

IN THE COURT OF APPEALS OF IOWA

No. 0-691 / 10-0407
Filed November 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DUSTIN ODELL KENDRICK,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, David H. Sivright Jr., Judge.

Defendant appeals his conviction for engaging in a prohibited activity at a gambling game in violation of Iowa Code section 99F.15(4)(d) (2009).

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Michael L. Wolf, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Eisenhauer, J., and Huitink, S.J.*
Tabor, J., takes no part.

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

HUITINK, S.J.**I. Background Facts & Proceedings**

The record includes evidence of the following: On February 5, 2009, Dustin Kendrick was playing “Ultimate Texas Hold’em,” a card game, at the Wild Rose Casino in Clinton. Connie Boles, a dealer at the Wild Rose, testified she observed Kendrick place two five-dollar cheques on his trips bet¹ after play had commenced. Kendrick was not allowed to place additional cheques on his trips bet. Kendrick’s hand for that game included a straight, and he would have won \$140 on his trips bet, but instead he was paid \$100.

Kendrick was charged with prohibited activities at gambling, in violation of Iowa Code section 99F.15(4) (2009). The State alleged Kendrick attempted to engage in a practice known as “capping” by placing additional cheques on his trips bet after a round of play had commenced, which is not permitted by the rules of the game. Kendrick filed a motion in limine, seeking to exclude evidence that he had been observed capping bets while playing “Caribbean Stud Poker” at the Mississippi Belle II in 2007. On that occasion the rules of the game were fully explained to him. Kendrick asked the court to exclude evidence of the 2007 incident under Iowa Rule of Evidence 5.403. The State responded that it did not intend to present evidence of the 2007 incident unless Kendrick testified the February 5, 2009 capping incident was a mistake.

¹ In “Ultimate Texas Hold’em” at the Wild Rose Casino, a player could make a trips bet, but was not required to, in playing the game. To make this wager the player would place cheques in the trips area of the table at the beginning of the game. The player would be betting on receiving a five-card hand of three of a kind or better. A trips wager is payable whether or not the player beats the dealer’s hand. According to the rules of the game, a trips wager may not be increased, decreased, or withdrawn after the first card is dealt.

The trial judge reserved ruling on the motion in limine, stating, “If Kendrick testified, then we’ll consider outside the presence of the jury whether this comes in rebuttal.” Kendrick renewed his motion in limine at trial. The court’s ruling on Kendrick’s renewed motion in limine states, “the incident of February of 2007, where he was observed ‘capping bets,’ while playing Caribbean Stud poker will be admissible, should the defendant testify and claim that his actions . . . were a mistake.”

Kendrick did not testify at trial. The court then had the State summarize what its rebuttal evidence would have been if defendant testified and claimed his actions were an accident or mistake. The court again ruled the evidence “is relevant to show lack of mistake or accident in this incident—in the Texas Hold’em incident—because he had done it before and had been told is was wrong, and they reviewed it with him.” Kendrick reiterated his decision not to testify.

The jury found Kendrick guilty of prohibited activities at gambling. He was sentenced to a term of imprisonment not to exceed five years. The sentence was suspended, and he was placed on probation for a period of two years. Additionally, Kendrick was banned for life from any casino under the control of the Iowa Racing and Gaming Commission. Kendrick appeals the district court’s decision on his motion in limine.

II. Standard of Review

On evidentiary rulings concerning the admission of evidence of prior bad acts, we review for an abuse of discretion. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009). We will find an abuse of discretion where the court exercises

its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003).

III. Preservation of Error

Kendrick contends the district court abused its discretion by ruling that if he testified his actions were the result of accident or mistake, the State could present rebuttal evidence concerning the 2007 “capping” incident. The State asserts Kendrick did not preserve error on this claim because he did not testify. Furthermore, the evidence of prior bad acts was not presented to the jury.

In *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997), the State gave notice that if the defendant testified the State would seek to impeach him through evidence of his prior criminal record. The district court overruled the defendant’s motion in limine seeking to exclude the State’s proposed evidence. *Brown*, 569 N.W.2d at 115. The defendant decided not to testify. *Id.* He argued on appeal that the court’s ruling on his motion in limine was incorrect. *Id.* at 117-18. The Iowa Supreme Court concluded the defendant had not preserved his claim because he “was required to testify at trial and face the challenged evidence before complaining of it.” *Id.* at 118.

The court gave several reasons for this conclusion: (1) a defendant cannot create an alleged error merely by announcing he would have taken the stand but for the court’s ruling because it is unknown whether the election not to testify may have been the result of some other tactical reason; (2) it is uncertain whether the State would have actually used the impeaching evidence because the State could change tactics or strategy; and (3) the problem is entirely theoretical until the defendant testifies, “[o]nly after an accused testifies will a

reviewing court have an adequate record to determine whether the accused was prejudiced.” *Id.*

The United States Supreme Court considered this issue in *Luce v. United States*, 469 U.S. 38, 41-42, 105 S. Ct. 460-61, 463, 83 L. Ed. 2d 443, 447-48 (1984), as follows:

A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context. This is particularly true under Rule 609(a)(1), which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant’s testimony, which is unknowable when, as here, the defendant does not testify.

Any possible harm flowing from a district court’s *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. . . .

. . . .

. . . Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole; it will also tend to discourage making such motions solely to “plant” reversible error in the event of conviction.

(Footnotes omitted).² The court held “to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify.” *Luce*, 469 U.S. at 43, 105 S. Ct. at 464, 83 L. Ed. 2d at 448.

It is unknown what Kendrick’s testimony would have been if he had testified. It is unknown whether he would have testified his actions were the result of an accident or a mistake. Because it is unknown what Kendrick’s testimony would have been, it is also unknown whether the State would have attempted to present evidence of the 2007 incident. The State could have

² Federal Rule of Evidence 609 is similar to Iowa Rule of Evidence 5.609. See *State v. Hackney*, 397 N.W.2d 723, 726 (Iowa 1986). This rule governs the impeachment of a witness by evidence of conviction of a crime. Iowa R. Evid. 5.609.

changed its strategy or tactics, or decided to impeach defendant by other means. Furthermore, Kendrick could have objected to the State's attempt to present the evidence of the 2007 incident, and based on the factual scenario then present, the court could have changed its earlier ruling and determined the evidence was not admissible.

The fact of the matter is that none of these possible occurrences happened. Kendrick did not testify. The evidence of the 2007 "capping" incident was not presented to the jury. We decline to speculate about what could have happened if Kendrick had decided to testify. We conclude Kendrick did not preserve error on the prior bad acts issue he raises on appeal.

We affirm Kendrick's conviction.

AFFIRMED.