IN THE COURT OF APPEALS OF IOWA

No. 0-006 / 08-1751
Filed February 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS JOSEPH SCHOFIELD,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

The defendant appeals from his convictions and sentences for two counts of first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Dan Voogt and Stephanie Cox, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

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

MAHAN, S.J.

Dennis Schofield appeals from his convictions and sentences for two counts of first-degree murder. He contends the trial court erred in admitting evidence of other crimes and in allowing a firearm demonstration. He also contends his trial counsel was ineffective in failing to object to the admission of certain diary entries. Because the district court acted within its discretion in admitting evidence and counsel breached no duty, we affirm.

I. Background Facts and Proceedings. In the early morning hours of August 24, 2004, Lisa and Terry Dilks were murdered in their Urbandale home. They were each shot multiple times. Two of Lisa's coworkers discovered them later that morning.

The previous summer, the Dilkses had been caught selling methamphetamine out of their home. As part of a plea bargain, they had agreed to work with law enforcement, performing controlled buys of drugs from Raymondo Cruz and his girlfriend, Lisa Schofield. Lisa Dilks had informed law enforcement that Cruz and Lisa Schofield were aware of their cooperation with the police and that she was fearful for her safety. The Dilkses had planned to meet with an assistant country attorney to discuss their testimony against Cruz and Lisa Schofield on August 25, 2004, the day after their murders.

In investigating the murders, the police contacted Jeffrey Jones, a close friend of Lisa Schofield's brother, Dennis Schofield. Jones refused to cooperate with the murder investigation, and police did not have contact with him again until September 2006. In February 2007, Jones finally agreed to speak about the

case after being arrested for drug dealing. In exchange for his cooperation, it was agreed he would not be prosecuted.

Jones stated that Lisa Schofield had told Dennis Schofield Lisa and Terry Dilks were "informing on her" and that Lisa gave Dennis the Dilkses' address, which he wrote down and placed in the center console of his vehicle. Jones told police that on the morning of the murders, Schofield confessed to killing the Dilkses. Jones then helped Schofield clean his car, shoes, and clothing. Jones also assisted Schofield in disposing of the murder weapon, which Jones claims was a .40 caliber Smith & Wesson gun with a laser sight that belonged to their mutual friend, Jerry Ziebell.

On May 2, 2007, Schofield was charged with two counts of murder in the first degree. Schofield filed a motion in limine, seeking to suppress his journal entries. The district court sustained the objection to admitting the journal in its entirety, finding the State could revisit the issues of admitting specific entries at trial once a foundation had been laid. At trial, eight pages of the journal were admitted into evidence.

A trial was held in August 2008. During trial, Jones testified that he had committed burglaries with Schofield in 1999. A State witness also demonstrated the mechanics of a Smith & Wesson Sigma series .40 caliber gun for the jury. At the close of trial, the jury convicted Schofield on both counts of first-degree murder. Schofield appeals.

II. Scope of Review. When reviewing a trial court's rulings on admissibility of evidence, we use an abuse-of-discretion standard. *State v.*

Jones, 490 N.W.2d 787, 789 (Iowa 1992). We review ineffective-assistance-of-counsel claims de novo. *State v. Cromer*, 765 N.W.2d 1, 6 (Iowa 2009).

III. Evidence of Other Crimes. Schofield first contends the district court erred in allowing Jones to testify regarding burglaries he committed with Schofield in 1999.

Iowa Rule of Evidence 5.404(*b*) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The list of admissible "other purposes" stated above is not exclusive. *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997). Rather, "[t]he key is whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts." *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992) (citations omitted). If the evidence is relevant, then the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.*

As the State notes, trial counsel objected to the evidence in question "on the basis of Rule 5.402 and 5.403" relating to relevance and prejudice. Accordingly, any claim the evidence is a violation of rule 5.404(*b*) is not properly before us. *State v. Mann*, 602 N.W.2d 785, 791 (Iowa 1999) ("The orderly, fair and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial and a different one on appeal.") However, Schofield makes a claim on appeal that the evidence was irrelevant, stating

"there was no need for the prosecution to introduce evidence of prior burglaries." He also argues the evidence was prejudicial as "[t]he degree to which the jury was likely to be improperly aroused was high." Because these claims were raised at trial and ruled upon by the district court, we address their merit on appeal.

The basic test of relevancy is whether the evidence offered would make the desired inference more probable than it would be without the evidence. *Casady*, 491 N.W.2d at 785. Here, the State offered the evidence that Jones had committed burglaries with Schofield to establish "the incredible closeness of their relationship over time" and "not to impugn the character of the defendant." The district court agreed the evidence was relevant, finding:

> You know, I may have a close relationship with my brother or with a friend, but that doesn't mean I am going to share evidence of a crime with that person. And I think that's why the nature of the relationship—which is exactly what was true in *Shortridge*, because that was a criminal relationship that was allowed in the case.

We find the district court did not abuse its discretion in admitting the testimony regarding burglaries Jones and Schofield committed together. It was necessary to establish the nature of the relationship between Jones and Schofield to explain why Schofield would confess to the murders and seek his assistance in disposing of the evidence. *See State v. Shortridge*, 589 N.W.2d 76, 83 (Iowa Ct. App. 1998) (holding evidence of the defendant's involvement in prostitution was not only relevant to a motive for killing the victim, but was "also relevant to establishing the relationship between the parties involved in this case"). The evidence was relevant to Jones's credibility as a witness. *See State*

v. Chambers, 370 N.W.2d 600, 602 (Iowa Ct. App. 1985) (holding "the jury should know all facts which may reflect on [witness] credibility").

We then turn to Schofield's claim the evidence was unfairly prejudicial. Rule 5.403 requires the trial court to weigh the probative value of relevant evidence against the danger of unfair prejudice. *State v. Reynolds,* 670 N.W.2d 405, 414 (Iowa 2003). A finding that the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice precludes admissibility of even relevant evidence. *State v. Castaneda,* 621 N.W.2d 435, 440 (Iowa 2001). "The probative value of evidence is measured by its tendency to make a material fact more or less probable." *Reynolds,* 670 N.W.2d at 414. Unfairly prejudicial evidence is evidence that

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case.
>
> The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

State v. Plaster, 424 N.W.2d 226, 231-32 (Iowa 1988) (quoting 1 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 403[03], at 403-33-40 (1986)).

We cannot conclude the probative value of Jones's credibility as a witness was outweighed by the danger of unfair prejudice. The mention of Schofield's participation in burglaries five years before the murders occurred was not likely to arouse the jury's sense of horror or provoke an instinct to punish, given the nature of the crime for which Schofield was being prosecuted. *See State v.*

Delaney, 526 N.W.2d 170, 176 (Iowa Ct. App. 1994) ("The prior uncharged crime or bad act did not involve conduct more sensational or disturbing than the crimes prosecuted.")

Because the evidence was both relevant and there was no danger of unfair prejudice, the trial court acted within its discretion in admitting the testimony.

IV. Firearm Demonstration. Schofield next contends the court erred by allowing a witness for the State to demonstrate a .40 caliber Smith and Wesson pistol for the jury. He claims there was no probative value to the demonstration and that the passions of the jury were improperly inflamed.

The murder weapon in this case was never recovered. Jones testified that it was disposed of when it was thrown into the Des Moines River. Jones further testified Schofield used a .40 caliber Smith and Wesson he received from Ziebell to murder the Dilkses. Ziebell testified he once had the gun. In order to connect a weapon of this make and model with the murders, the State presented the testimony of a criminalist that the shell casings and bullets found at the scene were fired by a .40 caliber Smith & Wesson pistol. In so doing, a criminalist testified how he reached that conclusion, and demonstrated the way markings are made on the cartridges.

Demonstrative evidence is usually received if it affords a reasonable inference on a point in issue. *State v. Thornton*, 498 N.W.2d 670, 674 (Iowa 1993). Here, the firearm demonstration was relevant to connect the gun Schofield received from Ziebell and discarded with Jones to the one used to

murder the Dilkses. *See State v. Henderson*, 269 N.W.2d 173, 179 (Iowa 1978) (holding the court "acted well within its discretion in admitting the experiment gun of the same kind as the homicide gun which could not be located").

Schofield argues the probative value of the demonstration was outweighed by the danger of unfair prejudice because of the way the demonstration was carried out, complaining the criminalist "stood about five feet in front of the jury box," talked for approximately ten minutes, lifted the gun into the jury box at times, and "dry fired" the weapon twice. However, no objection was made to the way in which the demonstration was carried out until after the demonstration was finished. As the trial court noted, "[T]here was no objection from the defendant as to anything during the course of Mr. Murillo's demonstration as to any particulars of it, which I certainly would have entertained at the time." A party objecting has the duty to state what he complains of so the trial court has an opportunity to rule or correct the error which is now argued in this court. *State v. Baskin*, 220 N.W.2d 882, 886 (Iowa 1974). Schofield has not preserved error as to any prejudice regarding the specific manner in which the demonstration was carried out.

We conclude the district court acted within its discretion in allowing the demonstrative evidence.

V. Ineffective Assistance of Counsel. Finally, Schofield contends his trial counsel was ineffective in failing to object to the introduction of select portions of his journal into evidence.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Maxwell,* 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly,* 657 N.W.2d 462, 465 (Iowa 2003).

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam v. State,* 745 N.W.2d 719, 721 (Iowa 2008). We start with a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *DeVoss v. State,* 648 N.W.2d 56, 64 (Iowa 2002). We presume the attorney performed competently, and the defendant must present an affirmative factual basis establishing inadequate representation. *Millam,* 745 N.W.2d at 721. It is not enough for a postconviction applicant to assert that defense counsel should have done a better job. *Dunbar v. State,* 515 N.W.2d 12, 15 (Iowa 1994). Ineffective assistance of counsel claims

> involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

Ledezma v. State, 626 N.W.2d 134, 143 (Iowa 2001).

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Millam,* 745 N.W.2d at 722; *Ledezma,* 626 N.W.2d at 143. A reasonable probability is one that undermines confidence

in the outcome. *Millam,* 745 N.W.2d at 722. To establish prejudice, the defendant must "state the specific ways in which counsel's performance was inadequate and how competent representation would have changed the outcome." *Rivers v. State,* 615 N.W.2d 688, 690 (Iowa 2000) (quoting *Bugley v. State,* 596 N.W.2d 893, 898 (Iowa 1999)).

Counsel did not breach an essential duty in failing to object to two of the individual journal entries. Counsel made a motion in limine to exclude the journal in its entirety, arguing in part that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Schofield. When the issue was revisited in regard to certain journal entries, counsel stated, "I understand the Court's ruling on the motion in limine. I don't want to be saying that we're conceding this. . . . We have already made a record on that." The trial court stated, "I understand the defense is not agreeing with any of the pages" and went on to sustain an objection to the first page of the selected jury entries offered by the State and ruled "as to the remaining pages that I think the probative value exceeds the prejudicial effect." Because counsel objected to all of the journal entries, no essential duty was breached. Accordingly, we find Schofield was not rendered ineffective assistance of counsel.

AFFIRMED.