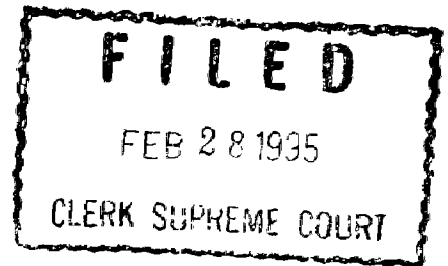


IN THE COURT OF APPEALS OF IOWA

No. 4-492 / 93-1312



STATE OF IOWA,

Plaintiff-Appellee,

vs.

GAVRIL BOT,

Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Jack L. Burns, Judge.

Gavril Bot appeals from his conviction, following a jury trial, of second-degree arson in violation of Iowa Code sections 712.1 and 712.3 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher and Annette L. Hitchcock, Assistant State Appellate Defenders, for appellant.

Bonnie J. Campbell, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Richard R. Phillips, County Attorney, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

4/13/93
HABHAB, J.

The State charged Gavril Bot with first-degree arson for allegedly setting fire to his home on January 3, 1993. We affirm the conviction.

Prior to trial, Bot filed a motion in limine seeking, among other things, to exclude evidence regarding a prior domestic abuse assault conviction. Bot had been charged and convicted in September 1992 of assaulting his wife, Jacqueline. The district court ruled the evidence of the conviction would not be admissible because it was irrelevant and unduly prejudicial.

At trial, Special Agent Michael Hiles of the State Fire Marshall's Office testified he believed the fire was caused by the pouring of accelerants at several locations in the house. His conclusions were based on: (1) his disbelief of Bot's original account of discovering the fire; (2) char patterns on the floor; and (3) his arson dog Ty's alerting at three areas in the home. Hiles acknowledged the results of a gas chromatograph test for accelerants were negative, but indicated he believed Ty was more accurate. Bot's expert, Bruce Johnson, testified the Christmas tree located in the dining room was a "highly probable ignition source." Johnson testified there was also a possibility that carelessly discarded smoking equipment may have been a source of the fire.

Several of Bot's neighbors testified they were awakened by Bot, in a drunken state, early on the morning of January

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3, 1993. The witnesses testified Bot did not appear to have trouble breathing, and that while his and his son's faces and hands were blackened, their clothing was not. Emergency personnel also testified Bot did not experience respiratory problems and was released shortly after he arrived at the hospital.

The State asked Deputy Sheriff Ken Rogers if Bot's appearance was consistent with Rogers' past experience of entering a burning house. Bot objected claiming the question sought testimony which exceeded the minutes of testimony. The district court overruled the objection, and Rogers testified Bot's blackened face was not consistent with his prior experience.

Bot testified he awoke to find the house on fire, grabbed his son, asked his neighbors to call for help, and then attempted to rescue his dog and possessions. Bot denied setting the fire.

Bot also testified his marriage was doing well at the time of the fire. He indicated earlier marital difficulties were due to his inability to communicate with his wife, Jacqueline.

Jacqueline Bot also testified their marriage had improved. On cross-examination, the State asked whether Gavril had ever assaulted her. Gavril objected based on relevancy and the prior ruling on the motion in limine. The district court overruled the objection because defense counsel opened the door on the issue of marital harmony.

During the State's closing argument, Bot objected several times, claiming the prosecutor was manufacturing evidence. The court overruled these objections.

The jury found Bot guilty of second-degree arson. Bot filed a motion for new trial alleging his right to a fair trial was violated by the prosecutor's improper closing argument. The district court denied the motion, entered judgment, and sentenced the defendant to a term not to exceed ten years. The defendant's sentence was suspended and he was placed on probation..

Bot appeals.

I. Sufficiency of the evidence. Bot contends the district court erred in failing to sustain his motion for a judgment of acquittal based on insufficiency of the evidence. The scope of review for issue is for errors of law. Iowa R. App. P. 4. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

It is necessary to consider all of the evidence and not just the evidence supporting the verdict. A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational trier of fact that the [defendant is] guilty of the crime charged beyond a reasonable doubt.

State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984) (quoting State v. Blair, 347 N.W.2d 416, 417 (Iowa 1984)).

Where evidence is in conflict, the jury may resolve such conflicts in accordance with its own views as to the credibility of the witnesses. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984); State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978). Credibility of a witness and the weight to be given a witness' testimony are determinations properly reserved for the jury. State v. Schertz, 328 N.W.2d 320, 322 (Iowa 1982); State v. Williams, 315 N.W.2d 45, 58 (Iowa 1982); Aldape, 307 N.W.2d at 40; State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980). The jury may reject the defendant's version of the facts. State v. Wilkens, 346 N.W.2d 16, 20 (Iowa 1984); State v. Pletka, 310 N.W.2d 525, 527 (Iowa 1981); State v. Hall, 214 N.W.2d 205, 210 (Iowa 1974).

We find the evidence, when viewed in the light most favorable to the State, to be sufficient to support Bot's conviction. Bot focuses his argument primarily on the testimony given by his expert, Bruce Johnson, in contrast to the testimony given by Michael Hiles, a special agent with the State Fire Marshall's Office. Mr. Johnson, an engineering consultant with extensive work in fire investigation, testified the Christmas tree located in the dining room was a "highly probable ignition source." Agent Hiles, on the other hand, gave extensive testimony on why he thought an accelerant was used in the fire.¹

1. Agent Hiles testified the burn patterns on the floor indicated an accelerant was applied to the floor. The charring on the floor and the spilling pattern left on

Bot contends Mr. Johnson's testimony is more plausible when viewed by itself and in light of other testimony provided at trial. The jury found otherwise. We find the testimony given by Agent Hiles, along with other evidence introduced at trial, is evidence which would convince a rational trier of fact Bot is guilty beyond a reasonable doubt. We find the evidence to be sufficient.

II. Prior bad acts. Bot contends the district court erred in allowing the State to introduce evidence of Bot's prior domestic assault conviction. Review of this issue is for errors at law. Iowa R. App. P. 4. In order for there to be reversible error, an abuse of discretion on the part of the district court must be shown. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

the floor indicated the use of an accelerant. Agent Hiles also testified that the wooden floor burned unevenly, with the most severely damaged areas being along the cracks in the wood floor. That was significant as accelerants tend to flow down and get into the gaps in hardwood floors and burning occurs along the edges of the gaps. If no accelerant were used, there should be an even burning of the flooring. In addition to the charring pattern and the uneven burning, Agent Hiles testified his arson dog, who is trained to detect the odor of certain common fire accelerants, located accelerants in three locations in the Bot home.

Prior to trial, Bot filed a motion in limine seeking to preclude the State from introducing evidence of Bot's prior conviction for assaulting his wife. The incident in question occurred in September 1992, roughly three months prior to the fire in the Bot home. The State resisted the motion stating it intended to use the evidence to show motive. The State's theory was that because of marital discord, Bot wanted to burn his house and collect the insurance money to enable his return to his native land of Romania. The district court found the evidence to lack relevancy and to be more prejudicial than probative.

During the course of the trial, Bot's counsel and Bot's wife, Jacqueline, had the following exchange.

- Q: . . . Let's talk a little bit about your marital relationship in the months of December and -- of '92 and January of '93. Would you describe how you and Gabby [Gavril Bot] were getting along during that time period?
- A: Really good.
- Q: Can you give me examples of some things that would tell you that you were getting along good.
- A: We'd laugh and joke and we went places. We did a lot of things together.
- Q: Did you have any hint of a -- any marital problems during that time period of December and January, 19 --
- A: No, not at all.
- Q: Had he at any time ever threatened to leave you and take Lee [the Bot's child] with him?
- A: No.

During the State's cross-examination of Jacqueline, the State asked, "Mrs. Bot, September of 1992 didn't Mr. Bot physically assault you?" Bot's attorney objected on relevancy grounds citing the ruling on the motion in

limine. The district court overruled the objection stating the area of marital harmony had been opened up by the defense.

We find the district court was correct in finding the defense opened the door for such testimony to be admitted. The defense's questions were posed to elicit information regarding marital harmony just prior to the burning of the Bot home. The prior conviction occurred in the months directly preceding the fire. Defense counsel chose the trial tactic of eliciting testimony regarding marital harmony. We find the district court did not abuse its discretion in admitting the evidence on grounds that defense counsel's questions opened the door for such testimony.

III. Prosecutorial misconduct. Bot alleges four instances of prosecutorial misconduct all occurring in closing arguments. The first instance was when the State asserted, "Agent Hiles and Agent Collins said there weren't any electrical problems. In fact, you're always going to have the breakers trip in a fire like this." Bot contends this statement is unsupported by the record. The second instance occurred when the State asserted, "In this kind of magnitude you're always going to have those trip. The intensity of that will melt some wires or break the circuit somewhere." The third instance was when the State asserted, "If you have carpeting like this and fire drops down on it, think of a cigarette and it drops down on it,

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or an ember comes up from a fireplace. It doesn't burn the whole rug. It just burns in that spot." Bot contends the State was attempting to create facts not in the record with this statement. The fourth and final instance occurred when the State asserted defense counsel "keeps talking about only \$35,000 of insurance, but there's an additional \$15,000 worth of insurance, or \$50,000 worth of insurance." Bot once again contends this statement is not supported by the record.

Issues involving prosecutorial misconduct are reviewed for an abuse of discretion. State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986). We will reverse only if district court has abused its discretion. Id. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

Preservation of error is disputed by the parties. We acknowledge there was no objection made after the second alleged instance of misconduct regarding the melting wires and circuits. Error was not properly preserved on that specific allegation and we choose not consider it as a result. On the remaining alleged instances of misconduct, we assume, without deciding, for the purpose of this discussion that Bot properly preserved the issue

Bot must show misconduct and the prejudice flowing from such misconduct in order to prevail on a claim of prosecutorial misconduct. State v. Ruble, 372 N.W.2d 216, 218 (Iowa 1985). Prosecutorial misconduct alone will not warrant a new trial; there must also be a showing that the defendant suffered prejudice as a result of the misconduct. Bishop, 387 N.W.2d at 561; State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982); State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). The burden of establishing prejudice is on the defendant. State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989).

Counsel is allowed some latitude in closing arguments. State v. Thornton, 498 N.W.2d 670, 676 (Iowa 1993); State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975). Counsel may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented. Id. However, counsel has no right to create evidence or to misstate the facts. Id.

We do not find support in the record for the first, third, or fourth alleged instances of misconduct. We further do not find the statements to be permissible inferences which flow from the evidence. This leads us to conclude that such statements made by the prosecution during closing arguments are unsupported by the record and constitute misconduct as a result.

While we do find the statements to be misconduct, we do not, however, believe Bot was prejudiced by any of the

statements. Prosecutorial misconduct will not warrant a reversal unless the misconduct was prejudicial to the point of depriving Bot of a fair trial. State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989); State v. Lyons, 210 N.W.2d 543, 549 (Iowa 1973). After one of the objections, the district court gave a detailed admonition to the jury to only consider the evidence in the record.² After other objections made by the defense, the district court repeatedly stated the jury was only to consider evidence in the record. An admonition will be held to be insufficient only in exceptional cases in which the prejudicial effect of prosecutorial misconduct cannot be eliminated. Williams, 315 N.W.2d at 56. We find the admonition given to the jury and statements made by the district court were sufficient to prevent prejudice. As stated in State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986):

A showing of prosecutorial misconduct alone will not warrant a new trial. Defendant must show he was so prejudiced by the misconduct he was denied a fair trial. In addition, trial court has

2. The district court's admonition following the objection to the cigarette statement was as follows:

Frankly, I don't recall that particular evidence either, but the jurors will be reminded arguments of counsel is not evidence. You heard the evidence that came from the witnesses. That is evidence. Arguments of counsel is not evidence, and you will base your decision on the evidence that came from there and you are the ones who will recall what it was and what it was not. But counsel nevertheless should restrict their arguments to those things that are in the record.

broad discretion to determine whether defendant has suffered such prejudice. On review we reverse only when the trial court has abused its discretion. (citations omitted). Moreover, we note trial court is in the better position to determine if prejudice resulted from the prosecutor's conduct because that court observed the alleged misconduct and the jury's reaction. (citation omitted).

IV. Testimony exceeding the scope of the minutes. Bot contends the district court erred in overruling his objections to testimony given by Deputy Sheriff Ken Rogers. Bot's contention at trial was that Roger's testimony exceeded the scope of the minutes of testimony filed by the State. Although there is some question as to whether error was properly preserved, we choose to address the merits of this issue.

The State is required to file minutes of evidence which is to consist of a "full and fair statement of the witness' expected testimony." Iowa R. Crim. P. 5(3). The purpose of this rule is to provide the defense information which fairly alerts the defendant to the source and nature of evidence against him. State v. Waterbury, 307 N.W.2d 45, 50-51 (Iowa 1981); State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). The minutes need not list each detail to which a witness will testify, but rather must provide a full and fair statement which will alert the defendant as to the source and nature of the evidence against him. State v. Ellis, 350 N.W.2d 178, 181 (Iowa 1984); State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983); State v. Conner, 314 N.W.2d 427, 430 (Iowa 1982). A "full and fair statement of

the witness' expected testimony" is determined on a case-by-case basis. Walker, 281 N.W.2d at 614.

The minute of evidence at issue described expected testimony from Deputy Sheriffs Ken Rogers and Bill Wilson. This minute stated:

These witnesses were on duty on January 3, 1993 and will testify that they were called to the scene of the fire and had contact with the defendant, Gavril Bot. They will testify to his intoxicated state and lack of any symptoms of smoke inhalation. Deputy Wilson will further testify that he is the Atalissa Fire Chief and has experienced many fires and will testify to the effects of smoke on most firefighters and the results thereof. In addition, he and Deputy Rogers can both testify as to the blackness of Gavril Bot's face. They will also testify as to his belligerent manner and other actions at the fire scene. These witnesses will testify to the additional facts and circumstances surrounding this incident.

Bot claims the following testimony exceeded the scope of the minute set out above.

- Q: Deputy Rogers, have you ever gone into a burning building?
A: Yes, I have.
Q: And what was that for?
A: I responded to a house fire and when I arrived I had several people outside telling me there was still a teenage girl inside in the upper floor of this residence. I entered the residence to rescue that teenage girl, and I could have only been at the very maximum I was in the residence for three minutes, the electricity was still on at the time I entered and I was able to see fairly well getting upstairs. After we both exited the residence we both had to be treated for smoke inhalation.
Q: Was your face blackened and your hands blackened?
A: No. I had just a very small amount of soot, black soot just around the edge of my nostrils and the corner of my mouth.
Q: And were you having problems breathing?

A: A lot of problems.

Q: Was that an experience in itself?

A: Not one I would want to go through again, but yes, a very rough experience. I was treated on the scene by Riley Ambulance and transported to Muscatine General and treated again at Muscatine General.

Q: Well, in your experience, then, was Defendant Bot's black face consistent with him --

Q: Consistent with -- is that consistent with what you had?

A: No.

Bot contended at trial and contends before this court that this testimony by Deputy Rogers exceeds the scope of the minute of evidence.

In order for there to be reversible error, testimony which exceeds the minutes of evidence must either surprise or prejudice the defendant. Waterbury, 307 N.W.2d at 51. The minute stated Deputy Rogers would testify he was called to the scene of the fire and had contact with Bot. He was to further testify regarding Bot's intoxicated state, Bot's lack of any symptoms of smoke inhalation, and Bot's appearance. We find Deputy Rogers' testimony to be within the general scope of the minute. As such, we find there to be no reversible error.

We affirm the conviction of Gavril Bot's conviction of second-degree arson.

AFFIRMED.