 N.W.2d 330, 336 (Iowa 1976). Fundamental evidence law recognizes five surviving lines of attack upon the credibility of a witness. *Id.*

In *State v. Nelson*, 480 N.W.2d 900 (Iowa App. 1991), we said a "defendant is entitled to present evidence *relevant* to his theory of defense." *State v. Nelson*, 480 N.W.2d 900, 906 (Iowa App. 1991) (emphasis added). In

other words, like any other evidence, evidence to support the defense's theory of the case is bounded by the rules of evidence. The questions we must answer are whether the proffered evidence was relevant to the defendant's theory of defense and whether it was relevant to impeach O'Conner's testimony Bitting was afraid of Morris.

Certain rules of evidence apply. First, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. Second, to the extent character evidence of a homicide victim is offered, "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." *State v. Jacoby*, 260 N.W.2d 828, 837 (Iowa 1977) (citing 40 Am.Jur.2d, Homicide, § 301, pp. 568-569 (1968); Annot., Evidence Self-Defense Reputation, 1 A.L.R.3d 571, § 1, p. 574 (1965)). This is because "[a]ll persons, independently of their character or reputation, are under the equal protection of the law." *Id.* The only exception recognized by Iowa law to the above cited rule "applies where the accused asserts he or she acted in self-defense and the slightest supporting evidence is introduced." *Id.* When this is the case, the defendant may present both reputation evidence and specific instances of the victim's violent character. *Id.* Such evidence is relevant and admissible to show (1) the state of mind of the defendant and the degree of apprehension of danger felt by the defendant in order to gage whether the act of

self-defense was justified or not; and (2) to prove the victim was the aggressor. *See id.*

3. Analysis

Morris wishes to use the evidence of a prior road rage incident and previous altercations with another male to attack O'Conner's testimony that the victim was afraid of Morris. This would attempt to use the fifth alternative method of impeachment described in *Harvey*, 242 N.W.2d at 336, proving by other witnesses that material facts are otherwise than as testified to by the witness under attack. However, we agree with the trial court that these alleged prior instances of violence do not tend to make the fact that the victim was afraid of Morris any more or less probable. Simply put, a person being unafraid of certain particular persons has little or no tendency to make it more probable that the person is or is not afraid of some other particular person or persons. The proffered evidence is irrelevant for Morris's stated purpose. The trial court did not abuse its discretion by not allowing it for this purpose.

Morris also wished to use the evidence to prove someone else had motive to kill the victim. However, there was no evidence the women involved in the road rage incident ever knew Bitting or knew who she was. Further, the incident happened some three years before the victim's death. We find speculative in the extreme any suggestion these women came back three years later to shoot Bitting. The other proffered evidence of the victim's character involved altercations with a male who at the time of the murder had been in prison for at least one and one-half years. He obviously could not have killed Bitting.

The defense could not and did not show any of these individuals could possibly have killed the victim. Further, the proffered evidence does not make it more probable there were other, unknown people whom the victim previously had altercations with that would have motive to kill her. The proffered evidence was not relevant to the theory of defense. The trial court did not abuse its discretion by not allowing it.

The trial court did allow the defendant, over the objection of the State, to present certain testimony of Ms. Terry Wood. Wood testified to the effect that her daughter, Mary Wood, was beaten up by the victim two weeks before Bitting's murder. The purpose of this testimony was to allow the defense to argue others might have had motivation to kill Bitting, as well as to suggest and argue the victim had a violent character and therefore wasn't afraid of Morris. This was the most recent known incident that arguably bore on these matters. In light of the trial court allowing the defense to present this evidence, the trial court did not abuse its discretion in disallowing irrelevant evidence of the road-rage incident involving unknown persons three years before the murder, and the fights between the victim and a person who had been incarcerated for one and one-half years at the time of the murder.

III. Prosecutorial Misconduct

A. Morris's Contention

Although closing arguments were not reported, Morris contended in his motion for a new trial, and now on appeal, that the prosecutor misstated a significant fact when, during closing argument, the prosecutor allegedly said Morris admitted, during an interview by police, to being on the driver's side of the

Blazer just prior to the shooting.[2] Morris also alleged below and now on appeal that the State misstated the law during closing argument by urging the jury to "follow their gut feeling." In its resistance to Morris's motion for new trial the State did not deny it made the contested statements.

Morris contends on appeal the trial court erred by not granting his motion for a new trial based on alleged misstatements of fact and law by the State during closing argument. Morris contends in the alternative that if the issue was not properly preserved due to trial counsel's failure to object at the time the prosecutor allegedly made the contested statements, trial counsel was ineffective in not doing so, resulting in a breach of duty and prejudice to him because the issue is meritorious.

We assume, without deciding, for the purposes of this discussion that Morris properly preserved the issue.

B. The Law

As our supreme court has previously pointed out, "In closing arguments, counsel is allowed some latitude. Counsel may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented. However, *counsel has no right to create evidence or to misstate the facts.*" *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993) (emphasis added) (citations omitted).

The trial court has broad discretion in ruling on claims of prosecutorial misconduct; therefore, our review is for abuse of discretion. *Id.* We find an

[2] The record affirmatively discloses that in Morris's statement to the police he only admitted to arguing with a guy who was sitting in the passenger seat of the vehicle.

abuse of discretion only where (1) there is misconduct, and (2) the defendant was so prejudiced by the misconduct as to deprive the defendant of a fair trial. *State v. Greene*, 592 N.W.2d 24, 30 (Iowa 1999). "Thus, '[i]t is not the prosecutor's misconduct [that] entitles a defendant to a new trial, but rather any resulting prejudice [that] prevents the trial from being a fair one.'" *Id.* at 31 (quoting *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989)). When determining whether any prejudice resulted from the prosecutorial misconduct, such that the defendant was deprived of a fair trial, we "consider the whole trial, including the court's admonition to the jury." *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). Whether the incident was isolated or one of many is also relevant; because prejudice results more readily from persistent efforts to place prejudicial evidence before the jury. *See id.* at 34. Prejudice can, but usually does not, result from isolated prosecutorial misconduct. *See id.* Finally, we consider whether the evidence against the defendant is strong. *See id.*

C. Analysis

1. Misstatement of Fact

The alleged, unreported comment, if made, did not deprive the defendant of a fair trial. The tape recording of Morris's interview by the police had been played to the jury. The trial court allowed the tape recording to go to the jury room. Trial counsel stated that this procedure would alleviate any concerns he had about the prosecutor's misstatement of fact. Further, the court instructed the jury that statements, arguments, questions and comments by the lawyers were not evidence. This was an isolated incident. Morris does not claim any other misstatement of fact by the prosecutor. Finally, and perhaps most importantly,

the evidence against Morris was very strong. The fighting issue at trial was the identity of the shooter. Caster, who had gone down to the floorboard of his vehicle, heard Morris come to the driver's side and speak to the victim from outside the driver's window, and heard more shots fired from that location. The victim's mother testified she saw Morris shoot her daughter. Three disinterested witnesses testified that a black man of Morris's height and build shot the victim. Morris admitted to being at the scene of the crime. The murder weapon was found in the vehicle Morris was driving when arrested the next day. In light of all these facts, we do not believe the prosecutor's misstatement of fact denied Morris a fair trial.

2. Misstatement of Law

Closing argument was not reported. Morris is confronted with the difficult problem of showing what was in fact said and how it constituted prosecutorial misconduct. We note that in his motion for new trial he alleges the prosecutor said "go with your gut feeling," while his attorney's supporting affidavit alleges the prosecutor said the jurors should "follow their gut feeling." The latter appears highly unlikely, because it appears much more likely that in addressing the jurors the prosecutor would state "your gut feeling" than that he would state "their gut feeling."

Had this been a close case on the evidence presented, and the prosecutor asked the jury to go with their gut feelings despite a reasonable doubt in the State's case, misconduct would be apparent. However, if the passing comment by the prosecutor asked the jury to go with their gut feeling in assessing the credibility of witnesses, then we cannot say misconduct occurred. *See People v.*

Barnett, 954 P.2d 384, 456-57 (Cal. 1998) (holding the prosecutor did not attempt to define the reasonable doubt standard as having a "gut feeling;" rather, the prosecution was merely directing the jurors to trust their gut feelings in assessing the credibility of witnesses and resolving the conflicts in testimony).

Morris makes no claim or showing that the alleged "gut feeling' comment was related in any manner to the reasonable doubt standard of proof. Further, when we consider the record as a whole, the alleged comment could not have misled the jurors into applying a lower standard of proof than beyond a reasonable doubt. The trial court instructed the jury it was to base its verdict only upon the evidence and the instructions given by the court. The instructions identified the correct standard of proof, beyond a reasonable doubt, and accurately defined that standard. We find this was sufficient to dispel any potential confusion which might have been caused by the prosecutor's alleged comment. *See State v. Hardin*, 569 N.W.2d 517, 522 (Iowa App. 1997). In addition, as with the prosecutor's misstatement of a fact, any alleged misstatement of law was one isolated incident. Finally, as noted earlier, the evidence against Morris was very strong. We conclude any alleged misstatement of law by the prosecutor did not deny Morris a fair trial.

IV. Conclusion

Having considered each of Morris's contentions on appeal, we find they have no merit. We therefore affirm the judgment of the district court.

AFFIRMED.