

IN THE COURT OF APPEALS OF IOWA

No. 0-206 / 09-0524
Filed June 16, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

OLIVER LITT, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve,
Judge.

Appeal from the judgment entered following a jury verdict of guilty of first-
degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, Michael J. Walton, County Attorney, and Dion Trowers, Assistant
County Attorney, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J.,
takes no part.

SACKETT, C.J.

Appellant, Oliver Litt, appeals from the judgment entered after a jury found him guilty of first-degree murder. He contends there was insufficient evidence to support the conviction, the court erred in allowing testimony concerning rumors, the court erred in denying his motion for mistrial based on prosecutorial misconduct, and he received ineffective assistance of counsel when his trial counsel did not object to reference to rumors in an exhibit and failed to preserve a claim. We affirm.

I. Background Facts and Proceedings.

The victim, Hano Bailey, was shot five times as he arrived for work at an IHOP restaurant. He was alive when police arrived, but died hours later in the hospital. At the time of the shooting, Britton Witcher, a customer in the restaurant, was sitting facing a window and heard two “popping” sounds. He stood to look out the window and saw a man standing over Bailey with a gun. Witcher heard two more popping sounds and saw two flashes from the gun. He went to the door of the restaurant and watched the assailant get into the passenger side of a car. He saw the assailant’s face briefly before the car drove away. There was a second person in the car but Witcher did not get a good look at the person’s face. Witcher described the assailant as a tall African-American man who was bigger “through the midsection.” Witcher described the car as a darker blue, two-door or possibly four-door 1992 to 1999 model rounded in the back and top, consistent with a Buick Regal, Bonneville, or Riviera.

Kourtney Davis, a server at the restaurant, told police she saw a “bubbly dark purple, bluish car” with an “R” on the front grille earlier in the evening of the shooting. She said the car moved around the parking lot, parking in at least two different spots. She left the restaurant between 10:00 and 10:30 p.m., Davis and saw two black men in the car. The passenger was a “heavier set” man. Davis believed, although she was not 100 percent sure, that defendant was the passenger. Mary Struck, the assistant manager at IHOP, saw a two-door Buick Riviera with a “bubbly” body style and an “R” on the front grille. Dustin Murphy, a customer in the restaurant, saw the assailant leave in a two-door, dark-colored 1998 or 1999 model Riviera with some custom vents in the front quarter panel.

Officer Robert Bytnar of the Davenport Police Department, driving in Davenport at about 5:00 p.m. the day before the shooting, saw Litt driving a blue Riviera with custom vents. The morning after the shooting, a car matching the description given by the witnesses was located at American General Finance. The vehicle had been collateral for a loan made to Michellien Lagrone. Lagrone lived with defendant. She had been delinquent on the loan for months but was told that American wanted her to make payments, not return the car. Yet Lagrone and defendant returned the car at the start of business on May 23, 2008, hours after Bailey’s murder.

When interviewed by law enforcement officers, defendant gave contradictory accounts of his actions the evening of the shooting. He first said he had not driven Lagrone’s Riviera for two months, but later admitted driving the car the evening of the shooting, but not in the area where it occurred. Later he

said he drove the car and met a man not far from the place where the shooting occurred.

At trial, Witcher, Officer Bytnar, Davis, Struck, and Murphy identified the car as the one they saw the night of the shooting. Litt's fingerprint was found in the car. Witcher identified Litt as the assailant, estimating his degree of certainty as eighty to eighty-five percent. Davis identified Litt, but was not 100 percent sure.

II. Scope and Standards of Review.

We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008). A guilty verdict is binding on us on appeal unless no substantial evidence in the record supports it or the verdict is clearly against the weight of the evidence. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009). Substantial evidence means evidence that could convince a rational jury that the defendant is guilty beyond a reasonable doubt. *Id.* We view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). We consider all the evidence presented, not just that of an inculpatory nature. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001). "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.” *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001) (citation omitted).

Claims counsel rendered ineffective assistance have their basis in the Sixth Amendment to the United States Constitution; we review these claims de novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). “To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted.” *State v. Kingery*, 774 N.W.2d 309, 312 (Iowa Ct. App. 2009). Failure to prove either element is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). Normally, ineffective-assistance-of-counsel claims are preserved for postconviction-relief proceedings; however, if the record is sufficient to permit a ruling, we will consider such a claim. *State v. Canal*, 773 N.W.2d 528, 532 (Iowa 2009).

III. Merits.

A. Testimony Concerning Alleged Sexual Assault. There apparently had been rumors that the victim sexually assaulted Litt’s daughter. Litt contends the district court erred in allowing a police detective to testify he checked police records and found no record of a sexual assault or sexual abuse of Litt’s daughter. Defense counsel objected to the evidence on relevance grounds. The court overruled the objection. Here Litt contends the court erred in admitting the evidence as it was not relevant to any issue in the case because motive is not an element of murder. See Iowa R. Evid. 5.401; Iowa Crim. Jury Instruction 700.1 (2008). He argues “the alleged motive was completely without foundation in the

record of this case.” He further contends it was unfairly prejudicial, even if relevant. See Iowa R. Evid. 5.403.

The State argues the testimony was “relevant to whether defendant had guilty knowledge concerning the murder, whether he had a motive for the murder, and whether he was trying to preempt the officers’ use of the rumor during his questioning.”

To determine whether evidence is admissible under Iowa Rules of Evidence 5.402 and 5.403 requires a two-step inquiry: first, is the evidence relevant? Second, if it is relevant, is its probative value substantially outweighed by the danger of unfair prejudice or confusion? See *State v. Thomas*, 766 N.W.2d 263, 270 (Iowa Ct. App. 2009). “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. 5.401.

Although Litt correctly notes that motive is not an element the State must prove for first-degree murder, evidence of motive may be relevant to proof of deliberation and premeditation, which are required elements. See *State v. Gordon*, 354 N.W.2d 783, 784 (Iowa 1984) (using motive to show deliberation or premeditation); see also Iowa Code §§ 707.1, 2 (2007) (listing elements of murder). Another element of first-degree murder is malice aforethought. See *State v. Lee*, 494 N.W.2d 706, 707 (Iowa 1993); see also Iowa Code § 707.1. “Malice aforethought” is defined as “a fixed purpose or design to do some physical harm to another that exists before the act is committed.” *State v.*

Buenaventura, 660 N.W.2d 38, 49 (Iowa 2003) (citation omitted). “Because this element is a state of mind, circumstantial evidence is generally used to prove malice.” *Id.* Bad feelings or quarrels between the defendant and the victim may be shown to prove the defendant’s state of mind and motivation at the time of the crime. *State v. Newell*, 710 N.W.2d 6, 21 (Iowa 2006). We conclude the district court properly overruled the relevance objection.

Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Iowa R. Evid. 5.403. Litt contends “the danger of undue prejudice is very real” because the evidence was irrelevant “yet could only have bolstered that evidence of rumor in [the videotaped interview] with an imprimatur of approval of the trial court in front of the jury.” Here, in the second step of the two-step inquiry in rules 5.402 and 5.403, “unfair prejudice” is evidence that “would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party.” *Reynolds*, 765 N.W.2d at 290 (citation omitted). “Because the weighing of probative value against probable prejudice is not an exact science, we give a great deal of leeway to the trial judge who must make this judgment call.” *Newell*, 710 N.W.2d at 20-21.

Litt further argues he was prejudiced by admission of the testimony because the State’s case was not overwhelming. The State contends its evidence was strong. Reversal of a ruling that admits or excludes evidence is not necessary unless a substantial right of a party is affected. Iowa R. Evid. 5.103(a).

To determine whether a substantial right of a party has been affected when a nonconstitutional error occurs, we employ harmless error analysis and ask: “Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?”

State v. Paredes, 775 N.W.2d 554, 571 (Iowa 2009) (citation omitted).

The prejudice analysis under rule 5.103(a) presupposes an error. *See id.* Because we have determined the district court did not err in overruling the objection to the evidence, this argument must fail.

On appeal, Litt also tries to recast his relevance objection to the police detective’s testimony about checking records. Litt argues “no evidence whatsoever” exists to support the suggested motive of vengeance and it “was completely without foundation in the record.” A lack-of-foundation objection was not raised at trial and is not properly before us on appeal. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (limiting appellate review to objections raised in and ruled on by the district court). Even if we assume for the sake of argument that this lack-of-foundation objection were subsumed within Litt’s relevance objection, we would find that Litt was not prejudiced. In light of the admission of the interrogation video, which contained Litt’s own statements about rumors regarding the victim having sexually assaulted Litt’s daughter, we do not believe the officer’s testimony would have had any meaningful additional impact on the jury. The jury heard other evidence about the rumors.

B. State’s Video of Interrogation. Litt contends counsel was ineffective in not objecting to portions of a video of his interrogation by police because the video contained references to rumors of the rape of Litt’s daughter by the victim. The video also contains statements by the interrogating officer concerning Litt

taking the law into his own hands. On appeal, Litt incorporates his argument and citation to authority from the discussion of rules 5.402 and 5.403 in the preceding section.

During a police interview Litt was asked if he knew why he was being interviewed. He responded he hoped it was not because there were rumors the victim had raped Litt's daughter. The officer questioned Litt about the rumors and asked if they were true. Litt insisted they were false. Prior to trial, Litt moved in limine to exclude any references by the State's witnesses to the rumors on the basis of relevance and prejudice. Alternatively, Litt asked to be allowed to present evidence of the victim's prior history of sexual assault if the State was allowed to present evidence about the rumors. The district court, in denying a portion of the motion in limine, stated:

In the portion of Defendant's interrogation that is admissible, Defendant brings up that there is a rumor that the victim allegedly raped his daughter. Defendant makes this statement without any prior information or prompting from law enforcement. He also denies that this ever happened. The State argues there is evidence this incident happened and that Defendant was aware of it. The Court finds this evidence is relevant and is not overly prejudicial to Defendant.

Even though evidence regarding an alleged sexual assault of Defendant's daughter by the victim is admissible, there is still no reason to introduce evidence of the victim's conviction for sexual abuse and subsequent incarceration. The victim's conviction for sexual abuse was unrelated to Defendant's daughter and is not relevant for any purpose.

Litt argues that his counsel was ineffective for not objecting to this portion of the video at trial. The trial exchange went as follows:

MR. WALTON [Prosecutor]: Your Honor, at this time, I would move to admit State's Exhibit 47, which is a version or portions of the interview *as agreed to by the parties*.

MR. RAMIREZ [Defense counsel]: No objection.

THE COURT: Exhibit 47 is admitted.

(Emphasis added). To prevail on an ineffective assistance of counsel claim, Litt has the burden to prove by a preponderance of the evidence that “(1) counsel failed to perform an essential duty, and (2) prejudice resulted.” *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). “In analyzing the first prong of the test, we presume counsel acted competently.” *State v. Cromer*, 765 N.W.2d 1, 7-8 (Iowa 2009). The prosecutor’s statement when offering Exhibit 47 indicates that the portions of the video to be presented at trial had been discussed and “agreed to by the parties.” This suggests defense counsel made a considered choice as part of a trial strategy and that the lack of objection was not the result of some lapse in judgment. We “require more than mere ‘[i]mprovident trial strategy, miscalculated tactics, mistake, carelessness or inexperience,’ as viewed with the clarity of hindsight.” *Id.* (citation omitted). The record before us, however, is inadequate to determine that Litt is not able to establish either prong of an ineffective assistance of counsel claim as a matter of law. See *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Accordingly, we preserve this claim for possible postconviction proceedings, which “allows the defendant to make a complete record of the claim, allows trial counsel an opportunity to explain his or her actions, and allows the trial court to rule on the claim.” *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006).

C. Mistrial for Prosecutorial Misconduct. Litt contends the district court erred in denying his motion for mistrial following the prosecutor’s remarks in closing argument on rebuttal that Litt “lied about his involvement.” Defense counsel interrupted and asked to approach the bench. After a discussion off the

record, the prosecutor rephrased and simply pointed to several changes Litt made in over time in his account of the event. Defense was allowed to make a record out of the jury's presence where counsel noted the prosecutor's comment that Litt lied and defense counsel moved for a mistrial. The prosecutor responded that counsel "objected, I didn't repeat it and we rephrased it as to what actually happened." The court ruled:

The court finds that it is not so prejudicial as to warrant a mistrial and it's not prosecutorial misconduct in the sense that it was not deliberately done to cause any prejudice to Mr. Litt. Certainly it was done in rebuttal. One statement was made. But the jury has heard a lot of other arguments up to this point, and the court finds that they will not be so prejudiced by that one minor statement that a mistrial is warranted. So your motion is denied.

We review a district court's ruling on a motion for mistrial for an abuse of discretion. See *State v. Piper*, 663 N.W.2d 894, 921 (Iowa 2003). "A mistrial is appropriate when an impartial verdict cannot be reached or the verdict would have to be reversed on appeal due to an obvious procedural error in the trial." *Newell*, 710 N.W.2d at 32 (citation omitted). A party is entitled to a new trial based on prosecutorial misconduct only if the party has shown prejudice. *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002). "Thus it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." *Graves*, 668 N.W.2d at 869 (citation omitted). A prosecutor is entitled to "some latitude" during closing arguments in analyzing the evidence admitted at trial. *Id.* at 874. A prosecutor may argue the reasonable inferences and conclusions to be drawn from the evidence, but may not suggest that the jury decide the case on any ground other than the weight of the evidence introduced at trial. *Id.*

The prosecutor here made one improper remark. See *id.* (contrasting argument related to evidence showing the defendant was untruthful with the prosecutor's personal opinion of the defendant's credibility). He rephrased, citing to conflicting statements made by defendant without saying Litt was lying. See *id.* at 875. Litt argues the misconduct was severe because defense counsel had no opportunity to respond and it was almost the last thing the jury heard before the court instructed the jury. Defense counsel spent considerable time in closing argument pointing to inconsistencies in the State's case. In response the prosecutor, prior to the challenged comment, set forth the "chain of facts and circumstances that leads you to a conclusion, a reasonable conclusion." He then said, "Use your reason. Use your common sense. And when you look at the evidence and when you consider the fact that the defendant lied about his involvement." Following a conference off the record, the prosecutor rephrased:

When you look at the statement, the interview of Mr. Litt, and how he tells you at one point he did not have that car for two months and he tells you that his girlfriend gave him a ride to Mr. Warren's house and how he changes that to later he did have the Riviera and he did drive the Riviera to Mr. Warren's house and then he did have that Riviera up in the area, when you compare all that, it tells you the story. I didn't put him there. He put himself there.

Another conference outside the presence of the jury occurred. Then the court read the final jury instructions.

It was improper for the State to accuse the defendant of lying. Though not minimizing or excusing the prosecutor's statement we must determine whether the defendant has shown prejudice. See *id.* (listing factors in determining prejudice). There was only one objectionable remark. It was corrected.

Defendant has not shown prejudice. See *id.* The court did not abuse its discretion in denying the motion for mistrial.

D. Due Process Objection. Litt contends his trial counsel was ineffective in not specifying a due process objection to the prosecutor's alleged misconduct. The preceding analysis of a challenge to the prosecutor's comment required evidence of misconduct and proof of prejudice. See *id.* If the challenge is based on violation of due process, "[e]vidence of the prosecutor's bad faith is not necessary, as a trial can be unfair to the defendant even when the prosecutor has acted in good faith." *Id.* The district court based its ruling in part on its finding "it's not prosecutorial misconduct in the sense that it was not deliberately done to cause any prejudice to Mr. Litt." Defendant argues this ruling is incorrect if the challenge is based on due process. He asserts the outcome of the ruling would have been different if counsel had expressly raised a due process challenge, in that the court would have then granted the motion for mistrial. "Counsel was, thus, ineffective."

Without a showing of prejudice, Litt cannot demonstrate counsel was ineffective. It makes no difference in the result of our ineffective-assistance analysis if we assume counsel had a duty to make a due-process objection and failed in that duty, because Litt's failure to prove prejudice is fatal to this claim. See *Polly*, 657 N.W.2d at 465 ("A defendant's failure to prove either element is fatal to the claim.").

E. Motions for Judgment of Acquittal. Litt contends the court erred in denying his two motions for judgment of acquittal because there was insufficient

evidence Litt was the person who shot the victim. “A motion for judgment of acquittal is a means of challenging the sufficiency of the evidence, and we review such claims for correction of errors at law.” *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). We must determine if substantial evidence supports the verdict. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005).

“Substantial evidence” is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. In conducting our review, we consider all the evidence, that which detracts from the verdict, as well as that supporting the verdict. We view the evidence in the light most favorable to the State.

State v. Hagedorn, 679 N.W.2d 666, 668-69 (Iowa 2004) (citations and internal quotes omitted). “Direct and circumstantial evidence are equally probative.” Iowa R. App. P. 6.904(3)(p). “[A] jury may not rely upon evidence that merely creates speculation, suspicion or conjecture.” *Bentley*, 757 N.W.2d at 262 (citation omitted).

Litt focuses his argument on what he considers lacking in the State’s case namely the lack of a positive identification of Litt being near the restaurant at the time of the shooting or of defendant being the perpetrator. Britton Witcher, who witnessed the shooting did not identify anyone from a police photo array when questioned after the shooting. He told officers, “I didn’t catch his face real well.” The murder weapon was not found. Mary Struck, identified a Buick Riviera as the car used by the perpetrator, but did not see the occupants. Kourtney Davis, saw the same car and said it contained two black males. When asked at trial if she could say under oath that she could identify Litt as one of the men in the car she said, “I did see somebody. I’m not 100 percent positive that it was him.” When later asked for her opinion whether Litt was the person she saw in the car,

she said, "I think he is, in my opinion. I'm not 100 percent sure, but he looks familiar."

The State argues substantial evidence supports the jury's verdict. Whitcher testified he was 80-85 percent sure of his identification of Litt as the perpetrator. He gave a detailed description of the body shape and size of the perpetrator, which described Litt. Davis also described the man she saw as "heavier set" and was confident in her identification. Officer Bytnar positively identified Litt as driving a customized Buick Riviera about 5:00 p.m. on the day before the shooting. Several witnesses identified the car that moved around the restaurant and parked in several spots as a customized Buick Riviera. Litt's girlfriend owned a Buick Riviera identical to the car seen by witnesses and captured on security video around the time of the shooting. Just hours after the shooting, Litt and his girlfriend turned in her customized Buick Riviera to the finance company even though the finance company preferred she keep the car and make arrangements to pay her loan. Whitcher was ninety to ninety-five percent certain the car the perpetrator got into after the shooting was the same car as shown in a photograph of the car turned in to the finance company. Davis and Struck also identified the car in the finance company photo as the car they saw that night at the restaurant. The jury was allowed to view the customized Buick Riviera. It had distinct vent holes in the quarter panels, as did the car observed by witnesses at the restaurant and on the security video.

Defendant made conflicting statements to police. First he said he had not driven the Riviera for two months. Then he said he had driven it the day of the

shooting, to a friend's house not near the restaurant. Later he said he had driven the car to an appliance store near the restaurant. "Admissions may be implied by the conduct of the defendant subsequent to a crime, including fabrication, when such conduct indicates a consciousness of guilt." *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993). A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt, and the false story is relevant to show that the defendant fabricated evidence to aid his defense. See *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982); see also *State v. Schrier*, 300 N.W.2d 305, 309 (Iowa 1981) (inconsistent statements of a defendant of material facts are probative circumstantial evidence from which a jury may infer guilt).

The court's ruling on Litt's motion for judgment of acquittal clearly outlines the evidence it believed was sufficient to submit the case for the jury's consideration:

In order for the State to be successful in its case, they would have to prove by evidence beyond a reasonable doubt that on May 22, 2008, Mr. Litt shot Hano Bailey. That Hano Bailey died as a result of being shot. That he acted—that Mr. Litt acted with malice aforethought and acted willfully, deliberately, premeditatedly, and with the specific intent to kill Hano Bailey. The Court finds that the jury could find from the eyewitnesses, Britton Witcher and Kourtney Davis, that on May 22nd, the defendant shot Mr. Bailey. Their eyewitness identification, though challenged by the defense, could be believed by the jury because that is the jury's choice.

Further, there's other circumstantial evidence from which the jury could conclude that the defendant shot Mr. Bailey. That the testimony from various witnesses, including Witcher, Davis, and Dustin Murphy, that the defendant's blue Buick Riviera was at the IHOP at the time of the murder. In fact, Mr. Litt, as [the prosecutor] just said, in his statement to police initially denied his car being in that area whatsoever, but then finally recanted that and stated it was in the area, although he claims it was there later.

The videotape that we just saw from the IHOP shows a car coming in and leaving at about the time of this murder, which is

additional circumstantial evidence. Clearly, the car was identified by several witnesses and it is unique, the color, and does have some after-market vents. So it does make it a little bit easier to identify; although, certainly the defense has arguments against that. But again, because of that, that's a jury question, not a question for the Court.

Clearly Mr. Bailey died as a result of being shot, as we heard from the autopsy doctor. With regard to evidence regarding the malice and premeditation elements of murder in the first degree, the jury could determine those elements based on the car being in the parking lot for at least forty-five minutes, if we believe Ms. Davis's testimony, as well as the videotape from IHOP, shows that the car parked in several different spots, which would show certainly some type of willful specific intent, along with malice and premeditation.

Viewing the evidence in the light most favorable to the State, we conclude there is substantial evidence from which a rational jury could find Litt guilty. Therefore, the district court did not err in overruling Litt's motions for judgment of acquittal.

We affirm Litt's conviction of first-degree murder and preserve his ineffective-assistance-of-counsel claim for possible postconviction proceedings.

AFFIRMED.