

IN THE COURT OF APPEALS OF IOWA

No. 0-117 / 09-0749
Filed April 21, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LAWRENCE WESLEY HAMBY,
Defendant-Appellant.

Appeal from the Iowa District Court for Bremer County, Bryan McKinley,
Judge.

Lawrence Hamby appeals his conviction and sentence for first-degree
murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Kasey E. Wadding, County Attorney, and Kasey E. Wadding, Assistant
County Attorney, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

Lawrence Hamby appeals his conviction and sentence for first-degree murder. He contends the evidence was insufficient to support his conviction. Additionally, he argues the district court erred in failing to grant a mistrial after evidence concerning Hamby's prior bad acts was admitted, and the prosecutor committed prosecutorial misconduct concerning the evidence. We affirm.

I. Background Facts and Proceedings.

On January 18, 2006, Michelle Otterbein received a call from her husband telling her that Nate McKinney, the son of his best friend Frank McKinney, had called him.¹ Otterbein's husband told her Nate said Frank was dead and lying on the floor in Nate and Frank's home. Otterbein's husband asked her to go to the McKinneys' house right away. When she arrived, she found Nate walking around in the backyard talking on a cell phone that looked like Frank's cell phone. Nate told her he had called 911. She went into the house and found Frank dead on the living room floor.

At approximately 1:00 p.m., a paramedic arrived on the scene. The paramedic examined Frank's body and found no pulse or signs of breathing. The paramedic found that the body was cold and starting to stiffen. The paramedic noted that there was some kind of coagulated blood in the corner of Frank's mouth and some marks around Frank's neck and facial area. Thereafter, law enforcement officers and the medical examiner arrived. The medical examiner evaluated the body and determined the death was suspicious.

¹ Evidence later revealed Nate was not Frank's biological son. However, there was no evidence that either Nate or Frank were aware of that fact prior to Frank's death.

An autopsy was performed, and the medical examiner concluded Frank's death was a homicide, caused by trauma to the head, neck, and chest. Nine ribs had been fractured, and his face was beaten. Frank had also been strangled, and there were ligature marks on his neck from the strangulation.

Nate was interviewed by police, and his clothes were confiscated at the interview. Nate initially told police he discovered his father on the floor that morning. He told police that he had played video games with his friend and neighbor, Lawrence Hamby, the previous day. He also stated that he had taken Hamby's live-in girlfriend, Jenifer Meana, to the hospital the previous night and that Hamby had been out of town fixing a friend's computer.

After the interview, Nate went to stay with an uncle. He discussed Frank's death with his family members. The next day, Nate told his family that he "couldn't cover for that dude anymore." Nate called the detective working on the case and told them that he had lied for Hamby. Nate gave the officers the following account:

On the 17th, he and Hamby played video games and smoked marijuana in Nate's bedroom. At that time, Frank was at a local bar. Hamby and Nate went to the liquor store and purchased alcohol, including a bottle of Everclear. They returned to Nate and Frank's home, made a few mixed drinks, and continued playing video games. Nate called Frank's cell phone to see what he wanted for dinner, and Frank offered to buy pizza. Nate declined and told Frank he would buy something from the local gas station.

Later in the evening, Meana called Nate's house and asked for Hamby. Hamby gave Nate a signal that he did not want to take the call, so Nate told

Meana that Hamby was out meeting some friends. Meana said she had a migraine headache and wanted to go to the hospital. Nate offered Meana some ibuprofen tablets, and he took them over to Hamby's house. Nate told her to call back if her headache did not improve.

Meana called Nate's house again approximately fifteen minutes later, looking for Hamby, but Hamby again did not take the call. Nate talked to Meana, and she requested she be taken to the hospital. Meana and Nate then went to the hospital. Nate called his house from the hospital to see if his father was home, but his father was not there. Nate called the bar where Frank had been and was told Frank had left. Nate made a few other calls, but was not able to locate his father.

After using the hospital phone, Nate stole approximately eight syringes and needles from the hospital. Nate placed the stolen items in the trunk of Meana's vehicle. He then went and rejoined Meana in the hospital. Two to three hours after arriving, Nate and Meana left the hospital.

On their way home, Meana was pulled over by a police officer at approximately 11:30 p.m. Meana received a citation for no proof of insurance and for driving without her headlights on. After arriving at Hamby and Meana's house, Nate took the syringes and needles inside and then went to Hamby and Meana's bedroom. The phone rang while Meana was in the bathroom, and he did not answer it. He saw a car pull up, and then Hamby came in. Nate recognized the vehicle as his father's red Bronco. Hamby told Nate that his dad was dead. Hamby told Nate that he had heard an argument downstairs while he was playing video games in Nate's room, so he went downstairs. He said he

saw two guys fighting, and Hamby punched one of them and the guys took off. Hamby told Nate that by that time his dad was dead. He also told Nate that one of the guys fighting was a big-time drug dealer. Nate wanted to go to his dad, but Hamby told him they had to “ditch the body,” and Nate agreed to help him.

Nate and Hamby went back to Nate’s house to look at Nate’s father. Nate said he wiped his father’s neck. They then returned to Hamby’s house, and Hamby got a syringe and four pills. They went back to Nate’s house, and Nate removed several items from the house, including drug paraphernalia, bullet shells, knives, and a bloody newspaper. While Nate was doing that, Hamby broke a few of the pills up, mixed them with Everclear, and placed the mixture into the syringe. Hamby then injected the mixture into Frank’s arm, to make it look as if Frank had overdosed. Nate then went back to Hamby’s house and stayed the night.

The next day, Nate and Hamby went back to Nate’s house, and Nate decided to call the police. Hamby saw two belts and told Nate to get rid of them. Nate refused and Hamby took them. Hamby told Nate to tell the police that Hamby was in another town fixing a friend’s computer and that was why Nate had to take Meana to the hospital. He also told Nate to wait until he was back home across the street before the police were called. Nate then called the police around one o’clock. Nate was then interviewed by the police, and Nate told them what Hamby had told him to tell them.

After receiving Nate’s new statement, police conducted two searches of Hamby’s home. In the basement, the officer found a syringe and needle, an empty syringe package, a pill bottle, and a plastic bag full of needles and

syringes. On the main floor, the officer found a bottle of Everclear. The officers later found a belt and a bat in a cupboard in Hamby's kitchen. Another officer found a black and orange extra-large t-shirt, a red rag or cloth, and a small baseball bat underneath the stairway leading to the second level of the home. Another belt was found on Hamby's bedroom floor.

Hamby was interviewed by the police. Although he admitted he was present at Frank's house prior to and after Frank's death, he denied killing Frank. Hamby told the police that he leaned over Frank's body to determine if he was alive.

On April 24, 2007, Lawrence Hamby was charged with murder in the first degree, in violation of Iowa Code section 707.2(1) (2007). Prior to trial, Hamby filed a motion in limine to exclude evidence of his probation-parole status, among other things. A jury trial commenced on January 6, 2009.

Nate testified that he had initially lied to the police, as Hamby had asked. He testified he had then come clean and gave his account of the events, as recounted above. Nate also testified that he and his father had a rocky relationship. Nate admitted he had previously stolen money and drugs from Frank. Nate testified he was positive that he did not go home while Meana was at the hospital, and that he was not at home between 9:45 and 10:30 p.m. that evening.

Meana testified she thought Nate had been wearing different pants than the ones confiscated by the police. She testified that Nate took her to the hospital for her migraine and that he had stolen needles, syringes, and other supplies from the hospital. She testified he had left her room to smoke and to

make a few calls. She testified she was awake off and on in her treatment room, and that Nate had been asleep in her room too. She testified that after she and Nate returned to her and Hamby's house, she checked her messages on her cell phone that she had left at home. She testified she had one from Hamby asking where they were and to pick up the phone. She did not recognize the phone number and said the number aloud. Nate recognized it as his father's number. She testified that Hamby came home frantic and told Nate that his dad was dead. He told Nate that his dad had worn a wire to a drug deal. She testified that Nate wanted to call the police, but Hamby told him that the police would think Nate killed his father. Hamby had Frank's phone when he returned to the house. She testified that she saw Hamby and Nate bring stuff over from Nate's house. She testified that Hamby told her to tell the police that Hamby was out of town that evening fixing a friend's computer. She testified that she initially told the police what Hamby had told her to tell them, but that she eventually told them the truth.

The medical examiner testified that the ligature marks on Frank's neck were consistent with one of the belts seized from Hamby's house. A criminalist with the Iowa Department of Criminal Investigation testified that Frank's DNA was discovered on the belt, and a blood stain on Frank's t-shirt matched the DNA of Hamby.

Nurses testified that they had seen Nate at the hospital that evening. The officer who pulled Meana over testified that the stop occurred at approximately 11:30 p.m. on the 17th.

Hamby's sponsor for drug recovery was called as a witness for the State. The following exchange occurred:

Q. . . . [H]ow often would you communicate [with Hamby] or how would you describe that? A. [Hamby] was in communication with me quite a bit before his incarceration on his parole revocation, I believe.

The jury was excused and Hamby moved for a mistrial. Hamby argued that the testimony was prejudicial. The State stated that the question asked was not designed to elicit that response from the witness. The State admitted it had failed to advise the witness prior to taking the stand not to mention Hamby's probation status. The State argued that the witness was stopped at that point and the testimony was not elaborated upon. The State argued a limiting instruction would sufficiently cure any deficiency. The district court agreed with the State, finding the witness's reference to Hamby's probation status to be an innocent mistake and that a limiting instruction would be sufficient to cure any prejudice to Hamby. The court, upon recalling the jury, gave an instruction advising the jury that the reference to the prior probation status of Hamby did not relate to any act of violence or drug use. The court instructed that the reference was not relevant in any manner to any issue in the case, and it instructed the juror that they shall not consider the reference in their deliberations.

Hamby did not take the stand, and in his defense, he attempted to indicate Nate had killed Frank. Otterbein testified that Frank was constantly afraid of Nate, and Frank's brother-in-law testified that Nate did not cry or seem upset after Frank died. Another neighbor testified that she believed she saw Nate walking across her driveway on the night of Frank's death at around 9:30 p.m.

On January 22, 2009, the jury found Hamby guilty as charged. Hamby later filed a motion for a new trial, arguing the evidence was insufficient to support the jury verdict. The court denied Hamby's motion.

Hamby now appeals.

II. Discussion.

On appeal, Hamby contends the evidence was insufficient to support his conviction. Additionally, he argues the district court erred in failing to grant him a mistrial after evidence concerning Hamby's prior bad acts was admitted, and the prosecutor committed prosecutorial misconduct concerning the evidence. We address his arguments in turn.

A. Sufficiency of the Evidence.

"We review a challenge to the sufficiency of the evidence for correction of errors at law." *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009). "The jury's findings of guilt are binding on appeal if the findings are supported by substantial evidence. Substantial evidence is evidence that could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt." *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007) (citation omitted).

The goal of the court is to determine whether the evidence could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. The court views the evidence in the light most favorable to the State in making this determination.

Canal, 773 N.W.2d at 532. If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence and credit other evidence. *State v. Ame*, 579 N.W.2d 326, 328 (Iowa 1998). The very function of the jury is to sort out the evidence and place credibility where it belongs. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(6)(p); *State v. Parish*, 502 N.W.2d 1, 3 (Iowa 1993).

Viewing the evidence in the light most favorable to the State, we find the circumstantial evidence in this case is substantial and supports the jury's determination that Hamby is guilty of first-degree murder. Hamby was alone in the Frank's house when Frank returned home that night, and Hamby was the last to see him alive. Both Nate and Meana testified as to Hamby's actions following Frank's death; specifically that Hamby asked them to lie to the police about his whereabouts and cover up Frank's death. A bloodstain on Frank's shirt matched Hamby's DNA. Frank's DNA was discovered on the belt found in Hamby's house, and the belt was consistent with the ligature marks on found Frank's neck. Although Hamby again seeks to establish Nate as the murderer, our task is not to refind the facts on a sufficiency-of-the-evidence review. *Canal*, 773 N.W.2d at 532. We conclude sufficient evidence supports the jury's verdict.

B. Motion for a Mistrial.

Hamby contends the district court erred in failing to grant him a mistrial after evidence concerning Hamby's probation status came into evidence. A trial court has broad discretion in granting or denying a motion for mistrial. *State v. Brotherton*, 384 N.W.2d 375, 381 (Iowa 1986). We review for an abuse of that

broad discretion. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003). An abuse of discretion occurs when the district court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *Id.* An "untenable" reason is one that lacks substantial evidentiary support or rests on an erroneous application of the law. *Id.*

We find an abuse of discretion only when defendant shows prejudice which prevents him from having a fair trial. The trial court was in a better position to observe the matters complained of and to ascertain its effect, if any, on the jury.

Brotherton, 384 N.W.2d at 381 (internal citations omitted). In most circumstances, a curative instruction is sufficient to enable the jury to complete its task without being improperly influenced by otherwise prejudicial testimony. *State v. Williamson*, 570 N.W.2d 770, 771 (Iowa 1997). Unless the contrary is shown, a jury is presumed to follow the court's instructions. *Schwennen v. Abell*, 471 N.W.2d 880, 887 (Iowa 1991). A mistrial is necessary only when the evidence was so prejudicial its effect on the jury could not be erased by an admonition. *State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998). Only in extreme cases will a cautionary instruction be deemed insufficient to remove the danger of prejudice. *State v. Plaster*, 424 N.W.2d 226, 232 (Iowa 1988).

In our review of the record on this appeal, we find no abuse of discretion by the district court in not granting Hamby's motion for mistrial. Here, the single reference to Hamby's probation revocation was brief, isolated, and not elaborated upon. The court's admonition to the jury was sufficient to cure any prejudice that may have resulted. We therefore affirm on this issue.

C. Prosecutorial Misconduct.

Finally, Hamby briefly argues that the prosecutor knew in advance that the State's witness would testify as to Hamby's probation-parole status. Hamby argues that the State's failure to advise the witness not to testify to his probation status amounted to prosecutorial misconduct. The State argues that Hamby failed to preserve the error for our review. Although it appears Hamby did not preserve error, as he did not raise the issue before the district court, see *State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002), we will bypass the State's error preservation concerns and proceed to the merits. *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

To prevail on his claim of prosecutorial misconduct, Hamby must prove that misconduct occurred and that he was so prejudiced by the prosecutor's misconduct that he was denied a fair trial. *Piper*, 663 N.W.2d at 913. In determining whether Hamby was prejudiced by the prosecutor's misconduct, we are to consider:

(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, 877 (Iowa 2003).

Although we admonish the prosecutor's failure to properly prepare and direct its witness not to testify about matters specifically excluded from admission by the district court, we believe the strength of the State's evidence outweighed any possible impact of the prosecutor's inaction, after evaluating the relevant factors. We conclude the prosecutor's question was not designed to elicit such a

response from the witness. Moreover, the State presented ample evidence for the jury to reach its guilty verdict. Hamby cannot prove he was denied a fair trial as a result of the prosecutor's conduct, and, therefore, cannot prove prejudice sufficient to sustain his ineffective assistance claim.

III. Conclusion.

For all of the foregoing reasons, we affirm Hamby's conviction and sentence.

AFFIRMED.