IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0085

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEE SAMUEL CHRISTENSEN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR EMMET COUNTY
THE HONORABLE DAVID A. LESTER, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant appeals his second-degree murder conviction. He argues two jury issues and two witness issues. Related to the jury, the defendant contests that (1) one juror had a fixed opinion of guilt and was biased and (2) the jurors became aware of a threat to their safety during deliberation that influenced the verdict. Related to the witnesses, the defendant argues prosecutorial misconduct because allegedly (1) the prosecutor shifted the burden to the defendant when he asked a witness whether someone else could have tested the victim's fingernail clippings for evidence of the defendant's DNA and (2) a witness falsely testified that he used a metal detector at the scene.

Course of Proceedings

Charged with first-degree murder, a jury convicted the defendant of murder in the second degree. Trial Information; Verdict; App. 5. The defense theory at trial was to acknowledge that

the defendant killed the victim, but that it was a rash act during a fight and not a premediated killing. *See* Trial Tr. I p. 35, lines 2-8 ("The evidence will show. . .that it was a fight that led to a death, but it was not first degree murder."); p. 35, lines 9-12 ("Men and women of the jury, there is no question that Lee Christensen killed Thomas Bortvit, but he did not, he did not, commit murder in the first degree.").

At issue in this case are two mistrial motions, one request to remove a juror for cause, and a request for a new trial based on juror misconduct. The defendant requested a mistrial for each of two claims of prosecutorial misconduct. Trial Tr. II p. 215, lines 24-25; 216, lines 1-19 (Witness Tara Scott); Trial Tr. IV p. 7, lines 3-20 (Witness Peter Wagner). For one witness, the district court struck the testimony and gave a curative instruction. Trial Tr. II p. 219, lines 4-7; 220, lines 1-16. For the other witness, the district court had the witness recalled to clarify his testimony and permitted the defense to cross-examine a second time. Trial Tr. IV p. 228, lines 4-25; 229, lines 1-4.

The request to remove a juror for cause happened mid-trial as well. The parties learned during trial that one juror had allegedly

talked about her jury service over the weekend, had expressed an opinion about the defendant's guilt, and had stated that her opinion was firm. Trial Tr. V p. 9, lines 15-25; 10, lines 1-13. After a discussion in chambers, the district court determined that the juror remained fair and impartial and denied the request to remove for cause. Trial Tr. V p. 16, lines 8-23.

The jury then convicted the defendant of second-degree murder. Verdict; App. 23. Before sentencing, the defendant filed a motion for new trial and argued that the jury had considered social media information during trial that influenced the jury verdict. Motion for New Trial; App. 27. The defendant also sought to poll the jury, and the district court granted that request. Motion for Jury Poll; App. 29-31.

The district court denied the motion for new trial in a 20-page order. Order; App. 32-51. The defendant was sentenced to fifty years imprisonment. Judgment; App. 53.

Facts

The defendant shot his 19-year-old classmate Thomas Bortvit at least five times with a .45-caliber gun. Trial Tr. I p. 38, lines 17-19; 45, lines 2-14; Trial Tr. II p. 135, lines 16-25; 136, lines 1-9; Trial Tr.

III p. 58, lines 8-15. Thomas died from the gunshot wounds. Trial Tr. II p. 171, lines 1-13. The defendant confessed to his parents that he harmed Thomas, told his ex-girlfriend that he killed Thomas, and gave information to police officers about where he had left the body. Trial Tr. III p. 46, line 25; 47, lines 1-25; 48, lines 1-10; 56, lines 21-25; 57, lines 1-9; 58, lines 8-15 (defendant's statements to his father); 127, lines 9-25; 128, lines 1-25; 129, lines 15-17 (defendant's statements to his mother); Exhibit 189 (texts to ex-girlfriend).

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion When It Determined That the Defendant Failed to Show Juror Bias or Juror Misconduct.

Preservation of Error

The State does not contest error preservation on the juror bias issue involved Juror Budach. Generally, a defendant must preserve error by raising an issue to the district court and receiving an adverse ruling. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). After speaking to the juror in chambers, the defendant asked to excuse the juror. Trial Tr. V p. 15, lines 22-24. The district court made a credibility finding, determined the juror remained impartial, and denied the defendant's request. Trial Tr. V. p. 16, lines 8-23.

The State does not contest error preservation on the jury misconduct issue. In his motion for new trial, the defendant argued that the jury was exposed to and influenced by improper social media information during jury deliberations. Motion for New Trial; App. 29-30. The district court denied the motion. Order; App. 19-20.

Standard of Review

Abuse of discretion is the standard of review for the district court's denial of a motion for new trial based upon juror misconduct or juror bias. *State v. Webster*, 865 N.W.2d 223, 231 (Iowa 2015). "An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *See id.* "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). Even when constitutional issues are involved, reviewing courts "give deference to the district court's fact findings because of that court's ability to assess the credibility of the witnesses." *See State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005).

Merits

Under both the United States and Iowa Constitution, criminal defendants are guaranteed due process rights to a fair trial and an impartial jury. U.S. Const., amend. VI, XIV; Iowa Const. art. I §§ 9, 10. These guarantees entail freedom from juror misconduct and juror bias. *Webster*, 865 N.W.2d at 233; *see also State v. Johnson*, 445 N.W.2d 337, 340 (Iowa 1989) (discussing claims of juror bias and juror misconduct) overruled on other grounds by *State v. Hill*, 878 N.W.2d 269, 275 (Iowa 2016). But "[i]mpartiality…does not mean complete juror ignorance of issues and events." *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985) (internal quotation marks and citation omitted).

The defendant argues both juror bias and juror misconduct that prejudiced his trial. The State addresses each claim individually.

A. The district court did not abuse its discretion because it found Juror Budach was credible when she said she maintained an open mind.

After speaking to Juror Budach in chambers, the district court determined she was credible and remained a fair and impartial juror. This Court should not disturb that decision.

"Juror bias may be actual or implied." *Webster*, 865 N.W.2d at 236. "Actual juror bias occurs when the evidence shows that a juror, in fact, is unable to lay aside prejudices and judge a case fairly on the merits." *Id.* "Implied bias arises when the relationship of a prospective juror to a case is so troublesome that the law presumes a juror would not be impartial." *Id.* (internal citations omitted).

There must a factual showing that a seated juror was biased; mere speculation is insufficient to require the extraordinary remedy of a new trial. *See State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993) ("In the absence of some factual showing that this circumstance resulted in a juror being seated who was not impartial, the existence of prejudice is entirely speculative."). The defendant bears the burden to show juror bias warrants a new trial. *Id.* at 747. "For the purpose of determining juror prejudice, the relevant question is not what a juror has been exposed to, but whether the juror holds such a fixed opinion of the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant." *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985).

Here, the parties learned during trial that Juror Budach allegedly talked about her jury service over the weekend, had

expressed an opinion about the defendant's guilt, and had stated that her opinion was firm. Trial Tr. V p. 9, lines 15-25; 10, lines 1-13. In chambers, the juror explained that she had attended her brother's fiftieth wedding anniversary party in Sioux Falls that weekend. Trial Tr. V p. 10, lines 14-18. She admitted she may have said she was a juror, but she did not remember making any statements about whether the defendant was guilty or innocent. Trial Tr. V p. 11, lines 10-20.

The district court was "somewhat concerned" about her equivocation and pressed the juror. Trial Tr. V p. 12, lines 2-4. Juror Budach was firm that she did not make a statement that she had a set position on the defendant's guilt. Trial Tr. V p. 12, lines 8-14. She was also firm that she did not know how she was going to vote in the case. Trial Tr. V. p. 13, lines 16-25. The district court determined that all of Juror Budach's answers were credible and found that she continued to be a fair and impartial juror. Trial Tr. V p. 16, lines 8-23.

There is no factual showing that the juror stated at the party that the defendant was guilty. The juror did not recall making a definitive statement of guilt, and believed she would not have because

she had not made a decision yet. Instead, the discussion with the juror shows that the person who reported on the juror may have intentionally made a false report. The report was tied back to a person named Koons. Trial Tr. II, lines 3-9; 12, lines 15-25. When asked about this person, the juror explained that "my son put his brother or one of the Koons boys in prison, you know. And that may be where it came from. I don't know." Trial Tr. V p. 12, lines 15-22.

But even if the juror made a prior statement about the defendant's guilt, this Court should credit the district court's credibility finding that Juror Budach remained an impartial juror. Though she equivocated on a prior statement she may have made, the district court recognized that "she did again state here on the record, looking me in the eye, that she has not made up her mind about Mr. Christensen's guilt or innocence." Trial Tr. V p. 16, lines 8-23. The defendant fails to show that Juror Budach was biased. Instead, the record shows that the juror did not hold a fixed opinion of his guilt and therefore served impartially on the jury.

B. The district court did not abuse its discretion because the jurors' testimony showed they did not discuss the threat until after the verdict.

No juror testified during the hearing that he or she personally logged into Facebook and saw a threat to juror safety. Instead, the jurors' statements as a whole show that at most, a juror's relative had discovered information about a threat, told the juror, and that juror related the threat to some of the jury after the verdict. Yet even if the jury knew about the threat before the verdict, there is no reasonable probability it affected the verdict. The defense theory urged a second-degree murder conviction, the jury's verdict was second-degree murder, and the evidence was strong that the defendant killed the victim. The district court's ruling denying a new trial was not an abuse of discretion.

The alleged misconduct here is the jurors' exposure to a threat to their safety, either through social media or through conversations in the community. *See* Christensen Br. 39. Juror misconduct relates to a juror's actions that impair the integrity of the fact-finding process. *Webster*, 865 N.W.2d at 231. Often the action is contrary to the trial court's admonitions, but is insufficient alone to show juror misconduct to require a mistrial. *See id.* (noting that the juror action

must impair the integrity of the fact-finding process). Threats to the jurors' safety do not automatically create a juror misconduct problem that requires a new trial. *See State v. Fenton*, 620 P.2d 813, 818 (Kan. 1980) (finding the trial court did not abuse its discretion when it denied a motion for new trial because only three jurors testified they heard about the defendant's threat to their safety prior to jury deliberation, nine jurors did not hear about the threat until after the verdict, and all jurors stated that the threat did not affect their decision).

Under Iowa law, a defendant must satisfy three prongs to show juror misconduct:

> (1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

Webster, 865 N.W.2d at 234, *clarified by Ryan v. Arneson*, 422 N.W.2d 491, 495 (Iowa 1988)).

1. No juror testified that he or she directly saw a threat through social media.

The alleged misconduct here is that some jurors learned of a threat to their safety, but substantial evidence shows that any misconduct was not through a juror violating the social media admonition. The jurors' testimony shows that one juror spoke to her granddaughter, and the granddaughter relayed that she—the granddaughter—saw a threat on Facebook. Another juror heard from a community member about a threat to the jury's safety. None of the testimony shows that a juror saw a threat by violating the district court's social media admonition.

Half of the jurors had no recollection of someone mentioning a threat from social media. Three jurors did not recall any comments about a riot or public disturbance. Jury Poll p. 5, lines 2-25 (Juror Gregori); Jury Poll 33, lines 17-25; 26, lines 3-25; 27, lines 1-5 (Juror Budach); 34, lines 1-10 (Juror Diekmann). Juror Kirchner overheard someone else in the community discussing a threat. Jury Poll p. 18, lines 17-25; 19, lines 1-13; 20, lines 12-20. Juror Schmidt believed any perceived threat came generally from the tension and emotions in the courtroom from the families. Jury Poll 31, lines 16-19; 32, lines 18-25; 33, lines 1-2. Juror Johnson remembered that someone was upset

about a possible riot but did not know where the juror had heard the information. Jury Poll 40, lines 7-22.

Of the remaining jurors, the most specific information came from Juror Sander, who explained that knowledge of any threat was second-hand. Another juror had spoken to her granddaughter, the granddaughter relayed something about a threat on social media, and the juror had relayed the threat to some of the other jurors. Jury Poll 14, lines 12-25; 15, lines 1-12. Four other jurors corroborated that the juror did not directly see a social media post, but had heard about a threat from someone else. Jury Poll 21, lines 19-25; 22, line 1 (Juror Lobato); Jury Poll 24, lines 15-25; 25, line 1 (Juror Arneson); Jury Poll 28, lines 13-21; 29, lines 4-12 (Juror Fontenot); 35, lines 18-25; 36, lines 1-20 (Juror Hinshaw). Only Juror Walter believed that two female jurors had directly seen a threat on Facebook, a statement not corroborated by any of the other jurors. Jury Poll p. 9, lines 1-5.

This record does not show that any juror violated the social media admonition and saw the threat. Instead, the issue is if the knowledge of the threat from another person was extraneous information that created jury misconduct.

2. *The district court did not abuse its discretion when it found that the jurors did not discuss the threat during jury deliberations.*

Under *Cullen*, the defendant must show that any statement about a threat was outside the bounds of tolerable jury deliberations. Three jurors did not know about a threat. Four jurors not hear about the threat until after the verdict. One juror heard about the threat from the community generally but did not tell the rest of the jury, and the remaining jurors were uncertain of the timing. Because this is substantial evidence to support the district court's ruling that the threats were not discussed during jury deliberations, the defendant fails to show this prong.

Outside information relayed to the jury before or during jury deliberations exceeds the permissible bounds of jury deliberation. *State v. Johnson*, 445 N.W.2d at 342. In *Johnson*, a juror told the other jurors that one of the defendant's victims "broke down" and cried in front of a teacher at school and had heard rumors that the defendant hit the victims. *Id.* at 339. The Iowa Supreme Court determined that the juror's statements "improperly furnished information to other members of the jury" prior to the verdict and thus violated the boundaries of jury deliberation. *Id.* at 342.

This case is not like *Johnson* because the district court concluded from its credibility findings that no juror discussed the threat during jury deliberations. This conclusion is sound. Three jurors did not recall any discussion of a riot or public disturbance at any point during jury service. Jury Poll p. 5, lines 2-25 (Juror Gregori); Jury Poll 33, lines 17-25; 34, lines 1-10 (Juror Diekmann); Jury Poll 26, lines 3-25; 27, lines 1-5 (Juror Budach). Four jurors believed they did not discuss the threat until after the verdict. Jury Poll 9, lines 6-21 (Juror Walter); 25, lines 2-8 (Juror Arneson); 28, lines 8-21 (Juror Fontenot); 3, lines 5-15 (Juror Johnson). One juror was aware of a threat because she had overheard a member of the community say something, but she did not share what she heard with the jury. Jury Poll 18, lines 17-25; 19, lines 1-16 (Juror Kirchner). Two other jurors could not recall the timing of the threat. Jury Poll 21, lines 19-25; 22, lines 1-12 (Juror Lobato); 31, lines 3-8 (Juror Schmidt). . One juror said there was a comment about a possible riot but only said the comment was prior to announcing the verdict, not necessarily before deliberations. Jury Poll 35, lines 18-24 (Juror Hinshaw).

The district court's finding shows that it discounted the credibility of the remaining juror. This finding is justified because the last juror equivocated on when the statement was made. Initially she said it was after the verdict. Jury Poll 12, lines 3-17 (Juror Sander). Then she said it was a few days before the verdict. Jury Poll 12, lines 21-25; 13, lines 1-5. Then she said it was "[d]uring the time we were in the jury room. I have no idea how – when it was." Jury Poll 13, lines 12-15. This juror was also confident that another juror had talked to the judge about the Facebook post several days prior to the verdict, which the district court expressly discounted. Jury Poll 13, lines 16-20; 16, lines 9-17.

Substantial evidence supposed that the jurors did not discuss the threat during jury deliberations. The district court did not abuse its discretion when it found the defendant failed to meet the second *Cullen* prong.

3. The district court did not abuse its discretion when it found no reasonable probability that the threat affected the verdict.

The defendant also fails to show the third *Cullen* prong because the jurors who remembered a threat did not take the threat seriously and the evidence of the defendant's guilt was strong. For the third

prong, the defendant must show that "the misconduct was calculated to, and with reasonable probability did, influence the verdict." *See Cullen*, 357 N.W.2d at 27. "The difference between a possibility and a reasonable probability is significant." *See id.* at 28.

The reviewing court may look at the influence of the extraneous information in light of witnesses' demeanors, the trial evidence, and the issues presented to determine the impact of the jury misconduct. *Johnson*, 445 N.W.2d at 342. *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991) ("We are still convinced that the trial court is in the best position to objectively assess the impact of juror misconduct."). A defendant did not show a reasonable probability of information influencing the jury's sexual abuse verdict when the victims reported sexual abuse to a third person and the juror's improper statements did not relate to the sexual abuse. *Id.* A defendant did not show a reasonable probability a statement affected the jury verdict when the jurors discussed information that was not introduced at trial, specifically that the defendant had previously shot his brother, but there were only bare assertions that the shooting was mentioned during deliberations and there was no hint of the extent of the discussion. *State v. Harrington*, 349 N.W.2d 758, 762-63 (Iowa

1984) abrogated on other grounds by *Ryan v. Arneson*, 422 N.W.2d 491 (Iowa 1988).

The defendant fails to show a reasonable probability that a threat to the jurors' safety affected the verdict. Of the jurors who remembered a threat, several of the jurors were dismissive of the threat. One juror thought the threat "sounded ridiculous." Jury Poll 18, lines 22-25; 19, lines 1-9 (Juror Kirchner). Another juror remembered "[t]here was a comment made, but it was fairly dismissed" and explained that no one really reacted to the comment or said much about it. Jury Poll 21, lines 19-25; 22, line 1; 23, lines 3-8 (Juror Lobato). One juror did not believe the threat was dependent on any specific verdict. Jury Poll 10, lines 16-24. Only one juror was described as upset and she did not hear about a threat until after the verdict. Jury Poll 28, lines 8-25 (Juror Fortenot) 40, lines 7-22 (Juror Johnson identifying Juror Fortenot by first name as the juror who was upset and requested an escort to her vehicle after the verdict).

Even if the jurors were aware of any safety concerns prior to deliberations, it appears they were generally concerned that any decision they made would upset a portion of the community. There

was "obviously tension in the courtroom." Jury Poll 9, lines 6-15. After the verdict, jurors asked for a police presence to walk them to their cars. Jury Poll 8, lines 7-11. The district court explained that it had made arrangements for law enforcement after the verdict because jurors had expressed concerns about all of the family members and the public attending trial, and were concerned that they could be confronted when leaving the courthouse. Jury Poll 43, lines 12-25; 44, line 1. These statements do not show a reasonable probability that the threat affected the jurors' decision-making.

There is also no reasonable probability that a threat impacted the verdict when the prosecution's evidence of murder was so strong and the defense theory was that it was second-degree murder, not a premeditated killing. The defendant's defense at trial was to admit that he killed the victim but that he acted rashly instead of in a premeditated manner. Trial Tr. I p. 35, lines 2-8. His defense succeeded. The jury convicted him of second degree murder instead. Verdict; App. 23. It is unreasonable to believe that a comment about the jurors' safety—which one juror believed was a "ridiculous" threat—was the reason the jury convicted the defendant when the defendant's whole theory was that he did kill the victim. The

defendant admitted to both of his parents and his ex-girlfriend that he harmed the victim. Trial Tr. III p. 46, line 25; 47, lines 1-25; 48, lines 1-10; 56, lines 21-25; 57, lines 1-9; 58, lines 8-15; 127, lines 9-25; 128, lines 1-25; 129, lines 15-17; Exhibit 189. The gun and ammunition were discovered in the defendant's home. Trial Tr. II p. 52, lines 1-23. A bloodstain on the defendant's blue jeans and bloodstains on boots from the defendant's home were consistent with the victim's blood. Trial Tr. II p. 55, line 25; 56, lines 1-4; 203, lines 6-14; 204, lines 12-25; 205, lines 1-13. The victim texted his ex-girlfriend that he gave the defendant a ride home on the day of his murder, and the evidence showed that the victim was killed during a narrow window consistent with when he was with the defendant. Exhibit 188. The defendant was upset that his ex-girlfriend was dating the victim and kept trying to win back the ex-girlfriend. Trial Tr. III p. 278, line 25; 279, lines 1-25; 280, lines 1-10. With this amount of evidence, there is no reasonable probability that a vague threat affected the jury verdict.

II. The District Court Did Not Abuse Its Discretion Because the Curative Instruction and Admonitions Cured Any Error.

Preservation of Error

Error is not preserved on either prosecutorial misconduct claim. The defendant did not ask for a ruling on prosecutorial misconduct from the district court during trial, and the district court did not apply any of the factors for prosecutorial misconduct. Instead, the defendant generally objected to the prosecution's question to witness Tara Scott as an improper comment on the burden of proof. Trial Tr. II p. 215, lines 9-25; 216, lines 1-25; 217, line 1. The district court determined the question was improper, struck the testimony, and gave a curative instruction but did not apply the *Graves* factors to determine prejudice. Trial Tr. II p. 219, lines 4-7.

Similarly, the defendant failed to ask for a ruling on prosecutorial misconduct from the district court regarding criminalist Wagner. While the defendant insinuated that the prosecutor knew the testimony was false, he did not specifically ask for a ruling on prosecutorial misconduct. Trial Tr. IV p. 7, lines 21-25; 8, line 1. Error is not preserved on either issue.

Standard of Review

Trial courts have broad discretion on prosecutorial misconduct claims. *State v. Greene*, 592 N.W.2d 24, 30 (Iowa 1999). Appellate courts review the district court's ruling for abuse of discretion for denials of mistrial motions based on prosecutorial misconduct. *Id.*

Merits

The defendant identifies two issues of alleged prosecutorial misconduct. First, he argues that the prosecutor shifted the burden to him to prove his innocence during criminalist Tara Scott's testimony. Second, he argues that criminalist Peter Wagner gave false testimony. Neither issue requires a new trial.

To establish a claim of prosecutorial misconduct, a defendant must show not only that the prosecutor engaged in misconduct but also that prejudice resulted. *State v. Barrett*, 445 N.W.2d 749, 753 (Iowa 1989). "A prosecutor's misconduct will not warrant a new trial unless the conduct was 'so prejudicial as to deprive the defendant of a fair trial.' " *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999) (quoting *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989)). "Prejudice can, but usually does not, result from isolated prosecutorial misconduct."

Anderson, 448 N.W.2d at 34. It is persistent efforts that create prejudice. *Id.*

In determining whether a defendant has been prejudiced by prosecutorial misconduct, the court considers: "(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence, (4) the use of cautionary instructions or other curative measures, and (5) the extent to which the defense invited the misconduct." *State v. Graves*, 668 N.W.2d 860, 868, 877 (Iowa 2003) (internal citations omitted). These factors are assessed within the context of the whole trial. *Id.* at 869. "The most important factor is the strength of the State's case against the defendant." *State v. Boggs*, 741 N.W.2d 492, 509 (Iowa 2007).

A. The prosecution's questioning was proper, but nonetheless, the curative instruction and the isolated nature of the comment eliminated any prejudice.

The prosecution may draw the jury's attention to holes in the defendant's defense theory, as the prosecution did in this case. It was not prosecutorial misconduct to do so. Nonetheless, any improper action did not prejudice the defendant.

A defendant's defense theory is not immune to testing from the prosecution. Instead, "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) (internal citation omitted). In *Craig*, the defendant argued self-defense during his assault trial. *Id.* at 795-96. During closing argument, the prosecutor said that the defendant had been speaking with friends prior to the incident and insinuated that the defendant could have had those friends testify, presumably to corroborate the self-defense theory. *See id.* at 797. The Iowa Supreme Court determined that the prosecutor made a fair comment and that there was no prosecutorial misconduct. *Id.*

Here, the prosecutor's question to the witness was a much subtler attack on the defendant's theory than the scenario in *Craig*. State witness Tara Scott was a criminalist in the DNA section of the Iowa Division of Criminal Investigation. Trial Tr. II p. 190, lines 10-13. Among other evidence, she had received the victim's fingernail clippings. Trial Tr. II. P. 207, lines 3-19. She explained that there

was no sign of a struggle so the decision was made not to examine the clippings. Trial Tr. II p. 207, lines 10-19.

After the defense asked if the defendant's DNA could be in the clippings, the prosecution questioned if the evidence was available for someone else to test. Trial Tr. 213, lines 16-25; 214, lines 1-20; 215, lines 3-11. The defense objected and argued that the question was an improper comment on the defendant's presumption of innocence and the burden of proof and requested a mistrial. Trial Tr. II 215, lines 12-14; 216, lines 1-19. The prosecution argued the questioning was proper, but acknowledged the court could strike the answer. Trial Tr. II p. 217, lines 16-25; 218, line 1.

As in *Craig* with the comment that the defendant could have provided witnesses to support his theory, it was proper to briefly mention the defendant's ability to test the prosecution's evidence. The defendant's theory was that he and the victim fought, and the victim's death was not premeditated. The insinuation was that there were skin cells under the victim's fingernails to support the fight theory. Like the failure to present certain witnesses, the absence of testing evidence showed weakness in the defense theory. This is not

burden shifting, but instead permitted the jury to test the defense theory. The prosecutor did not commit any misconduct here.

Yet if there was misconduct, the defendant was not prejudiced under *Graves*. First, any misconduct was neither severe nor pervasive. The prosecutor had a single question about whether anyone else had the opportunity to test the fingernail filings. Trial Tr. II p. 215, lines 9-11. This was not repetitive commentary. Second, the fingernail clippings did not affect the central issue in the case, namely, whether the defendant murdered the victim. Any relevance the fingernail filings had to the defense theory ultimately succeeded in the defendant's favor: the jury convicted him of second-degree murder instead of first-degree murder. Verdict; App. 23.

Third, the prosecution's evidence was strong that the defendant murdered the victim. The defendant confessed to both of his parents and his ex-girlfriend and gave information through his father to the police to locate Thomas's body. Trial Tr. III p. 46, line 25; 47, lines 1-25; 48, lines 1-10; 56, lines 21-25; 57, lines 1-9; 58, lines 8-15; 127, lines 9-25; 128, lines 1-25; 129, lines 15-17; Exhibit 189. The murder weapon and similar bullets were discovered in the defendant's home, along with blood-spattered blue jeans and boots. Trial Tr. II p. 55,

line 25; 56, lines 1-4; 203, lines 6-14; 204, lines 12-25; 205, lines 1-13. Fourth, the district court struck the testimony and gave a curative instruction. In its curative instruction, the district court emphasized that "[w]e've told you many, many times, including in our preliminary instructions" that the defendant had no obligation to prove his innocence and to disregard that specific questioning and answers. Trial Tr. II p. 219, lines 13-25; 220, lines 1-16. It then had the jury acknowledge their understanding. Trial Tr. II p. 219, lines 13-25; 220, lines 1-16.

Even if the prosecutor should not have asked the question, the defendant fails to show this single question prejudiced his entire trial. The district court did not abuse its discretion when it denied the motion for new trial.

B. The criminalist's testimony was not false.

This record shows that the criminalist accurately testified that he used a metal detector at the crime scene, and even if his testimony was improper, the prosecutor did nothing to invite perjured testimony. The district court did not abuse its discretion.

Criminalist Wagner gave truthful testimony. He testified that he used a metal detector at the crime scene. Trial Tr. II p. 84, lines

17-23. The sheriff also remembered that the criminalist had used a metal detector. Trial Tr. IV p. 174, lines 7-25; 175, lines 1-25. Contrary to the defendant's argument, the witness's testimony about using the metal detector was not false. *See* Christensen Br. 50.

The defendant also alleges criminalist Wagner gave false testimony about a conversation he had during trial with his former partner, Keri Davis. During the initial cross-examination, defense counsel reminded the criminalist that his partner, another criminalist Keri Davis, had testified in a deposition that they did not use a metal detector. Trial Tr. II p. 85, lines 8-25; 86, lines 1-24. Over the noon hour, the investigator contacted his partner and then testified that his partner admitted she was incorrect in her deposition. Trial Tr. II p. 95, lines 9-20; 96, lines 3-17. The specific statement at issue was the following:

> [DEFENSE ATTORNEY]: Did you tell [Keri Davis] when you phoned her over the noon hour that she testified under oath that you and she did not use a metal detector?
>
> A. Yes I did mention that to her.
>
> [DEFENSE ATTORNEY]: And what did she say to that?
>
> A. She said that was incorrect.

Trial Tr. II p. 96, lines 12-17.

The falsity of this statement is not absolute. The criminalist did not remember Keri Davis specifically saying that her testimony under oath was incorrect. Trial Tr. IV p. 216, lines 5-15. Keri Davis also did not recall what she specifically told the criminalist. Trial Tr. IV p. 40, lines 11-25. Although she said she did not believe she told him her testimony was incorrect, she also said "I don't remember what I told him regarding the depo. I don't remember." Trial Tr. IV p. 40, lines 11-25. This is not clear-cut false testimony.

Yet even if the criminalist gave false testimony, there is no evidence the prosecution knew such a statement was false and the credibility of this witness does not outweigh the strong evidence of murder. To show prosecutorial misconduct that warrants a new trial when the State introduces false testimony, there are four steps. First, it must be the prosecution that introduces or fails to correct the false testimony. *Hamann v. State*, 324 N.W.2d 906, 909 (Iowa 1982). Second, the false testimony must be given at trial. *Id.* Third, mere perjured testimony, without proof that the prosecution knew it was false, is insufficient for a new trial. *Id.* Fourth, the new trial is warranted only if the false testimony is material, that is, the reviewing

court must examine the weight of independent evidence of guilt against the tainted testimony. *Id.*

Assuming the testimony was false, the defendant's claim still fails on steps three and four. There is no evidence that the prosecution knew it was false testimony. The prosecutor was not on the phone call between Keri Davis and the witness. Trial Tr. IV p. 9, lines 9-24. And on the metal detector issue, the prosecutor had another witness who could corroborate that the investigator used a metal detector. Trial Tr. IV p. 174, lines 7-25; 175, lines 1-25. This record does not show that the prosecutor knew any testimony was false.

Most importantly, the metal detector testimony is not significant enough to outweigh the strong evidence of the defendant's guilt. The defense was that the defendant killed the victim during a fight. He never disputed that he shot the victim. *See* Trial Tr. I p. 35, lines 2-8 ("The evidence will show. . .that it was a fight that led to a death, but it was not first degree murder."); p. 35, lines 9-12 ("Men and women of the jury, there is no question that Lee Christensen killed Thomas Bortvit, but he did not, he did not, commit murder in the first degree."). He confessed to both of his parents and his ex-

girlfriend that he harmed Thomas. Trial Tr. III p. 46, line 25; 47, lines 1-25; 48, lines 1-10; 56, lines 21-25; 57, lines 1-9; 58, lines 8-15; 127, lines 9-25; 128, lines 1-25; 129, lines 15-17; Exhibit 189. He provided information that led police to Thomas's body. Authorities discovered blood stained boots and jeans, the murder weapon, and additional ammunition in the defendant's home. Trial Tr. II p. 55, line 25; 56, lines 1-4; 203, lines 6-14; 204, lines 12-25; 205, lines 1-13. Whether the investigator used a metal detector at the site of the murder is not material to the defendant's murder conviction. The metal detector issue does not show prosecutorial misconduct and does not warrant a new trial.

CONCLUSION

All of the defendant's claims fail. Juror Budach was not biased because she maintained an open mind about the defendant's guilt and the district court found her credible. The jurors did not commit misconduct when their testimony shows that the jurors did not discuss a threat to their safety until post-verdict and the threat was otherwise relatively benign when considering the strength of the prosecution's case and the defense theory that the defendant killed

the victim during a fight. The prosecutorial misconduct claims fail because there is no prejudice. This Court should affirm.

REQUEST FOR NONORAL SUBMISSION

The State believes oral argument is unnecessary to decide this case and will not "be of assistance to the Court." *See* Iowa R. App. P. 6.908.

Respectfully submitted,

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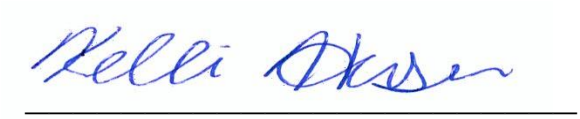

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