

**IN THE COURT OF APPEALS OF IOWA**

No. 8-212 / 06-1983  
Filed July 30, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**HOWARD PAUL GARRISON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Marion County, Peter A. Keller,  
Judge.

Defendant appeals his convictions on two counts of first-degree murder.

**AFFIRMED.**

Alfredo Parrish, Andrew Dunn, and Tammy Westhoff-Gentry of Parrish,  
Kruidenier, Dunn, Boles, Gribble, Cook, Parrish, Gentry & Fisher, L.L.P., Des  
Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Thomas S. Tauber,  
and Douglas Hammerand, Assistant Attorneys General, and Terry E. Rachels,  
County Attorney, for appellee.

Heard by Zimmer, P.J., and Miller, J., and Nelson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**NELSON, S.J.****I. Background Facts & Proceedings**

Howard Garrison was charged with two counts of first-degree murder for the shooting deaths of John Caswell, Jr. and Steven Emerson. Caswell and Emerson manufactured methamphetamine at a farm outside Knoxville, Iowa. Garrison frequently visited the farm, where he smoked methamphetamine with the victims.

Brian Martin testified that while he and Garrison were in jail together, Garrison told him he shot Caswell and Emerson because he was “tired of being ripped off.” Garrison told Martin he and Emerson had a disagreement about the manufacture of methamphetamine and he got mad and shot Emerson. Then, realizing Caswell probably heard the shots, Garrison waited for Caswell to appear and he shot him as well.

Witnesses testified Garrison was at the farm on the morning of October 24, 2002, the day of the murders. The murder weapon was a .22 caliber gun. Witnesses stated Garrison owned a .22 Ruger, but it could not be found after the murders. Garrison had ammunition consistent with that used in the killings. One spent cartridge, which matched those from the murders, was found in the vent on the hood of Garrison’s car. Also, in Garrison’s car officers found a plastic box with a foam insert which had the imprint of a shape that matched a .22 Ruger. Garrison told witnesses he left the farm at noon, and Caswell and Emerson were alive then. The County Medical Examiner Investigator testified, however, that the time of death for both men was about 11:00 a.m.

Garrison was convicted of two counts of first-degree murder in November 2003. During opening arguments the State alleged Garrison had sold OxyContin to Martin, and because of this previous relationship Garrison confessed to Martin. During the trial, Martin testified he did not personally know Garrison and had only heard rumors Garrison sold OxyContin. We reversed Garrison's convictions and remanded for a new trial, finding the OxyContin references were not relevant and were highly prejudicial. *State v. Garrison*, No. 04-0141 (Iowa Ct. App. Jan. 19, 2006).

A new trial commenced on October 23, 2006. Evidence was presented as outlined above, except for the evidence relating to OxyContin. The jury returned a verdict finding Garrison guilty of two counts of first-degree murder, in violation of Iowa Code section 707.2 (2001). Garrison was sentenced to life in prison without parole on each count, to be served consecutively. He now appeals his convictions.

## **II. Motion to Dismiss**

Prior to the second trial, Garrison filed a motion to dismiss that claimed the State had engaged in conduct during the first trial designed to force him to move for a mistrial. He claimed further prosecution of the case should be barred based on the Double Jeopardy Clause. He also raised arguments based on due process and the furtherance of justice. In the alternative, Garrison asked the court to sanction the State by precluding it from calling Martin as a witness. The district court denied Garrison's motion to dismiss and his request for sanctions.

On constitutional issues, we review de novo, considering the totality of the circumstances. *State v. Rademacher*, 433 N.W.2d 754, 759 (Iowa 1988).

**A.** Generally, when a mistrial requested by a defendant is the result of even clear overreaching by the prosecution, the Double Jeopardy Clause will not prohibit a retrial of the case. See *Oregon v. Kennedy*, 456 U.S. 667, 675-76, 102 S. Ct. 2083, 2089, 72 L. Ed. 2d 416, 424 (1982). If the prosecution, however, deliberately forces a mistrial then the Double Jeopardy Clause will bar a retrial. *Id.* at 676, 102 S. Ct. at 2090, 72 L. Ed. 2d at 424.

The issue of whether the prosecution has intentionally provoked a mistrial must be made in the first instance by the district court. *Rademacher*, 433 N.W.2d at 757. In ruling on the motion to dismiss, the district court stated:

It is the belief of this Court, however, that the evidence overwhelmingly supports the notion that the mistake was not intentional. Once it became apparent that the defendant and Martin did not have a prior relationship, the State dropped the issue and did not mention it during its closing argument. Furthermore, when the defense requested a limiting instruction, the State did not object. Based on the aforementioned facts, the Court concludes that the State did not intend to force a mistrial when it misinformed the Court that the defendant and Martin had a prior relationship.

We note that the same judge who heard the first trial also ruled on the motion to dismiss. On the factual question of whether the prosecution intentionally engaged in misconduct resulting in a reversal of Garrison's convictions, in this instance we choose to defer to the court that actually heard the evidence in question and considered the prosecutor's testimony at the hearing on the motion to dismiss. See *id.* at 759 (noting the district court was in a far better position to resolve the issue of the prosecutor's intent).

**B.** Garrison asserts that due to prosecutorial misconduct he was denied his right to a fair trial and due process. A prosecutor has a duty under the due process clause to see that a defendant receives a fair trial. *State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003). Generally, if there has been a due process violation, a defendant may receive a new trial. *State v. Swartz*, 541 N.W.2d 533, 540 (Iowa Ct. App. 1995). Only as the most drastic step will a court dismiss the charges against a defendant. *Id.* “[D]ismissal is ordinarily inappropriate, even when the misconduct involved was deliberate, ‘where there is no continuing prejudice that cannot be remedied by suppression of the evidence or a new trial.’” *Id.* (citation omitted). A new trial is considered to cure the prejudice caused by prosecutorial misconduct. *Id.* at 541.

We conclude the district court did not abuse its discretion by denying Garrison’s motion to dismiss based on a violation of due process. We concur in the district court’s conclusion that granting a new trial was a sufficient remedy in this case.

Garrison also contends the district court should have dismissed the case under Iowa Rule of Criminal Procedure 2.33(1) based on the “furtherance of justice.” The district court did not address this issue. We conclude it has not been preserved for our review. See *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) (noting we do not address issues raised for the first time on appeal).

**C.** In the alternative, Garrison asserted the district court should sanction the State by precluding it from presenting the testimony of Martin. “Trial courts have discretion to determine the appropriate sanction in response to

prosecutorial misconduct.” *Swartz*, 541 N.W.2d at 540. The district court determined that Martin’s testimony would be limited, so the testimony regarding OxyContin would not be mentioned, but his testimony would not be precluded altogether. We find no abuse of discretion in the district court’s determination in this regard.

### **III. County Medical Examiner Investigator**

The Marion County sheriff, Marvin Van Haaften, was also the county medical examiner investigator.<sup>1</sup> Over the period of several hours, Van Haaften took the temperatures of the bodies and examined them for developing rigor mortis and livor mortis. Based on his observations, Van Haaften developed an opinion about the time of death for the victims.

Garrison filed a motion in limine seeking to prohibit the State from presenting Van Haaften’s testimony concerning the time of death. Garrison claimed Van Haaften did not have sufficient expertise to testify as an expert under Iowa Rules of Evidence 5.702 and 5.703. The district court ruled Van Haaften’s testimony would be admissible, and that Garrison could challenge the evidence through cross-examination. Garrison claims the district court abused its discretion by ruling Van Haaften could testify as an expert as to the time of death.

We review rulings of the district court on the admissibility of expert testimony for an abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 28 (Iowa

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<sup>1</sup> A county medical examiner investigator is a person appointed by a county medical examiner, with approval of the board of supervisors and the State medical examiner, to serve under the supervision of a county medical examiner and to assist in death investigations. Iowa Admin. Code r. 641-127.1 (2007). The necessary qualifications for a county medical examiner investigator are set forth in rule 641-127.7(2).

2006). An abuse of discretion occurs when the 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, 245 (Iowa 2001).

Under rule 5.702, a witness may be qualified as an expert “by knowledge, skill, experience, training, or education . . . .” “The witness need not be considered a specialist in the particular field as long as the testimony is within the general area of expertise.” *State v. Belken*, 633 N.W.2d 786, 800 (Iowa 2001). There is no requirement that a witness possess a particular license, certification, or educational degree. *Id.* In Iowa, the general rule is for liberality in the admission of opinion evidence. *Newell*, 710 N.W.2d at 28.

Van Haaften testified to his training to become the county medical examiner investigator. He had been trained as an emergency medical technician, and had taken several classes on death investigation. A county medical examiner investigator is required to be certified by the State of Iowa. See Iowa Admin. Code r. 641-127.7(2). Garrison’s concerns about Van Haaften’s credentials and methods of investigation go to the weight of his testimony, but do not lead to the conclusion his testimony should have been excluded. We determine the district court did not abuse its discretion in permitting Van Haaften to give his opinion as to the time of death.

#### **IV. Impression of Gun**

Inside the trunk of Garrison’s car police officers found a plastic case containing foam material. The foam material had the imprint of a gun, but the gun itself was not found. Victor Murillo, of the Division of Criminal Investigation

(DCI), conducted several tests to determine what type of gun had made the imprint in the foam. Murillo made a foam imprint of a .22 Ruger with bio-foam, and compared the resulting imprint to the imprint in the plastic case.<sup>2</sup> Murillo also prepared a transparency of a .22 Ruger and placed it over the imprint in the plastic case to compare and contrast the two images. Based on his testing, Murillo came to an opinion about the type of gun that had made an impression in the foam in the plastic case.

Garrison filed a motion in limine, arguing Murillo was not qualified to give his opinion about the gun imprint. Murillo gave his proposed testimony outside the presence of the jury. After hearing the proposed testimony, the district court found “he is a firearms expert who makes comparisons in his work on many occasions, whether that be firing pin impressions or as in this case by comparing foam impressions.” The court also found Murillo’s testimony was relevant, and the relevancy was not outweighed by undue prejudice. Garrison claims the district court abused its discretion by permitting Murillo to testify about his conclusions concerning the gun imprint.

As noted above, we review rulings concerning the admissibility of expert testimony for an abuse of discretion. *Newell*, 710 N.W.2d at 28. Murillo testified he was a firearms expert at the DCI. He testified that while he had not previously compared foam imprints of a weapon, “[i]mpression type evidence like this one are almost an everyday occurrence within my section of the laboratory anyways.” The concerns raised by Garrison go to the proper weight to be given Murillo’s

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<sup>2</sup> Murillo testified he used the same foam material that the DCI used to make imprints of footprints for comparison purposes.

testimony. We conclude the district court did not abuse its discretion in permitting Murillo to give his opinion about the gun imprint.

#### **V. Methamphetamine Evidence**

Garrison contends the district court abused its discretion by permitting witnesses to testify that they saw Garrison using methamphetamine at the farm. He claims the evidence was not relevant to the issue of whether or not he killed the victims. He also claims the prejudicial effect of the evidence outweighed its probative value. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001).

Evidence which is not relevant is not admissible. Iowa R. Evid. 5.402. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Evidence of other crimes, wrongs, or acts may be admissible to show motive, opportunity, or knowledge. Iowa R. Evid. 5.404(b).

Martin testified Garrison told him he committed the murders because of a disagreement with Emerson about the manufacture of methamphetamine, and that Garrison killed Caswell in an effort to avoid detection. Evidence that Garrison had previously smoked methamphetamine with Emerson in the mobile home where Emerson was murdered was relevant to the issue of motive, and Garrison's knowledge of methamphetamine manufacturing at the farm. The evidence was clearly probative of a fact or element other than the defendant's criminal disposition. *See State v. Taylor*, 689 N.W.2d 116, 123-24 (Iowa 2004)

(finding that to be admissible under rule 5.404(b), evidence must be relevant to a legitimate factual issue in dispute).

Relevant evidence may not be admissible if the probative value of the evidence is outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403. “Probative value” refers to strength and force of the evidence to make a consequential fact more or less probable. *State v. Martin*, 704 N.W.2d 665, 671 (Iowa 2005). Evidence is unduly prejudicial if it has “an undue tendency to suggest decisions on an improper basis commonly, though not necessarily, an emotional one.” *Newell*, 710 N.W.2d at 20 (citations omitted).

The manufacture and use of methamphetamine were integral parts of this case. “If the challenged evidence is relevant to a legitimate issue in dispute, then it is prima facie admissible, regardless of any tendency to also establish a defendant’s bad character or propensity for committing bad acts.” *State v. Mitchell*, 633 N.W.2d 295, 298 (Iowa 2001). The evidence of methamphetamine use was relevant to a legitimate issue, and we find no abuse of discretion in the district court’s conclusion that the probative value of the evidence was not outweighed by its prejudicial effect. We conclude the district court did not abuse its discretion in finding the evidence was admissible.

## **VI. Prosecutorial Misconduct**

**A.** Prior to trial, Garrison filed a motion in limine seeking to prohibit the State from presenting evidence of the gun imprint in the foam in the plastic case. At that time the court ruled, “You can talk about they found the case but not about the impression testimony.” In his opening statement, the prosecutor

stated, “They also found a medical plastic case that when they opened it it appeared to have an impression in it, and an impression something looked like could have been a gun so they collected that piece of evidence.”

Garrison moved for a mistrial, claiming the State violated the ruling on the motion in limine. The State responded that it believed it could not mention Murillo’s proposed testimony, but believed it could explain why officers had collected the plastic case as a piece of evidence. The district court denied the motion for a mistrial. The court instructed the jury to disregard the prosecutor’s statement.

Garrison raised this issue again after the jury’s verdict in a motion for new trial. The court noted that ultimately the plastic case and Murillo’s testimony about the imprint in the foam in the case were admitted into evidence. The court concluded Garrison was not prejudiced by the mention of the imprint of a gun in the plastic case, and was not entitled to a new trial on this ground.

We review the district court’s ruling on a claim of prosecutorial misconduct for an abuse of discretion. *State v. Jacobs*, 607 N.W.2d 679, 689 (Iowa 2000). A party claiming prosecutorial misconduct must show misconduct, and that the misconduct resulted in prejudice to such an extent the defendant was denied a fair trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). 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). The party claiming prejudice has the burden of establishing such prejudice. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989).

We conclude the district court did not abuse its discretion in finding Garrison was not prejudiced by the prosecutor's conduct during the opening statement. The evidence concerning the gun imprint in the foam in the plastic case was discussed at length later in the trial, and Garrison was not prejudiced by the prosecutor's mention of the imprint during the opening statement.

**B.** Based on Garrison's motion in limine, the court ruled prior to the trial that the State could not present any evidence relating to the first criminal trial. During cross-examination of Van Haaften, Garrison made the point that during a deposition Van Haaften stated he took the temperatures of the bodies at about 2:00 p.m., but at first testified during the trial that he took the temperatures at 1:00 p.m. He later clarified to say he first saw the bodies at about 1:00 p.m., and did not take the temperatures until about 2:00 p.m.

On redirect examination, the State asked Garrison about his testimony during a deposition on April 30, 2003, and again in November 2003, that he took the temperatures of the bodies at 2:00 p.m. The prosecutor then asked the question, "This wasn't the first time you came into court today to determine a time of death in this case, is that correct?"

Garrison moved for a mistrial, claiming the prosecutor's statement clearly referred to the first criminal trial. The prosecutor explained he was asking about the prior depositions, when Van Haaften testified under oath as to the times in question. The district court ruled, "While dangerously close to a reference to a first trial, I don't believe it goes that far and, therefore, the motion for mistrial is overruled." The court advised the jury to disregard the question. Additionally,

the court ruled neither party could ask any more questions of Van Haaften, and he was excused.

This issue was also raised again in Garrison's motion for new trial. The court reiterated its previous ruling that the question "was dangerously close, but did not cross the line . . . ." Garrison claims the district court abused its discretion by failing to grant him a new trial based on alleged prosecutorial misconduct.

In considering claims of prosecutorial misconduct, we look at the alleged misconduct within the context of the entire trial. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). When viewed in context with the prosecutor's previous questions about Van Haaften's testimony during depositions, we agree with the court's conclusion that the question was not referring to the prior criminal trial. We conclude the district court did not abuse its discretion by denying Garrison's motion for a mistrial based on the allegations of prosecutorial misconduct.<sup>3</sup>

## **VII. Sufficiency of the Evidence**

Garrison asserts there was insufficient evidence in the record to prove that he committed two counts of first-degree murder. He points out that this case was based on circumstantial evidence. Garrison claims Martin's testimony was not credible because of Martin's prior drug use and because Martin wanted to get information about Garrison so he could make a deal with the State. Garrison also claims the testimony of Van Haaften was unreliable, and that he gave the wrong time of death.

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<sup>3</sup> Garrison also raises his claims of prosecutorial misconduct as a due process claim, asserting he was denied his due process right to a fair trial. Because we have found Garrison has not shown prosecutorial misconduct to the extent he was denied a fair trial, we also find he was not deprived of due process.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Schmidt*, 480 N.W.2d 886, 887 (Iowa 1992). A guilty verdict is binding on appeal, unless there is not substantial evidence in the record to support it, or the verdict is clearly against the weight of the evidence. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

The jury was free to believe or disbelieve the testimony of the witnesses, including Martin and Van Haaften. See *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). The question of the credibility of witnesses is for the jury to decide. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The jury could have found Martin's testimony concerning Garrison's confession was credible. Furthermore, if the jury believed Van Haaften's testimony concerning the time of death, then Garrison's statements that he saw the victims alive when he left the farm at noon would not be credible.

Other evidence also connected Garrison to the crimes. Garrison was at the scene of the crime in the timeframe when the murders were committed. He owned ammunition similar to that used in the murders. A spent cartridge found on the hood of his car matched the spent cartridges found at the scene of the murder. The murders were committed with a .22 caliber gun. Although witnesses had seen Garrison in possession of .22 Ruger, it could no longer be found after the murders. Considering all of this evidence, we conclude there is sufficient evidence to support the convictions in this case.

We affirm Garrison's convictions for two counts of first-degree murder.

**AFFIRMED.**