IN THE COURT OF APPEALS OF IOWA

No. 9-475 / 08-0847
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AUDREY NICOLE GILLELAND,
Defendant-Appellant.

Appeal from the Iowa District Court for Montgomery County, James M. Richardson, Judge.

Defendant appeals from the judgment and sentence entered on her convictions of first-degree arson and attempted murder. **REVERSED AND REMANDED FOR RETRIAL.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, and Bruce E. Swanson, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel, J. and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, J.

Defendant Audrey Nicole Gilleland appeals from the judgment and sentence entered on her convictions following a jury trial to one count of first-degree arson in violation of Iowa Code sections 712.1(1) and 712.2 (2007), and two counts of attempted murder in violation of Iowa Code section 707.11. She was sentenced to a term not to exceed twenty-five years on each of the charges, with sentences to run concurrently.

I. Background Facts and Proceedings

Gilleland, her husband, Jason, and their fourteen-month-old daughter, M.G., lived in Red Oak, Iowa. On May 26, 2007, after a day of shopping, the family returned home between 2:30 and 3:00 in the afternoon. All three then lay down to take a nap. Gilleland awoke at approximately 3:15 p.m., in order to be at work at 4:00. Before going to work, she planned to stop by the house of Jason's grandmother, Betty Young, who was hosting a family gathering. Gilleland took the car keys from Jason while he was still sleeping, and left the house through the garage. Shortly after Gilleland arrived at Young's house, Young noticed black smoke in the distance, and speculated that the school was on fire. Young testified that Gilleland said, "that's my house" and then took off running. Other witnesses testified accordingly.

Jason awoke to M.G.'s screams, fought his way through the smoke to reach M.G., and carried her out of the house before collapsing on the front lawn. Both Jason and M.G. were taken to the hospital and treated for smoke inhalation. The fire department arrived at the Gilleland's house to find the attached garage engulfed in flames, and the fire spreading inside the residence. After

extinguishing the fire, the investigation as to the cause began. The Red Oak Fire Chief, Rick Askey, and David Schipper of the State Fire Marshal's Office both concluded the fire started in the garage by a direct source ignition, and an accelerant was not used. Gilleland became the prime suspect. Following a jury trial, conviction, and sentencing, Gilleland appeals.

II. Minutes of Evidence

Gilleland argues that the district court abused its discretion by allowing testimony beyond the scope of the minutes of evidence.[1] We review for an abuse of discretion. *State v. Hayes*, 532 N.W.2d 472, 476 (Iowa Ct. App. 1995). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *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. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003). Even if an abuse of discretion is found, reversal is not required unless prejudice is shown. *Id.*

Gilleland claims that despite the defense objection, the court improperly allowed Jason to testify beyond the scope of the minutes of evidence. At the time of filing a trial information, the prosecutor must file minutes of evidence of the witnesses which shall provide a "full and fair statement of the witness' expected testimony." Iowa R. Crim. P. 2.5(3). The purpose is to "eliminate most claims of foul play and provide meaningful minutes from which a defense can be

[1] The briefs make reference to a deposition taken of Jason, but any such deposition is not part of the record on appeal.

prepared." *State v. Ristau*, 340 N.W.2d 273, 274 (Iowa 1983). It is not possible to formulate fixed criteria, and the adequacy of minutes must be determined on a case-by-case basis. *State v. Ellis*, 350 N.W.2d 178, 181 (Iowa 1984). "The minutes need not list each detail to which a witness will testify, but they must provide defendant with a full and fair statement sufficient to alert him to the source and nature of the information against him." *Id.*

Gilleland argues the minutes of evidence did not provide "a full and fair statement" of the testimony Jason later gave at trial. The minutes stated:

> If called upon to testify, [Jason] will testify that he is a resident of 105 1st Avenue in Red Oak, Iowa, and has been residing at said residence with his wife, Audrey Nicole Gilleland (defendant herein) and his daughter, [M.G.]; that on or about May 26, 2007, he and his daughter were sleeping in the residence at the time the fire started; that he will testify to any and all relevant facts herein.

At trial, Jason testified to a conversation he had with Gilleland during a trip to Missouri, two weeks after the fire. Jason stated that Gilleland "asked me to take the rap for her, and I said, No, you're crazy. It will be figured out later." Defense counsel then lodged an objection arguing that Jason's testimony was beyond the scope of the minutes. The court overruled this objection.

While the minutes indicated that Jason would testify to "any and all relevant facts herein," there was no hint that a conversation two weeks after the fire, which strongly suggested an admission by Gilleland, would be encompassed by the minutes of evidence. Gilleland's objection to such testimony is grounded in the very purpose of providing a "full and fair" statement so as to eliminate a claim of "foul play." *Ristau*, 340 N.W.2d at 274.

The State argues Jason's testimony was not beyond the scope of the minutes of evidence, but even if it was, Gilleland was not surprised, and hence not prejudiced by the testimony. We disagree. Gilleland did not have notice that Jason's version of their conversation would become a part of his testimony. The minutes of evidence did little more than identify Jason as a witness and recognize his presence at the fire when it began; the minutes were too cursory to allow Gilleland to prepare a defense to an alleged inculpatory statement. *See State v. Walker*, 281 N.W.2d 612, 614 (Iowa 1979). Upon review of the record, we conclude that Gilleland's objection should have been sustained, as Jason's testimony regarding Gilleland's incriminating comment was not within the scope of the minutes. *Id.* The trial court abused its discretion in allowing this unanticipated testimony to become a part of the record. "The ameliorative remedy of a new trial . . . is intended to encourage State compliance with the plain mandate of rule [2.5(3)]." *State v. Olsen*, 293 N.W.2d 216, 220-21 (Iowa 1980). As Gilleland was not provided a "full and fair" statement of Jason's expected testimony, she is entitled to a new trial.

REVERSED AND REMANDED FOR RETRIAL.