==
This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 211
The People &c.,
Respondent,
v.
Sherman Rivers,
Appellant.

Jonathan M. Kratter, for appellant.
Victor Barall, for respondent.

JONES, J.:

Defendant was charged with numerous offenses, including three counts of arson in the first degree (Penal Law § 150.20), in connection with two fires set five days apart in a four-story apartment building located at 408 Greene Avenue in Brooklyn, New York. The evidence adduced at trial established that defendant, who did not own the building, engaged in a scheme to profit from

its illegal sale. Defendant gained control of the property by means of a forged and fraudulently notarized deed. He then contracted to sell it to a third party for $300,000. Pursuant to a clause in the sales contract, the property was to be delivered "vacant and free of leases or tenancies." To that end, defendant, on two occasions, paid others to set fires in the building to drive the tenants out. Defendant was convicted, upon a jury verdict, of three counts of arson in the first degree, one count relating to a fire set on May 25, 2004 (expectation of pecuniary profit), and the other two counts relating to a fire set on May 30, 2004 (expectation of pecuniary profit and use of an incendiary device).

On appeal, defendant argued that the prosecutor repeatedly violated the trial court's Molineux rulings (see People v Molineux, 168 NY 264 [1901] [for Molineux rule]; People v Allweiss, 48 NY2d 40, 46-48 [1979] [for summary of principles related to Molineux rule]) by eliciting evidence of an uncharged arson attempt and of his prior bad acts and associations -- the elicited testimony linked defendant to violence, guns, the Nation of Islam, and a violent motor cycle gang. In defendant's view, the prosecutor's repeated violations of the court's Molineux rulings cumulatively denied him the right to a fair trial (see People v Calabria, 94 NY2d 519, 522 [2000]).

Defendant further argued that the elicited expert testimony concerning the origins of the fires was inadmissible

under People v Grutz (212 NY 72, 82 [1914] ["The physical facts" of an arson are always "so simple that they can be readily understood when properly described, and it is then for the jury to draw the appropriate conclusion," without guidance of expert opinion]) and People v Narrod (23 AD3d 1061, 1062 [4th Dept 2005] [it was error to allow an "arson investigator to testify that he had ruled out accidental causes of the fire"]).[1] According to defendant, the experts' improper testimony invaded the jury's province and denied him the right to a fair trial.

The Appellate Division affirmed the convictions, stating that any error concerning the contested testimony was harmless (74 AD3d 995, 995 [2d Dept 2010]). A Judge of this Court granted defendant leave to appeal and we now affirm.

---

[1] With respect to the first fire, a battalion chief testified that "it appeared a flammable liquid had been put on the stairs and lit on fire" and "[t]here was no other apparent cause for the fire." The chief further testified that the second fire was "suspicious."

The fire marshal who investigated the first fire testified that the "pour pattern" indicated that a flammable liquid had run from one step down to the next and been ignited. He further testified that there are three causes of fires, "accidental, natural and non-accidental," and that the fire was neither natural nor accidental but must have originated "in the vapors of a flammable liquid that was introduced to the steps."

The fire marshal who investigated the second fire testified that he eliminated accidental causes of the fire due to the absence of any ignition sources and natural causes because there had been no lightning. He further testified that "[t]he fire was originated by vapors of a flammable liquid introduced." Finally, he testified that his findings were consistent with the use of an incendiary device such as a Molotov cocktail.

Although, as the People concede, certain questions asked by the prosecutor at trial clearly violated the trial court's Molineux rulings, the contested testimony elicited, on the whole, was not significant. That is, if defendant was prejudiced at all, such prejudice was minimal. Each time after defendant moved for a mistrial based on an alleged violation of the court's Molineux rulings, the trial court, in its discretion, considered the arguments of the parties, concluded that what happened did not rise to the level of a mistrial and, in certain instances, provided further instruction to counsel to refrain from making statements regarding improper topics. For example, at the conclusion of the prosecutor's opening statement, defendant moved for a mistrial, arguing, *inter alia*, that the prosecutor's references to the Nation of Islam and Muslims were intended to inflame and prejudice the jury. After ruling that a mistrial was not warranted, the court told the prosecutor to "stay focused" and to avoid the appearance of stereotyping certain individuals just because they are members of the Nation of Islam and/or Muslims.

The trial court also took steps to minimize the impact of arguably improper testimony or prosecutorial statements during the trial. For example, after the prosecutor made conclusory statements of fact during his opening statement, the court sustained defense counsel's objection and reminded the jurors in no uncertain terms that "what counsel says is not evidence in the

case. Rather, you may consider the opening statement as a preview or an outline of what counsel believes the evidence will prove in the case."

In any event, to the extent any evidence subject to the trial court's Molineux rulings was improperly admitted, such error was harmless (see People v Crimmins, 36 NY2d 230, 240-242 [1975]). The evidence against defendant, from his own taped admissions, and testimony of the individual who set the first fire at defendant's behest, overwhelmingly established defendant's guilt of the crimes charged. Further, there was no reasonable possibility or significant probability that the improper questions and elicited references to defendant's bad acts and negative associations affected the jury's verdict, or that the absence of such errors would have led to an acquittal.

Defendant's second argument--that the expert testimony, ruling out accidental and natural causes of the fires and concluding that one of the fires was intentionally set, invaded the jury's province--is equally unavailing. At the outset, we consider the rule set forth in Grutz prohibiting expert testimony concerning whether a fire was intentionally set. This prohibition occurs as dictum in an opinion written in 1914 -- at a time when fire investigations involved far less technical expertise than they do today. Nevertheless Grutz is still frequently cited for the proposition that an expert may not invade the province of the jury by testifying that a fire was

intentionally set[2] or that the facts are "consistent" with an intentionally set fire.[3] It has continued to be cited even after Appellate Division panels have held that an arson expert may testify to a reasonable degree of scientific certainty that, based on the expert's investigations, all possible natural and accidental causes of the fire had been eliminated[4] -- thus eliminating all but intentional causes.

The result is that the law in New York is at once confusing and anomalous. As the Connecticut Supreme Court has recently noted,

> "the rule, followed by the courts of New York and Virginia, that precludes an expert witness from giving an opinion about the ultimate issue in arson cases, namely, whether the fire was intentionally set. . . . is a distinct minority position that stands in stark contrast to the 'modern trend,' which is 'to abolish the ultimate issue prohibition'"

(State of Connecticut v Beavers, 963 A2d 956, 977 n 27 [Conn 2009], quoting 1 P. Giannelli & E. Imwinkelried, Scientific Evidence § 5.07, at 321 [4th ed 2007], and citing cases).

---

[2] See e.g. People v Champion (247 AD2d 901, 901 [4th Dept 1998], lv denied 91 NY2d 971 [1998]); People v Avellanet (242 AD2d 865, 866 [4th Dept 1997], lv denied 91 NY2d 868 [1997]).

[3] See e.g. People v Negron (280 AD2d 557, 558 [2d Dept 2001]).

[4] See e.g. People v Capobianco (176 AD2d 815, 816 [2d Dept 1991], lv denied 79 NY2d 825 [1991]); Champion (247 AD2d at 901); Avellanet (242 AD2d at 866); People v Maxwell (116 AD2d 667, 668 [2d Dept 1986], 67 NY2d 886 [1986]).

We now put the Grutz proposition to rest. New York has a well-established body of case law concerning the admissibility and limits of expert testimony, that should be brought to bear in deciding what an arson expert may tell the jury in a particular case. "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (De Long v County of Erie, 60 NY2d 296, 307 [1983] [citations omitted]; see People v Taylor, 75 NY2d 277, 288 [1990] [same]). Moreover, this principle applies to testimony regarding both "the ultimate questions and those of lesser significance" (People v Cronin, 60 NY2d 430, 433 [1983], quoting Van Wycklen v City of Brooklyn, 118 NY 424, 429 [1890]).

Although, in deciding whether expert testimony is admissible, courts must determine whether "the potential value of the evidence is outweighed by the possibility of undue prejudice to the defendant or interference with the province of the jury" (People v Bennett, 79 NY2d 464, 473 [1992]), "courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province" (People v Lee, 96 NY2d 157, 162 [2001]). "Expert opinion testimony is used in partial substitution for the jury's otherwise exclusive province which is to draw 'conclusions from the facts.' It is a kind of authorized encroachment in that respect" (People v Jones, 73 NY2d 427, 430-431 [1989], quoting Cronin, 60 NY2d at 432 [citation

omitted]). Obviously, expert testimony would not generally be admissible in a case where the fire's cause is not in question.

Here, because the evidence adduced at trial conclusively established, apart from the expert testimony, that the subject fires were intentionally set, it can be argued that the admission of expert testimony was largely unnecessary. In any event, any error was harmless, because the evidence of defendant's guilt was overwhelming and there was no significant probability that the jury would have acquitted defendant without the expert testimony (see Crimmins, 36 NY2d at 240-242).

Accordingly, the order of the Appellate Division should be affirmed.

* * * * * * * * * * * * * * * * *

Order affirmed. Opinion by Judge Jones. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Decided November 22, 2011