

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION	
	)	(Not For Official Publication)	
Plaintiff and Appellee,	)		
	)	Case No. 20040358-CA	
v.	)		
	)	F I L E D	
Mazhar Tabesh,	)	(August 18, 2005)	
	)		
Defendant and Appellant.	)	<table border="1"><tr><td>2005 UT App 353</td></tr></table>	2005 UT App 353
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Fourth District, Heber Department, 021500182  
The Honorable Donald J. Eyre Jr.

Attorneys: Ronald J. Yengich, Salt Lake City, for Appellant  
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake  
City, for Appellee

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Before Judges Bench, Davis, and McHugh.

PER CURIAM:

Defendant Mazhar Tabesh appeals his conviction for aggravated arson, in violation of Utah Code section 76-6-103, a first degree felony. See Utah Code Ann. § 76-6-103 (2003).

In order to prevail on a sufficiency challenge to a jury verdict, "the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." State v. Pritchett, 2003 UT 24, ¶22, 69 P.3d 1278 (quoting State v. Hopkins, 1999 UT 98, ¶14, 989 P.2d 1065). "We will not overturn a jury verdict unless the evidence presented at trial is 'so insufficient that reasonable minds could not have reached the verdict.'" Id. (quoting State v. Colwell, 2000 UT 8, ¶42, 994 P.2d 177).

Section 76-6-103 of the Utah Code provides that a person commits aggravated arson if that person "by means of fire or explosives . . . intentionally and unlawfully damages . . . a habitable structure." Utah Code Ann. § 76-6-103(1)(a). Tabesh argues that, while the State presented sufficient evidence to indicate that the fire at issue was the result of arson, the evidence at trial failed to establish that Tabesh started the

fire. Viewing the evidence in a light most favorable to the verdict, we disagree.

The evidence at trial established that Tabesh was the owner of the motel. Shortly before the fire occurred, Tabesh had increased the insurance on the motel and secured renters' insurance on his personal belongings as well. Tabesh was present at the motel when the fire ignited. The room where a portion of the fire was located was locked and unoccupied. The only fingerprints found on the door to the room belonged to Tabesh. Further, his fingerprints were found on a taco bag and a purported receipt for the room, each found inside the room in question. The fire detector located in the room, as well as various other fire detectors located in the motel, had been disconnected. Although Tabesh claimed that he rented the room in question to a guest, this guest could not be located, the purported receipt documenting this guest was illegible, and no information pertaining to this guest was available save a general physical description given by Tabesh. There was testimony that Tabesh acted calmly and without haste once alerted to the existence of the fire and that he did not call for emergency assistance until a passerby came to the scene to assist with the fire. Furthermore, despite claiming that a guest occupied the room in question, Tabesh did not produce a key to the burning room until authorities threatened to break down the door to the room.

Along with the evidence at trial supporting the fact that the fire at the motel was set intentionally, there is sufficient evidence to support the verdict finding Tabesh guilty of aggravated arson.

Next, Tabesh argues that the district court erred by denying his motion for a new trial, which was based upon an allegedly improper statement the prosecutor made during closing arguments.<sup>1</sup> Tabesh asserts that this statement impermissibly shifted the burden of proof.

In determining whether a statement constitutes prosecutorial misconduct,

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<sup>1</sup>Specifically, the prosecutor stated: "Even on the other examples that we had that officers went through, every single receipt the prior year and a half, all the receipts they had in the office--and, by the way, Mr. Tabesh said they didn't get all the receipts. This is what we have here. I haven't seen any others brought in."

the statement must be viewed in light of the totality of the evidence presented at trial. Further, because the trial court is in the best position to determine the impact of a statement upon the proceedings, its rulings on whether the prosecutor's conduct merits a mistrial will not be overturned absent an abuse of discretion.

State v. Cummins, 839 P.2d 848, 852 (Utah Ct. App. 1992).

The prosecutor's statements did not improperly shift the burden of proof to Tabesh. "The prosecution has the duty to argue the case based on the total picture of the evidence or lack of evidence, including the paucity or absence of evidence adduced by the defense." State v. Bailey, 712 P.2d 281, 286 (Utah 1985). Tabesh testified on direct examination as to the existence of additional motel receipts that the State had purportedly failed to collect. The prosecutor's statements indicated only that there was a "paucity or absence of evidence adduced by the defense" on this matter. Id. Because the prosecutor's statements did not shift the burden of proof to Tabesh, we cannot say that the prosecutor engaged in misconduct.<sup>2</sup>

Finally, Tabesh argues that the trial court erred when it permitted expert testimony regarding inconclusive testing of accelerants found at the motel. However, "[e]ven where error is found, reversal is appropriate only in those cases where, after review of all the evidence presented at trial, it appears that 'absent the error, there is a reasonable likelihood that a different result would have been reached.'" State v. Norton, 2003 UT App 88, ¶11, 67 P.3d 1050 (quoting Mule-Hide Prods. Co. v. White, 2002 UT App 1, ¶12, 40 P.3d 1155) (additional quotations and citations omitted). Tabesh has failed to show that a different result was likely in this case. While Tabesh alleges that the testimony at issue should have been excluded as irrelevant, aside from conjecture he is unable to show that such evidence was prejudicial.

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<sup>2</sup>In any event, the district court instructed the jury on multiple occasions regarding the burden of proof, including a specific instruction before deliberations that "at no time does the burden ever shift to the defendant to produce any evidence with respect to a criminal case." Thus, even if Tabesh had shown that the statement made by the prosecutor was improper, he has failed to show any prejudice. See State v. Kohl, 2000 UT 35, ¶24, 999 P.2d 7 ("Defendant has not shown, as is his burden, that the comment was so prejudicial as to defeat the mitigating effect of the court's two curative instructions.") (citation omitted).

Therefore, we affirm the judgment and conviction of the district court.

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Russell W. Bench,  
Associate Presiding Judge

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James Z. Davis, Judge

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Carolyn B. McHugh, Judge