IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. CLAYTON CURTIS BROWN, Defendant-Appellant.	SUPREME COURT NO. 23-0055

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
THE HONORABLE DEREK JOHNSON, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 24th day of August, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Clayton Brown, No. 6636851, North Central Correctional Facility, 313 Lanedale, Rockwell City, IA 50579-7470.

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JI/ls/08/23

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STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about August 4, 2023. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. The district court erred by denying Brown's motion for mistrial after an officer, prompted by the prosecutor, testified Brown had a criminal history beyond that included in the stipulation.

Regarding error preservation, Brown's motion for mistrial was based on the State's violation of rules 5.401, 5.403, and 5.404(b). The parties and the court treated it as such—it was obvious the discussion centered around prior bad acts evidence, even though that phrase was not specifically uttered. (9/20/2022 Trial Tr. p. 33 L. 2–p. 35 L. 4). And a prior bad acts issue inherently also raises a question of relevance. See State v. Kidd, No. 12-1917, 2014 WL 3749365, at *3 (Iowa Ct.

App. July 30, 2014) (unpublished table decision) (citing State v. Putman, 848 N.W.2d 1, 9–10 (Iowa 2014)). Brown's challenge, including the rule violations underlying it, is fully preserved for review. See Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012) ("If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is incomplete or sparse, the issue has been preserved.") (citations and internal quotation omitted).

Turning briefly to the standard of review, it is for abuse of discretion. State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986). The abuse of discretion standard is generally deferential to the district court's decision. However, its application is not "more deferential in the context of a motion for mistrial" than in other areas subject to the same standard. See State's Proof Brief pp. 12–13. A court either has discretion in a given area, or it does not. The question is always the same: whether the district court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly

unreasonable." See State v. Huser, 894 N.W.2d 472, 498 (Iowa 2017) (citation omitted).

The district court abused its discretion in denying Brown's motion for mistrial, because that denial was based on an erroneous understanding of Brown's stipulation. The district court believed Brown had "stipulated to basically two convictions." (9/20/2022 Trial Tr. p. 34 L. 23–24). That was incorrect; he stipulated to being a felon and to having a barred license status. (Stipulation) (App. p. 17). That he stipulated to being barred "as a habitual offender" does not change this analysis. A habitual offender designation is the only way one's license becomes barred in Iowa; "barred" and "barred as a habitual offender" mean exactly the same thing. See Iowa Code §§ 321.555, 321.561; State v. Cook, 565 N.W.2d 611, 614–15 (Iowa 1997). A wide variety of circumstances can result in a habitual offender designation, ranging from vehicular manslaughter to scheduled violations of the traffic code. Iowa Code § 321.555. But any non-felony offense in

Brown's criminal history was irrelevant. As a result, relying on his barred license (and an inference of underlying convictions) does not help the State. It only makes matters worse that Slight's reference to "convictions" potentially meant misdemeanors of no relevance whatsoever.

The jury instructions did not negate the prejudice caused by Slight's improper testimony. While the court gave standard instructions about how to evaluate evidence and the State's burden of proof, it did not give a limiting instruction informing the jury for what purpose it could and could not consider Brown's criminal history. District courts are supposed to give that instruction when prior bad acts evidence is submitted, whether it is requested or not. State v. Kimbrough, No. 21-2010, 2023 WL 4755530, at *4 (Iowa Ct. App. July 26, 2023) (unpublished table decision) (citing State v. Thoren, 970 N.W.2d 611, 627 (Iowa 2022); State v. Rodriguez, 636 N.W. 2d 234, 243 n.2 (Iowa 2001)). Without such an instruction, the jury was free to consider Brown's history (both that contained

in the stipulation and in Slight's testimony) for any purpose, including an improper one. See id.; see also State v. Matlock, 715 N.W.2d 1, 6–7 (Iowa 2006) (district court erred in failing to instruct jury it may not consider prior bad acts evidence for propensity).

The court's instruction not to consider evidence it told the jury to disregard is also no help, because the court did not tell the jury to disregard the improper testimony at issue. Brown objected and moved to strike, and the court "[s]ustained" that request, but never instructed the jury to disregard the testimony or explained what the motion to strike meant. (9/20/2022 Trial Tr. p. 32 L. 3–9). The fact that Brown later declined a cautionary instruction of the sort courts, including the district court here, recognize might do more harm than good does not mean he was not prejudiced by the error. See (9/20/2022 Trial Tr. p. 35 L. 5–7); State v. Huser, 894 N.W.2d 472, 499 (Iowa 2017) (quoting Jones v. State, 128 So.3d 199, 200 (Fla. Dist. Ct. App. 2013) (per

curiam) (defense counsel "strategically declined a curative instruction because such an instruction would be 'like putting the fire out with gasoline.'").

Slight's testimony Brown had "convictions" which were significant to his possession of a firearm was improper. Brown entered a stipulation specifically so this sort of testimony was not necessary, and Slight's reference to "convictions" went beyond Brown's stipulation that he was a felon and his license was barred. The district court relied on an erroneous interpretation of the stipulation to conclude the error was not prejudicial, and thus abused its discretion. Brown's motion for mistrial should have been granted.

Conclusion

The district court abused its discretion in overruling Brown's motion for mistrial. His convictions should be vacated and the case remanded for new trial, subject to any limitations resulting from the determination of other issues raised.

II. The evidence was insufficient to establish the identity element of any offense of conviction.

While appellate review of sufficiency of evidence follows a deferential standard, it still requires the appellate court to consider all of the evidence presented at trial, not just the evidence supporting guilt, and a guilty verdict must be based on more than speculation, suspicion, or conjecture. State v. Kern, 831 N.W.2d 149, 158 (Iowa 2013) (citations omitted). Here, that evidence included Slight's claim he positively identified Brown as the driver of the vehicle, contradicted by his acknowledgment he identified the driver as someone else at the time and his dash cam video showing he was behind the vehicle the entire time, never in a position to clearly see the driver's face. (9/20/2022 Trial Tr. p. 20 L. 7–18, p. 54 L. 3–10, p. 54 L. 19–p. 55 L. 22, p. 63 L. 7–13; Exhibit 30 Dashcam at 00:31–01:45).

This contradictory evidence is not a substantial basis for a rational jury to conclude, beyond a reasonable doubt, that Brown was the driver. This remains true despite the fact some

of Brown's property was located in the car. This might support an inference he had been in the car before—which would make sense if Slight was correct the registered owner was Brown's girlfriend—but the extra step to conclude he was driving on this occasion does not rise above speculation, suspicion, or conjecture.

Conclusion

The evidence was insufficient to establish the identity element of any offense of conviction. Brown's convictions should be vacated and the case remanded for dismissal of all counts.

III. The evidence was insufficient to establish Brown knowingly possessed a firearm.

The State did not establish that Brown was in "exclusive" possession of the vehicle. As the State acknowledges, being alone in a vehicle is not the same as being in exclusive possession of it. See State's Proof Brief p. 24; State v. Dewitt, 811 N.W.2d 460, 474 (Iowa 2012) ("[P]ossession may be inferred if the defendant is in exclusive possession of the

premises in which the contraband was located. Vehicles, however, alter the exclusive possession rule because of its modern role as a shared accommodation."). Thus, the fact that only one person was in the vehicle during the chase, even assuming that person was Brown, cannot lead to a legitimate inference of knowing possession of the firearm tucked beneath the seat.

The ammunition and firearm were not in plain sight; the ammunition was in a closed pill bottle within the closed center console as well as under the passenger seat, and the firearm was far underneath the driver's seat. (9/20/2022 Trial Tr. p. 46 L. 22–p. 48 L. 4, p. 49 L. 10–15, p. 58 L. 16–23; Exhibit). None of the items linked to Brown—a wallet and a belt—were in a location where he would have seen the firearm or ammunition. See (Exhibit 9 Passenger Seat; Exhibit 10 Wallet in Cupholder) (Ex. App. pp. 6-7). And while the jury might infer the driver's flight was evidence of a guilty mind, the question remains: guilty of what? Brown stipulated his license

was barred; this is a reason, supported by the evidence, which would explain flight (assuming Brown was the driver). But taking the additional step of inferring knowledge of the firearm under the driver's seat crosses the line from legitimate inference to impermissible speculation. See State v. Jones, 967 N.W.2d 336, 342 (Iowa 2021) (citing State v. Ernst, 954 N.W.2d 50, 59 (Iowa 2021)) ("[T]he relevant inquiry is whether a fact finding is a legitimate inference that may be fairly and reasonably be deduced from the record evidence. The 'stacking' of inferences is problematic only when the jury's finding crosses from logical inference to impermissible speculation."). It is one thing to say flight may be evidence of a guilty state of mind, but quite another to say flight is evidence of guilt of everything the State alleged. Even viewing the evidence in the light most favorable to the State, including all reasonable inferences which could be drawn therefrom, the evidence was insufficient to support Brown's conviction for possession of a firearm by a felon.

Conclusion

The evidence was insufficient to support Brown's conviction for possession of a firearm by a felon, and in turn was also insufficient to support Brown's conviction for eluding while participating in a felony. Those convictions should be vacated and the case remanded for dismissal of the felon in possession count, and resentencing as an aggravated misdemeanor on the eluding count.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.44, and that amount has been paid in full by the Office of the Appellate Defender.

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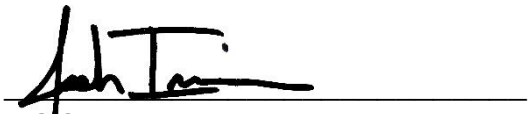
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,770 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



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